No. 21A____

In the Supreme Court of the United States

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., TECHNOLOGIST P., DR. S., NURSE S., PHYSICIAN LIAISON X., ET AL.,

Applicants,

v.

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY, DR. HOWARD A. ZUCKER, COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY,

Respondents.

APPENDIX OF EXHIBITS

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TABLE OF CONTENTS

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of October, two thousand twenty-one.

Before: John M. Walker, Jr.,
Robert D. Sack,
Susan L. Carney,
Circuit Judges.

We The Patriots USA, Inc., Diane Bono, Michelle Melendez, Michelle Synakowski,

Plaintiffs-Appellants,

v.

Kathleen Hochul, Howard A. Zucker, M.D.,

Defendants-Appellees.

ORDER

No. 21-2179

Dr. A., Nurse A., Dr. C., Nurse D., Dr. F., Dr. G., Therapist I., Dr. J., Nurse J., Dr. M., Nurse N., Dr. O., Dr. P., Technologist P., Dr. S., Nurse S., Physician Liaison X.,

Plaintiffs-Appellees,

v.

Kathy Hochul, Governor of the State of New York, in her official capacity, Dr. Howard A. Zucker, Commissioner of the New York State Department of Health, in his official capacity, Letitia James, Attorney General of the State of New York, in her official capacity,

Defendants-Appellants.

No. 21-2566

In No. 21-2179, Plaintiffs We The Patriots USA, Inc. et al., appeal from an order of the United States District Court for the Eastern District of New York denying their motion for a preliminarily injunction enjoining the State from enforcing N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61 (August 26, 2021). Upon due consideration, it is hereby ORDERED, ADJUDGED, and DECREED that this Court's September 30, 2021 order granting a temporary injunction pending appeal is VACATED, the district court's order denying the motion for a preliminary injunction is AFFIRMED, and the case is REMANDED for further proceedings consistent with this Order and the forthcoming opinion of this Court.

In No. 21-2566, the State of New York appeals from an order of the United States District Court for the Northern District of New York enjoining the State from enforcing N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61 (August 26, 2021). Upon due consideration, it is hereby ORDERED, ADJUDGED, and DECREED that the district court's order is VACATED and the case is REMANDED for further proceedings consistent with this Order and the forthcoming opinion of this Court.

The mandate shall issue forthwith for the limited purpose of vacating the injunction issued by the District Court for the Northern District of New York. An opinion in both No. 21-2179 and No. 21-2566 will follow expeditiously.

For the Court:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

EXHIBIT 2

In the
United States Court of Appeals
For the Second Circuit

August Term, 2021

(Argued: October 27, 2021 Decided: November 4, 2021)

Docket No. 21-2179

WE THE PATRIOTS USA, INC., DIANE BONO, MICHELLE MELENDEZ, MICHELLE SYNAKOWSKI,

Plaintiffs-Appellants,

–v.–

KATHLEEN HOCHUL, HOWARD A. ZUCKER, M.D.,

Defendants-Appellees.

Docket No. 21-2566

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., TECHNOLOGIST P., DR. S., NURSE S., PHYSICIAN LIAISON X.,

Plaintiffs-Appellees,

–v.–

KATHY HOCHUL, GOVERNOR OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY, DR. HOWARD A. ZUCKER, COMMISSIONER OF THE NEW YORK STATE

DEPARTMENT OF HEALTH, IN HIS OFFICIAL CAPACITY, LETITIA JAMES,
ATTORNEY GENERAL OF THE STATE OF NEW YORK, IN HER OFFICIAL CAPACITY,

Defendants-Appellants.

B e f o r e :

WALKER, SACK, and CARNEY, *Circuit Judges*.

In these two cases on appeal, district courts in New York State considered applications for preliminary injunctive relief that would restrain the State from enforcing its emergency rule requiring healthcare facilities to ensure that certain employees are vaccinated against COVID-19. *See* 10 N.Y.C.R.R. § 2.61 (Aug. 26, 2021) ("Section 2.61"). The State issued Section 2.61 in response to rapidly increasing infection rates related to the Delta variant of the virus. Section 2.61 contains an exemption for employees who are unable to be safely vaccinated due to pre-existing medical conditions, but does not contain an exemption for those who object to this vaccination on religious grounds. Plaintiffs, individual healthcare workers who object to receiving the vaccine because of their religious beliefs, as well as a membership organization, filed complaints and motions for preliminary injunctive relief, asserting that Section 2.61 violates their rights under the First Amendment, the Fourteenth Amendment, and the Supremacy Clause. In *We The Patriots*, filed in the U.S. District Court for the Eastern District of New York, the district court (Kuntz, *J.*) denied the motion without opinion. In *Dr. A.*, filed in the U.S. District Court for the Northern District of New York, the district court (Hurd, *J.*) granted the motion, deciding that Plaintiffs had established that Section 2.61 was likely neither neutral towards religion nor generally applicable, triggering strict scrutiny under the First Amendment's Free Exercise Clause, and that the State had failed to establish that Section 2.61 was likely narrowly tailored to serve a compelling government interest under strict scrutiny review. The district court in *Dr. A.* also concluded that Section 2.61 was likely preempted by Title VII's protection for employees who require religious accommodations, and thus ran afoul of the Supremacy Clause.

On appeal, focusing on the requirements for the grant of a preliminary injunction, we conclude that Plaintiffs in both cases have failed to establish a likelihood

of success on any of their claims, and thus the *Dr. A.* district court's issuance of a preliminary injunction was in error. As to Plaintiffs' Free Exercise claims, we conclude that Plaintiffs have not shown that they are likely to succeed in establishing (1) that Section 2.61 is not a neutral law of general applicability, or (2) that—in the resulting inquiry—Section 2.61 does not satisfy rational basis review. Next, we determine that Plaintiffs have not demonstrated a likelihood of success on their Supremacy Clause claim: it appears to us fully possible for employers to comply with both Section 2.61 and Title VII. Finally, we decide that Plaintiffs are not likely to succeed on their claims that Section 2.61 contravenes the Fourteenth Amendment. The order of the U.S. District Court for the Eastern District of New York is therefore AFFIRMED, the order of the U.S. District Court for the Northern District of New York is REVERSED, and the preliminary injunction entered by that court is VACATED. These tandem cases are REMANDED to their respective district courts for further proceedings consistent with the Order entered by this Court on October 29, 2021, and this Opinion.

CAMERON L. ATKINSON (Norman A. Pattis, Earl A. Voss, *on the brief*), Pattis & Smith, LLC, New Haven, CT, *for Plaintiffs-Appellants We The Patriots USA, Inc. et al. (in No. 21-2179).*

STEVEN C. WU, Deputy Solicitor General (Barbara D. Underwood, Mark S. Grube, *on the brief*) *for* Letitia James, Attorney General for the State of New York, New York, NY, *for Defendants-Appellants (in No. 21-2566) and Defendants-Appellees (in No. 21-2179) Kathleen Hochul et al.*

CHRISTOPHER A. FERRARA (Michael McHale, Stephen M. Crampton, *on the brief*), Thomas More Society, Chicago, IL, *for Plaintiffs-Appellees Dr. A. et al. (in No. 21-2566).*

Alex J. Luchenister, Richard B. Katskee, Americans United for Separation of Church and State, Washington, D.C.; Daniel Mach, Heather L. Weaver, Lindsey Kaley,

American Civil Liberties Union Foundation, Washington, D.C. & New York, NY; Christopher Dunn, Beth Haroules, Arthur Eisenberg, Amy Belsher, New York Civil Liberties Union Foundation, New York, NY, *for Amici Curiae* (*in No. 21-2179*) *Americans United for Separation of Church and State, American Civil Liberties Union, New York Civil Liberties Union, Central Conference of American Rabbis, Global Justice Institute, Metropolitan Community Churches, Men of Reform Judaism, Methodist Federation for Social Action, Muslim Advocates, National Council of Jewish Women, Reconstructionist Rabbinical Association, Union for Reform Judaism, and Women of Reform Judaism.*

Mark D. Harris, Shiloh Rainwater, Proskauer Rose LLP, New York, NY, *for Amicus Curiae (in No. 21-2179) Greater New York Hospital Association.*

PER CURIAM:

In these two cases on appeal, which we consider in tandem, federal district courts in New York State considered applications for preliminary injunctive relief that would restrain the State from enforcing its emergency rule requiring healthcare facilities to ensure that certain employees are vaccinated against COVID-19. *See* 10 N.Y.C.R.R. § 2.61 (Aug. 26, 2021) ("Prevention of COVID-19 transmission by covered entities") ("Section 2.61" or "the Rule"). The State issued the Rule in response to rapidly increasing infection rates related to the Delta variant of the SARS-CoV-2 virus, a virus that has caused widespread suffering in the State, country, and world since early 2020. The State described the Rule's purpose as primarily to preserve the health of healthcare workers, and from that narrow purpose, more broadly, to keep patients and the public safe from COVID-19. The Rule establishes a medical exemption to the vaccination requirement, but—consistent with New York's prior vaccination requirements for

healthcare workers—does not include an exemption based on religious belief. The Rule permits, but does not require, employers to make other accommodations for individuals who choose not to be vaccinated based on their sincere religious beliefs.

The moving parties—primarily healthcare workers allegedly affected by the Rule—challenge the Rule's omission of a religious exemption by asserting claims under the First Amendment, the Supremacy Clause, and the Fourteenth Amendment. Both groups of Plaintiffs moved to enjoin enforcement of the Rule. One district court granted the preliminary relief requested, enjoining the Rule insofar as it prevented healthcare workers from being eligible for an exemption based on religious belief; the other denied it. *See Dr. A. v. Hochul*, No. 21-cv-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021) (granting preliminary injunction) ("*Dr. A.*"); *We The Patriots USA, Inc. v. Hochul*, No. 21-cv-4954 (E.D.N.Y. Sept. 12, 2021) (denying preliminary injunction) ("*We The Patriots*" or "*WTP*").

The individual plaintiffs in *Dr. A.* are nurses, doctors, and other personnel employed by healthcare facilities in New York State; in *We The Patriots*, they are three nurses similarly employed and a related nonprofit organization. All individual plaintiffs aver that to receive any one of the three currently available vaccines against COVID-19 (Pfizer-BioNTech, Moderna, and Johnson & Johnson) would violate their religious beliefs because those vaccines were developed or produced using cell lines derived from cells obtained from voluntarily aborted fetuses. They assert that their employers have threatened them with adverse employment consequences if they refuse to be vaccinated.

Plaintiffs argue, and the district court in *Dr. A.* held, that they are likely to succeed in establishing that Section 2.61 violates their rights under the Free Exercise Clause of the First Amendment and under the Supremacy Clause. As to the Free Exercise Clause, Plaintiffs submit that because the State has afforded a medical

exemption to its requirement, the Free Exercise Clause requires the State also to afford a religious exemption. With respect to the Supremacy Clause, the *Dr. A.* Plaintiffs argue that the non-discrimination obligations placed on employers by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII") preempt the State's vaccination Rule. As a third basis for relief, the *WTP* Plaintiffs allege that the Rule infringes their rights to privacy and bodily integrity under the Fourteenth Amendment. Under the familiar standards for a preliminary injunction that Plaintiffs must meet to obtain such relief, Plaintiffs allege that, in addition to showing a likelihood of success on the merits, they will suffer irreparable harm absent immediate relief and that the balance of the equities and the public interest lie in their favor.

The State resists, contending primarily that Section 2.61 is a neutral provision of general applicability to those covered by the Rule; that the Rule serves its goal and compelling need to preserve the health of healthcare workers; that the medical and religious exemptions would not be comparable for purposes of the Free Exercise Clause analysis required by *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and its progeny; and that Plaintiffs have not shown a likelihood of success on the merits on any of their claims or otherwise satisfied the prerequisites for entry of the exceptional relief of a preliminary injunction at this phase of the litigation.

Following oral argument, on October 29, 2021, this Court entered an Order disposing of the appeals and advising that an Opinion would follow. This Opinion explains the basis for that Order.

As to Plaintiffs' Free Exercise claim, we conclude that Plaintiffs have not met their burden to show that they are likely to succeed in establishing (1) that Section 2.61 is not a neutral law of general applicability under *Smith*, or (2) that—in the resulting inquiry—Section 2.61 does not satisfy rational basis review. Next, we determine that

Plaintiffs have not demonstrated a likelihood of success on their Supremacy Clause claim on the record before us, as Plaintiffs have not shown that it would likely be impossible for employers to comply with both Section 2.61 and Title VII. Finally, we decide that Plaintiffs are not likely to succeed on their claim that the Rule contravenes the Fourteenth Amendment.

In light of these conclusions and of our further assessment of the irreparability of the harm Plaintiffs allege, the balance of the hardships, and the public interest in enforcing or not enforcing the Rule, we AFFIRM the order of the United States District Court for the Eastern District of New York denying the motion for a preliminary injunction in *We The Patriots*; and we REVERSE the order of the United States District Court for the Northern District of New York granting Plaintiffs' motion for the same relief in *Dr. A.* and VACATE the related preliminary injunction entered by that court. Finally, we REMAND both cases to their respective district courts for further proceedings consistent with our October 29, 2021 Order, and this Opinion. We stress that we do not now decide the ultimate merits of Plaintiffs' legal claims or of the State's defenses; rather, we make a limited determination with respect to preliminary relief based on the limited factual record presently before this Court.

BACKGROUND

I. New York's Emergency Rule

On August 26, 2021, New York's Department of Health adopted an emergency rule directing hospitals, nursing homes, hospices, adult care facilities, and other identified healthcare entities to "continuously require" certain of their employees to be fully vaccinated against COVID-19 beginning on September 27, 2021, for "general hospitals" and nursing homes, and on October 7, 2021, for all other "covered entities" as

defined in the Rule. 10 N.Y.C.R.R. § 2.61.[1] The vaccine requirement applies not to all employees, but only to those covered by the Rule's definition of "personnel": those employees, staff members, and volunteers "who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." *Id.* § 2.61(a)(2).

The Rule was issued by the State's Public Health and Health Planning Council, a group of 25 healthcare professionals, including the Commissioner of Health, that state law charges with issuing regulations "affecting the security of life or health or the preservation and improvement of public health," including those addressing the control of communicable diseases. N.Y. Pub. Health L. § 225(4), (5).

As required by New York law, the notice of emergency rulemaking included the Council's findings and a Regulatory Impact Statement (the "Statement"). *See* NYS Admin. Proc. Act § 202(6). The Statement explained that the Rule responded to the "significant public health threat" caused by the increasing circulation of the Delta variant: "Since early July, cases have risen 10-fold, and 95 percent of the sequenced recent positives in New York State were the Delta variant." *Dr. A.* Sp. App'x at 39. It also referenced data purporting to show "that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals" and that "[t]hose who are unvaccinated have over 11 times the risk of being hospitalized with COVID-19." *Id.* It described vaccination as critical to controlling the spread of the disease at healthcare facilities and in congregate care settings, which "pose increased challenges and urgency for controlling the spread of this disease because of [their] vulnerable patient and resident populations," determining that "[u]nvaccinated personnel in such settings have an unacceptably high

[1] The complete text of Section 2.61 is provided in an Appendix to this Opinion.

risk of both acquiring COVID-19 and transmitting the virus to colleagues and/or vulnerable patients or residents, exacerbating staffing shortages, and causing unacceptably high risk of complications." *Id.* As an emergency rule, Section 2.61 is in effect for a maximum of 90 days, expiring on November 23, 2021, unless renewed. *See id.* at 38; NYS Admin. Proc. Act § 202(6)(b).

Section 2.61 exempts from the vaccination requirement "personnel" for whom "immunization with COVID-19 vaccine is detrimental to [their] health . . . , based upon a pre-existing health condition" as more specifically defined and limited by the Rule. 10 N.Y.C.R.R. § 2.61(d)(1).[2] The medical exemption applies "only until such immunization is found no longer to be detrimental to [their] health." *Id.* It must be supported with a certification by a licensed physician or certified nurse practitioner issued in accordance

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[2] The full text of this medical exemption under Section 2.61(d)(1) reads as follows:

> (1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (i) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

10 N.Y.C.R.R. § 2.61(d)(1).

with generally accepted medical standards, including recommendations of the Advisory Committee on Immunization Practices ("ACIP") of the U.S. Department of Health and Human Services. *Id.*; *see also* N.Y. State Department of Health, *Frequently Asked Questions (FAQs) Regarding the August 26, 2021 – Prevention of COVID-19 Transmission by Covered Entities Emergency Regulation*, https://coronavirus.health.ny.gov/system/files/documents/2021/09/faqs-for-10-nycrr-section-2.61-9-20-21.pdf (last visited November 2, 2021) ("*FAQs*"). Section 2.61 contains no "exemption" for personnel who oppose vaccination on religious or any other grounds not covered by the medical exemption; however, as we discuss below, the Rule does not prohibit employers from providing religious objectors with accommodations.

On August 18, 2021, eight days *before* the Council promulgated Section 2.61, New York State Commissioner of Health Dr. Howard A. Zucker, acting alone, had issued an "Order for Summary Action" ("the August 18 Order" or "the Order") under the authority vested in him by New York Public Health Law § 16. *See Dr. A.* Sp. App'x at 41–47. Section 16 permits the Commissioner to issue a short-term order—effective for a maximum of 15 days—if he identifies a condition that in his view constitutes a "danger to the health of the people." N.Y. Pub. Health Law § 16. After making findings about the dangers of COVID-19, the Order similarly required certain healthcare facilities to ensure that certain personnel were fully vaccinated against COVID-19 by September 27, 2021, but differed from Section 2.61, which superseded it, in several respects. Most relevant here, the Order included a religious exemption for personnel who "hold a genuine and sincere religious belief contrary to the practice of immunization." *Dr. A.* Sp. App'x at 45–46. In addition, the Order could be effective for only a very brief period of time—for up to 15 days—whereas the Rule could be in effect for up to 90 days, subject to extensions. Further, the Order applied only to "general hospital[s]" and nursing homes; Section 2.61 applies more broadly, to all hospitals, nursing homes,

diagnostic and treatment centers, home healthcare agencies and similar programs, hospices, and adult care facilities. *Id.* at 43; 10 N.Y.C.R.R. § 2.61(a)(1).

In affidavits appended to its briefing to this Court and filed in other pending proceedings,[3] the State has provided preliminary vaccination data from the months of August through October 2021. It reflects a significant increase in vaccination rates among covered healthcare personnel that occurred after the Rule's effective date on September 27 (even though the Rule was subject to the temporary restraining order and later injunction issued in *Dr. A.*). As of August 24, the State's declarant reported, 71% of workers at nursing homes and 77% of workers at adult care facilities had received at least one dose of the vaccine; 77% of workers at hospitals were fully vaccinated. *See WTP* Appellees' Add. at 14–15 (Decl. of Elizabeth Rausch-Phung). As of October 19, 97.4% of workers at nursing homes and 96.7% of workers at adult care facilities had received at least one dose of the vaccine, and 91.4% of workers at hospitals were fully vaccinated. *See Serafin v. New York State Dep't of Health*, Index No. 908296-21, Doc. Nos. 56. (Decl. of Valerie A. Deetz), 57 (Decl. of Dorothy Persico) (Sup. Ct. Albany County Oct. 20, 2021). Also as of October 19, between 0.4% and 0.5% of workers at each facility

[3] We may take judicial notice of the existence of affidavits filed in another court. *See Glob. Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006). In addition, our Court has ruled that courts may consider hearsay evidence such as affidavits when determining whether to grant a preliminary injunction. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010); *see also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981) (observing that preliminary injunctive determinations may be based on "procedures that are less formal and evidence that is less complete than in a trial on the merits"). Thus, we consider the State's data submitted in affidavits filed in other courts. Although this data was not before the district court in *WTP*—and therefore Plaintiffs have not had an opportunity to contest its accuracy before the district court—they have not raised such a concern in their reply brief in *WTP* or at oral argument, nor have they challenged this Court's ability to consider the State's submissions. More broadly, Plaintiffs do not appear to contest the State's assertion derived from this data that religious exemptions are more common than medical exemptions, but instead consider this fact irrelevant.

type were medically ineligible to receive the COVID-19 vaccine, whereas 1.9% of workers at nursing homes and adult care facilities and 1.3% of workers at hospitals claimed "other" exemptions, which the State describes as reflecting religious exemptions permitted by the injunction entered in *Dr. A*. *Id.*

II. The District Court Proceedings

Plaintiffs in *We The Patriots* are a membership organization and three nurses working in hospital facilities in New York State.[4] Plaintiffs in *Dr. A.* are nurses, doctors, and others employed at healthcare facilities in New York State. In both cases, the defendants include Governor Kathleen Hochul and Commissioner Zucker; the *Dr. A.* Plaintiffs also named New York Attorney General Letitia James as a defendant.

All Plaintiffs assert that they object on religious grounds to receiving the COVID-19 vaccines as briefly described above. As public health authorities have explained, in the 1970s and 1980s, cell lines were derived from fetal cells obtained from elective abortions or miscarriages.[5] These cell lines have since been used in the development of various vaccines.[6] They were used for testing in the research and development phase of

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[4] Plaintiff We The Patriots USA, Inc., states that it is a section 501(c)(3) organization that "is dedicated to promoting constitutional rights and other freedoms through education, outreach, and public interest litigation, thereby advancing religious freedom, medical freedom, parental rights, and educational freedom for all." *WTP* App'x at 8.

[5] *See, e.g.*, Los Angeles County Dep't of Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines* (Apr. 20, 2021), http://publichealth.lacounty.gov/media/coronavirus/docs/vaccine/VaccineDevelopment_FetalCellLines.pdf; Michigan Dep't of Health & Human Servs., *COVID-19 Vaccines & Fetal Cells* (Apr. 21, 2021), https://www.michigan.gov/documents/coronavirus/COVID-19_Vaccines_and_Fetal_Cells_031921_720415_7.pdf; North Dakota Dep't of Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf.

[6] These cell lines "have been used to create vaccines for diseases such as hepatitis A, rubella, and rabies. Abortions from which fetal cells were obtained were elective and were not done for the

the mRNA (Pfizer-BioNTech and Moderna) COVID-19 vaccines and in the production of the Johnson & Johnson COVID-19 vaccine.[7] Plaintiffs assert that, in these circumstances, receiving any of the three available COVID-19 vaccines would conflict with their deeply held religious beliefs.

A. *We The Patriots USA, Inc. v. Hochul*

In *We The Patriots*, the three individual plaintiffs are registered nurses. Diane Bono and Michelle Melendez are employed at Syosset Hospital in Syosset, and Michelle Synakowski is employed at St. Joseph's Hospital in Syracuse. On September 2, 2021, one week after the Rule was adopted, Plaintiffs sued Governor Hochul and Commissioner Zucker in the United States District Court for the Eastern District of New York, alleging that the Rule violates their First Amendment right to exercise their religion freely. They also charged that it violates their rights to privacy and "medical freedom," which they locate in the First, Fourth, Fifth, and Fourteenth Amendments. They asked the district

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purpose of vaccine development." Los Angeles County Dep't of Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines*, *supra* note 5.

[7] The use of these cell lines was explained in press statements and publicly available research during the development of the COVID-19 vaccines. *See* Press Release, Johnson & Johnson, Johnson & Johnson Announces a Lead Vaccine Candidate for COVID-19; Landmark New Partnership with U.S. Department of Health & Human Services; and Commitment to Supply One Billion Vaccines Worldwide for Emergency Pandemic Use (Mar. 30, 2020), https://www.jnj.com/johnson-johnson-announces-a-lead-vaccine-candidate-for-covid-19-landmark-new-partnership-with-u-s-department-of-health-human-services-and-commitment-to-supply-one-billion-vaccines-worldwide-for-emergency-pandemic-use (describing use of PER.C6 cell line in Johnson & Johnson vaccine); Annette B. Vogel et al., *A Prefusion SARS-Cov-2 Spike RNA Vaccine Is Highly Immunogenic and Prevents Lung Infection in Non-human Primates*, bioRxiv (Sept. 8, 2020), https://doi.org/10.1101/2020.09.08.280818 (referencing use of HEK293 cell line in early testing stages of Pfizer-BioNTech vaccine); Kizzmekia S. Corbett et al., *SARS-CoV-2 mRNA Vaccine Design Enabled by Prototype Pathogen Preparedness*, 586 Nature 567, 572 (Oct. 22, 2020), https://doi.org/10.1038/s41586-020-2622-0 (referencing use of HEK293 cell line in testing of Moderna vaccine).

court to declare Section 2.61 unconstitutional and permanently enjoin the State from enforcing it.

Ten days later, the *WTP* Plaintiffs moved for a temporary restraining order and a preliminary injunction immediately enjoining the State from enforcing the Rule. They argued that immediate relief was essential because Section 2.61 puts them at imminent risk of losing their jobs if they persist in refusing vaccination. In support of their motion, they provided letters from Nurse Bono's and Nurse Melendez's employer, Northwell Health, a private entity.[8] In the letter received by Nurse Bono, dated August 31, Northwell Health advised that her "continued employment will be at risk" if she did not receive the vaccine by the deadline. *WTP* App'x 32. In its letter to Nurse Melendez, dated August 30, Northwell Health wrote only that Nurse Melendez would be required to undergo weekly PCR testing and would be unable to participate in certain meetings, gatherings, and events based on her vaccination status.[9]

The district court denied Plaintiffs' motion on September 12, the day it was filed, without explanation and without ordering or receiving a response from the State. Plaintiffs timely appealed.

B. *Dr. A. v. Hochul*

In *Dr. A.*, 17 medical professionals who work in New York sued Governor Hochul, Commissioner Zucker, and Attorney General James on September 13 in the United States District Court for the Northern District of New York, seeking declaratory

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[8] They did not name Northwell Health as a defendant or seek relief against it.

[9] In their brief on appeal, the *WTP* Plaintiffs state that Northwell Health terminated Nurse Bono's employment on September 29. The *WTP* Plaintiffs also assert that Nurse Synakowski was informed by her employer that her employment would be terminated by September 21 if she was not vaccinated by then, but in their briefs filed since that date they have not stated whether that came to pass.

and injunctive relief preventing the enforcement of the Rule.[10] In their verified complaint, they alleged three bases of unconstitutionality. First, they contended that the Rule infringes on religious rights secured by the Free Exercise Clause by requiring that they be vaccinated, contrary to their religious beliefs. Second, they claimed that Section 2.61 violates the Supremacy Clause because it is preempted by Title VII, which prohibits discrimination in employment based on religion. Third, they claimed that Section 2.61 runs afoul of the Equal Protection Clause because it prevents them from seeking a religious accommodation while at the same time allowing similarly situated healthcare workers to seek a medical accommodation.

The *Dr. A.* Plaintiffs simultaneously moved for a temporary restraining order and preliminary injunction. They sought immediate injunctive relief, citing "imminent irreparable harm from loss of employment and professional standing" as a result of their "religiously motivated refusal to be vaccinated." *Dr. A.* App'x at 207.

On September 14, the district court granted Plaintiffs' motion for a temporary restraining order, enjoining the State from enforcing any requirement that employers deny religious exemptions from the vaccine requirement or that employers revoke any religious exemption already granted, and directed the State to file its opposition to Plaintiffs' request for a preliminary injunction. Six days later, the district court extended the temporary restraining order for 14 days, pending its written opinion on Plaintiffs' request for a preliminary injunction to be issued on or before October 12.

On October 12, the district court issued the requested preliminary injunction, resting in part on its determination that Plaintiffs were likely to succeed on their Free Exercise claim. The district court concluded that Plaintiffs had established that Section

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[10] The district court granted a request by the *Dr. A.* Plaintiffs to proceed pseudonymously. The *Dr. A.* Plaintiffs do not identify their employers in their complaint.

2.61 is neither a neutral law nor one of general applicability. It also ruled that Section 2.61 is likely to fail strict scrutiny. *See Dr. A.*, 2021 WL 4734404, at *8–9. The district court further concluded that Plaintiffs were likely to succeed on their Title VII preemption claim, reasoning that Section 2.61 "effectively foreclose[s] the pathway to seek[] a religious accommodation that is guaranteed under Title VII." *Id.* at *6.[11]

The State timely appealed.[12]

DISCUSSION

Issuance of a preliminary injunction is an "extraordinary and drastic remedy" that is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, at 129 (2d ed. 1995)). Preliminary injunctive relief "should not be routinely granted." *Hanson Tr. PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir. 1985) (quoting *Medical Soc. of State of N.Y. v.*

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[11] The district court declined to consider the merits of Plaintiffs' Equal Protection claim. Plaintiffs do not pursue this claim on appeal.

[12] Having lost before the district court in the Eastern District on September 12—before the *Dr. A.* court entered its temporary restraining order (on September 14) or its preliminary injunction (on October 12)—the *WTP* Plaintiffs successfully sought interim relief from the September 28 motions panel in this Court. Motion Order, *WTP*, No. 21-2179, Dkt. No. 65 (Sept. 30, 2021). Oral argument on their appeal from the denial of a preliminary injunction was scheduled to be heard on an expedited basis on October 14 by a duly convened regular argument panel—the panel that now files this opinion per curiam. Case Calendaring, *WTP*, No. 21-2179, Dkt. No. 68. When the district court in the Northern District granted the *Dr. A.* Plaintiffs' request for a preliminary injunction on October 12, the State promptly appealed. Notice of Appeal, *Dr. A.*, No. 21-2566, Dkt. No. 1. Because the two cases request virtually identical relief and offer overlapping arguments, we determined not to hear the *WTP* Plaintiffs' appeal on October 14, separate from the State appeal in *Dr. A.*, but rather to hear the cases in tandem. We scheduled the combined oral argument for October 27, again on an expedited basis and with full briefing by the *Dr. A.* Plaintiffs and the State. Order, *WTP*, No. 21-2179, Dkt. No. 116; *Dr. A.*, No. 21-2566, Dkt. No. 8. The parties helpfully coordinated their oral argument presentations to avoid needless repetition.

Toia, 560 F.2d 535, 537 (2d Cir. 1977)). When deciding whether to issue a preliminary injunction, courts "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008).

To obtain a preliminary injunction that "will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction."[13] *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020) (internal quotation marks omitted). The movant must also show that the balance of equities supports the issuance of an injunction. *See Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020). We review the grant or denial of a motion for a preliminary injunction for abuse of discretion. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005). A district court has exceeded the permissible bounds of its discretion when its "decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding" or "cannot be located within the range of permissible decisions."

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[13] In *Dr. A.*, the district court applied the likelihood-of-success standard, and the *Dr. A.* Plaintiffs do not now argue that this was error. The parties in *WTP*, in contrast, cite our Court's alternative, less demanding "serious questions" standard for obtaining preliminary injunctive relief, which authorizes injunctive relief if the movant has shown imminent irreparable harm as well as "sufficiently serious questions going to the merits of its claims to make them fair ground for litigation, plus a balance of the hardships tipping decidedly in favor of the moving party." *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (internal quotation marks omitted). But we have consistently applied the likelihood-of-success standard to cases challenging government actions taken in the public interest pursuant to a statutory or regulatory scheme, including in cases involving emergency regulations and orders. *See*, *e.g.*, *Agudath Israel*, 983 F.3d at 631; *Alleyne v. New York State Educ. Dep't*, 516 F.3d 96, 99–101 (2d Cir. 2008). The *WTP* parties have not explained why the "serious questions" standard should nonetheless govern here. Accordingly, in our review of both appeals, we apply the likelihood-of-success standard.

Mastrovincenzo v. City of New York, 435 F.3d 78, 88 (2d Cir. 2006) (internal quotation marks omitted).

Because the issues and arguments presented by these two appeals overlap substantially, we consider them together, issue by issue, differentiating between them only as we think necessary.[14]

I. Likelihood of Success on the Merits: Free Exercise of Religion Claim

Plaintiffs contend that Section 2.61 violates their rights under the Free Exercise Clause of the First Amendment because it does not include an exemption for employees who oppose receiving the vaccine on religious grounds.

On a motion for preliminary injunction, the movants must show that they are likely to prevail on their claim that the challenged government action is unlawful. On the record before us, we conclude that neither the *Dr. A.* Plaintiffs nor the *WTP* Plaintiffs have established a likelihood of success on their Free Exercise claims such that they are entitled to the "extraordinary relief" of a preliminary injunction. The district court's conclusion to the contrary in *Dr. A.* was legal error and rested on clearly erroneous findings of fact.

A. The *Smith* Standard

The First Amendment forbids the enactment of laws, either state or federal, that "prohibit[] the free exercise" of religion.[15] U.S. Const., amend. I. But not all laws that

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[14] Although the district court's order denying the *WTP* Plaintiffs' motion did not state the basis for its decision, we may "affirm on any ground supported by the record." *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004).

[15] In relevant part, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The stricture has been

burden an individual's exercise of religion contravene this deeply rooted prohibition. Nor do they always trigger heightened scrutiny. The Supreme Court has long applied the standard set out by Justice Scalia for the Court in *Employment Division v. Smith* to determine whether a democratically enacted law that burdens religious practice is properly considered under rational basis review or strict scrutiny. *See* 494 U.S. at 879; *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021).

Under *Smith*, a "neutral law of general applicability" is subject to rational basis review even if it incidentally burdens a particular religious practice. 494 U.S. at 878–79; *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). We have observed that "[t]he teaching of *Smith* is that a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption." *Central Rabbinical Congress of the U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 196 (2d Cir. 2014). But if a law is not neutral towards religion or is not generally applicable, it falls outside the boundaries of *Smith.* Then, for such a law to survive, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32.

Because they seek a preliminary injunction, Plaintiffs bear the initial burden of establishing a likelihood of success on the merits. In the context of their First Amendment claim, this means that Plaintiffs must show that they are likely to succeed on their claim that Section 2.61 is not a neutral or generally applicable rule. If they succeed at that step, the burden shifts to the State to show that it is likely to succeed in defending the challenged Rule under strict scrutiny. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) ("[T]he burdens at the preliminary

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held to limit the authorities of the states as well. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

injunction stage track the burdens at trial."). We conclude that, at this stage, Plaintiffs have not carried their initial burden of showing that Section 2.61 is likely not neutral or generally applicable.

B. Neutrality

The State "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877; *see also Lukumi*, 508 U.S. at 532 (First Amendment protections apply when "the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons"). A law may be not neutral if it explicitly singles out a religious practice, but even a facially neutral law will run afoul of the neutrality principle if it "targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 533–34.

The Supreme Court has explained that "[a] law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533. Section 2.61 is facially neutral because it does not single out employees who decline vaccination on religious grounds. It applies to all "personnel," as carefully defined in the Rule, aside from those who qualify for the narrowly framed medical exemption.

Plaintiffs nonetheless maintain that the regulation "targets" them because of their religious opposition to receiving any one of the three currently available COVID-19 vaccines. In support, they point to events preceding the enactment of Section 2.61 and to several of Governor Hochul's public comments during the month of September as reflective of discriminatory intent on the part of the State. We take these claims in order.

First, Plaintiffs argue that the fact that the August 18 Order contained a religious exemption, but Section 2.61 does not, demonstrates that in Section 2.61 the State intended to "target" those who object to vaccination on religious grounds, and that this reflects anti-religion animus. The district court in *Dr. A.* agreed, finding that the difference between the two government actions amounted to a "religious gerrymander." *Dr. A.*, 2021 WL 4734404, at *8 (quoting *Lukumi*, 508 U.S. at 535). Specifically, the district court determined that Section 2.61, enacted eight days after the August 18 Order, intentionally "amended the [August 18 Order] to eliminate the religious exemption." *Id.* As a result, the district court concluded that Plaintiffs had established a likelihood that Section 2.61 was non-neutral based on their argument that it "effectively targets religious opposition to the available COVID-19 vaccines." *Id.*

In *Lukumi*, the Supreme Court determined that the municipal ordinance at issue, which prohibited animal sacrifice, was not neutral because it effectively prohibited conduct only undertaken by adherents to the Santeria religion as a part of their religious practice. *See* 508 U.S. at 534–35. In contrast, Section 2.61 requires all covered employees who can safely receive the vaccine to be vaccinated. It applies whether an employee is eager to be vaccinated or strongly opposed, and it applies whether an employee's opposition or reluctance is due to philosophical or political objections to vaccine requirements, concerns about the vaccine's efficacy or potential side effects, or religious beliefs. The absence of a religious exception to a law does not, on its own, establish non-neutrality such that a religious exception is constitutionally required.

Further, that the August 18 Order contained a religious exemption, while Section 2.61 does not, falls short of rendering Section 2.61 non-neutral. The historical background of Section 2.61, to be determined following discovery, may be relevant to fully discerning the State's intent, but the evidence before the district courts failed to raise an inference that the regulation was intended to be a "covert suppression of

particular religious beliefs." *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (quoting *Lukumi*, 508 U.S. at 534). In suggesting that Section 2.61 "eliminated" the religious exemption, *WTP* Appellants' Br. at 10, Plaintiffs misconstrue the connection between the August 18 Order and the August 26 Rule.[16] The August 18 Order was issued by Commissioner Zucker alone as an emergency measure, intended to be in place for a maximum of 15 days, in response to reports of the surging Delta variant. Section 2.61, in contrast, was issued following collective deliberation by the 25-member Public Health and Health Planning Council under the emergency rulemaking procedures set forth in New York law, which provided more process, public input, and support for a measure that would be effective for 90 days subject to renewal. These procedures required the Council, among other things, to develop and issue specific findings and a regulatory impact statement. NYS Admin. Proc. Act § 202(6)(iv), (viii). After this extensive process, the full Council came to the conclusion that the vaccine requirement should apply to a broader set of healthcare entities and, consistent with the State's highly effective existing vaccine requirements for measles and rubella (issued with no religious exemption), *see* 10 N.Y.C.R.R. §§ 405.3, 415.26, 751.6, 763.13, 766.11, 794.3, 1001.11, should not contain a religious exemption. The Council did not amend the August 18 Order: rather, it independently promulgated a new Rule. The record before the district courts does not demonstrate that the Rule was intended to "target"

[16] In a recent decision, the First Circuit similarly misunderstood the connection between the August 18 Order and August 26 Rule when attempting to distinguish the New York vaccination mandate from the Maine vaccination mandate. *See Does 1-6 v. Mills*, — F.4th —, 2021 WL 4860328 (1st Cir. Oct. 19, 2021), *application for injunctive relief denied sub nom. Does 1-3 v. Mills*, — S. Ct. —, No. 21A90, 2021 WL 5027177 (Oct. 29, 2021). The First Circuit mistakenly wrote, "Eight days after New York officials promulgated a version of the regulation containing a religious exemption, they amended the regulation to eliminate the religious exemption." *Id.* at *9. However, as we explain above, there was no "amending" of the regulation to remove a religious exemption. Rather, the August 18 Order and the August 26 Rule were issued through two separate processes.

individuals opposed to receiving the COVID-19 vaccines because of their religious beliefs.

Additionally, much occurred in the time between August 18 and August 26: former Governor Andrew Cuomo resigned and Governor Hochul assumed office;[17] the FDA gave full approval to the Pfizer-BioNTech vaccine for individuals 16 years of age and older;[18] and the Delta variant continued its spread, becoming the dominant strain of the virus in the State.[19] Even if the differing August 18 and August 26 requirements can be said to represent a shift in the State's policy position, Plaintiffs have not adduced facts establishing that the change stemmed from religious intolerance, rather than an intent to more fully ensure that employees at healthcare facilities receive the vaccine in furtherance of the State's public health goals.[20]

Second, on appeal, Plaintiffs assert that certain comments made by Governor Hochul in September reveal that Section 2.61 was intended to target them because of their religious opposition to the required vaccination.[21] Some of those comments,

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[17] New York State Governor's Office, Video, Audio, Photos & Rush Transcript: Kathy Hochul Is Sworn in as 57th Governor of New York State (Aug. 24, 2021), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-kathy-hochul-sworn-57th-governor-new-york-state.

[18] Press Release, U.S. Food and Drug Administration, FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

[19] *See Dr. A.* Sp. App'x at 39.

[20] This is another area in which factual development can be expected to shed more light on the circumstances surrounding the creation of both the Order and the Rule and validate or disprove Plaintiffs' allegations.

[21] Governor Hochul made the statements at issue after both the *Dr. A.* Plaintiffs and the *WTP* Plaintiffs filed their preliminary injunction motions.

however, did not relate to Section 2.61 or workplace vaccine requirements at all, including Governor Hochul's statements at church services in which she urged those in attendance to get vaccinated.[22] Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers; otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions "non-neutral" under *Smith*. At a press briefing on September 15, in which she responded to the temporary restraining order issued in *Dr. A.*, Governor Hochul stated her "personal opinion" that no religious exemption is required and that she was "not aware of" any "sanctioned religious exemption from any organized religion."[23] This comment simply mirrors the State's litigation position and conveys the fact—which Plaintiffs do not contest—that many religious leaders have stated that vaccination is consistent with their faiths.[24] Governor Hochul's comments may more reasonably be understood to express general support for religious principles

[22] *See* New York State Governor's Office, Rush Transcript: Governor Hochul Attends Service at Christian Cultural Center (Sept. 26, 2021), https://www.governor.ny.gov/news/rush-transcript-governor-hochul-attends-service-christian-cultural-center; New York State Governor's Office, Video, Audio, Photos & Rush Transcript: Governor Hochul Attends Services at Abyssinian Baptist Church in Harlem (Sept. 12, 2021), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-hochul-attends-services-abyssinian-baptist-church.

[23] *See* New York State Governor's Office, Video & Rush Transcript: Governor Hochul Holds Q&A Following COVID-19 Briefing (Sept. 15, 2021), https://www.governor.ny.gov/news/video-rough-transcript-governor-hochul-holds-qa-following-covid-19-briefing.

[24] *See, e.g.*, Devin Watkins, *Pope Francis Urges People to Get Vaccinated Against Covid-19*, Vatican News (Aug. 18, 2021), https://www.vaticannews.va/en/pope/news/2021-08/popefrancis-appeal-covid-19-vaccines-act-of-love.html; Chairmen of the Committee on Doctrine and the Committee on Pro-Life Activities, *Moral Considerations Regarding the New COVID-19 Vaccines*, U.S. Conf. of Catholic Bishops (Dec. 11, 2020), https://www.usccb.org/moral-considerations-covid-vaccines.

that she believes guide community members to care for one another by receiving the COVID-19 vaccine.

Altogether, Governor Hochul's comments, even considered in light of the differing approaches taken by Commissioner Zucker in the August 18 Order and the full Council in the Rule, do not evince animosity towards particular religious practices or a desire to target religious objectors to the vaccine requirement *because of* their religious beliefs. Rather, they suggest that the State wanted more people to obtain the vaccine out of a deep concern for public health, which is a religion-neutral government interest.

We therefore conclude that Plaintiffs at this stage have not carried their burden of establishing that Section 2.61 is likely not neutral. The district court's contrary conclusion in *Dr. A.* was based on a clearly erroneous assessment of the record before it.

C. General Applicability

As the Supreme Court recently explained in *Fulton v. City of Philadelphia*, a law may not be "generally applicable" under *Smith* for either of two reasons: first, "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"; or, second, "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." 141 S. Ct. at 1877 (internal quotation marks and alterations omitted). Here, Plaintiffs' argument, in substance, is that because Section 2.61 includes a medical exemption, it is not "generally applicable."

1. Whether Section 2.61 Permits "Comparable" Secular Conduct

The general applicability requirement "protects religious observers against unequal treatment, and inequality that results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against

conduct with a religious motivation." *Central Rabbinical Congress*, 763 F.3d at 196–97 (alterations omitted) (quoting *Lukumi*, 508 U.S. at 542–43).[25] "A law is therefore not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." *Id.* at 197. As the Supreme Court stated in a recent order, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). "Comparability is concerned with the risks various activities pose." *Id.* Notably, in *Smith*, a law criminalizing controlled substance possession was deemed generally applicable even though it contained an exception for substances prescribed for medical purposes. 494 U.S. at 874, 878–82.

The State alleges that the following interests underlie its adoption of Section 2.61. First, it seeks to prevent the spread of COVID-19 in healthcare facilities among staff, patients, and residents. Second, by protecting the health of healthcare employees to ensure they are able to continue working, it aims to reduce the risk of staffing shortages that can compromise the safety of patients and residents even beyond a COVID-19 infection. Thus, the State maintains, the medical and any religious exemption differ in

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[25] Plaintiffs suggest that our decision in *Central Rabbinical Congress* was overruled by the Supreme Court's orders in *Roman Catholic Diocese* and *Tandon*. But *Central Rabbinical Congress*'s formulation of the standard for identifying "comparable secular activity"—"secular conduct that is at least as harmful [as religious conduct] to the legitimate government interests purportedly justifying it," 763 F.3d at 197—is consistent with the Supreme Court's statements in both of those cases. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (stating that less-regulated factories, schools, and shopping centers were much more crowded than churches and synagogues or had contributed to the spread of COVID-19, in contrast to the religious institutions' "admirable safety records"); *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (considering secular activities comparable where they were not found to "pose a lesser risk of transmission than [plaintiffs'] proposed religious exercise at home").

an important respect: applying the Rule to those who oppose vaccination on religious grounds furthers the State's asserted interests, whereas applying the Rule to those subject to medical contraindications or precautions based on pre-existing conditions would undermine the government's asserted interest in protecting the health of covered personnel. *Cf. Does 1-6 v. Mills*, — F.4th —, 2021 WL 4860328, at *6 (1st Cir. Oct. 19, 2021), *application for injunctive relief denied sub nom. Does 1-3 v. Mills*, — S. Ct. —, No. 21A90, 2021 WL 5027177 (Oct. 29, 2021). Vaccinating a healthcare employee who is known or expected to be injured by the vaccine would harm her health and make it less likely she could work. The State identified these objectives in the Regulatory Impact Statement accompanying the emergency rulemaking, and Plaintiffs do not point to any evidence suggesting that the interests asserted are pretextual or should otherwise be disregarded in the comparability analysis. Accordingly, the State makes a reasonable case that Section 2.61 contains a medical exemption not because it determined that "the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation," *Lukumi*, 508 U.S. at 543, but because applying the vaccination requirement to individuals with medical contraindications and precautions would not effectively advance those interests. Indeed, applying the vaccine to individuals in the face of certain contraindications, depending on their nature, could run counter to the State's "interest in protecting the integrity and ethics of the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)); *see also Jacobson v. Massachusetts*, 197 U.S. 11, 38–39 (1905) (recognizing that the state may not be permitted to require vaccination of individuals with contraindications).

Importantly, the State has also presented evidence that raises the possibility that the exemptions are not comparable in terms of the "risk" that they pose. *See Tandon*, 141 S. Ct. at 1296. It notes that the medical exemption is defined to be limited in duration, as

the vaccine requirement is "inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health." 10 N.Y.C.R.R. § 2.61(d)(1). Although some of the contraindications and precautions identified by ACIP and incorporated into the Department of Health guidance are long-term health conditions, others are in fact explicitly temporary, such as having a current moderate-to-severe acute illness.[26] In contrast, a sincerely held religious belief that vaccination is inconsistent with one's religion is unlikely to change to permit vaccination in the future, absent the approval of new vaccines that are developed in a different way. The statistics provided by the State further indicate that medical exemptions are likely to be more limited in number than religious exemptions, and that high numbers of religious exemptions appear to be clustered in particular geographic areas. *See Dr. A.* Appellants' Reply Br. at 13 (citing *Serafin*, Index No. 908296-21, Doc. No. 57 (Decl. of Dorothy Persico)) (ratios of religious exemptions to medical exemptions among Erie County and Monroe County hospital workers were 18 to 1 and 23 to 1, respectively).[27]

As a result, it may be feasible for healthcare entities to manage the COVID-19 risks posed by a small set of objectively defined and largely time-limited medical exemptions. In contrast, it could pose a significant barrier to effective disease prevention to permit a much greater number of permanent religious exemptions, which, according to the State's evidence, appear more commonly sought in certain locations. *See Serafin*, Index No. 908296-21, Doc. No. 57 (Decl. of Dorothy Persico). Although these differences may, after factual development, be shown to be too insignificant to render the exemptions incomparable, the limited evidence now before

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[26] *See FAQs*, *supra* at 10.

[27] As discussed, Plaintiffs do not contest the State's assertion that higher numbers of employees claim religious exemptions than medical exemptions. *See supra* note 3.

us suggests that the medical exemption is not "as harmful to the legitimate government interests purportedly justifying" the Rule as a religious exemption would be. *Central Rabbinical Congress*, 763 F.3d at 197.

In their efforts to show a likelihood of success on the merits, Plaintiffs counter that Section 2.61, by providing a medical but not a religious exemption, effectively prohibits religion-based refusals of vaccination while permitting "comparable" refusals on secular grounds. To establish comparability under *Smith*, Plaintiffs rely heavily on the general—and reasonable—proposition that any individual unvaccinated employee is likely to present statistically comparable risks of both contracting and spreading COVID-19 at any given healthcare facility, irrespective of the reason that the employee is unvaccinated. In Plaintiffs' view, the Supreme Court's orders in *Roman Catholic Diocese of Brooklyn v. Cuomo* and *Tandon v. Newsom* require us to confine our analysis to evaluating the risk of COVID-19 transmission posed by each unvaccinated individual.

Both of those cases involved challenges to occupancy limits placed on religious services, in an effort to curb COVID-19 transmission indoors, which were not applied to secular businesses with similarly high capacities. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *Tandon*, 141 S. Ct. at 1297. Unlike Plaintiffs' proposed analysis here, however, *Roman Catholic Diocese* and *Tandon* did not involve a one-to-one comparison of the transmission risk posed by an individual worshipper and, for example, an individual grocery shopper. The Supreme Court's discussion in those cases, which compared the risks posed by groups of various sizes in various settings, suggests the appropriateness of considering aggregate data about transmission risks. *See, e.g.*, *Roman Catholic Diocese*, 141 S. Ct. at 66–67 (comparing "a large store in Brooklyn that could literally have hundreds of people shopping there on any given day" with "a nearby church or synagogue [that] would be prohibited from allowing more than 10 or 25 people for a worship service"). We doubt that, as an epidemiological matter, the

number of people seeking exemptions is somehow excluded from the factors that the State must take into account in assessing the relative risks to the health of healthcare workers and the efficacy of its vaccination strategy in actually preventing the spread of disease. The record before us contains only limited data regarding the prevalence of medical ineligibility and religious objections, but what data we do have indicates that claims for religious exemptions are far more numerous.

Further, *Tandon* expressly instructs courts to consider "the asserted government interest that justifies the regulation at issue" when determining whether two activities are comparable for Free Exercise Clause purposes. *Tandon*, 141 S. Ct. at 1296. By confining their discussion of comparability to individual risk of transmission alone, Plaintiffs fail to engage with the reasons above, persuasive to us, that substantially distinguish the medically ineligible from the religious objectors in light of the State's asserted purposes. At this stage, Plaintiffs do not meaningfully challenge the legitimacy of the government's asserted interest in protecting the health of workers and maintaining staffing levels, or the proposition that requiring those who have been granted a medical exemption to be vaccinated would undermine those interests to a lesser degree than would a religious exemption.

As counsel for the *WTP* Plaintiffs acknowledged at oral argument, Plaintiffs here essentially contend that *all* existing vaccination mandates without a religious exemption necessarily fail the general applicability test because they likely all contain medical exemptions. At the same time, it appears that for decades, those charged with protecting the public health against infectious disease in New York State have required vaccination of *all* medically eligible employees and treated the requirement as a condition of employment in the healthcare arena. For example, the State has required healthcare employees to be vaccinated against rubella and measles since 1980 and 1991, respectively, without a religious exemption. Many of these vaccines, including the

rubella vaccine, appear from the information available to us (and not to date contested by Plaintiffs) to have connections to the same fetal cell lines that form the basis for Plaintiffs' religious objections here. *See* Los Angeles County Dep't of Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines*, *supra* note 5. Thus, if accepted, Plaintiffs' arguments would go beyond just being inconsistent with past practices: they would have potentially far-reaching and harmful consequences for governments' ability to enforce longstanding public health rules and protocols.

With a record as undeveloped on the issue of comparability as that presented here, we cannot conclude that the above vaccination requirements are *per se* not generally applicable, as Plaintiffs' argument would have it, so as to support a preliminary injunction at this time. *See Smith*, 494 U.S. at 888–89 (counting "compulsory vaccination laws" among those generally applicable civic obligations for which no religious exemption is required); *see also Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) ("[A parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease . . . ." (footnote omitted)); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (per curiam) (maintaining that religious exemptions to vaccine mandates are not constitutionally required).

The record before the district courts was sparse. It does not support a conclusion that Plaintiffs have borne their burden of demonstrating that the medical exemption provided in Section 2.61 and the religious exemption sought are likely comparable.

2. *Whether Section 2.61 Provides for a System of Individualized Exemptions*

General applicability may be absent when a law provides "a mechanism for individualized exemptions," *Smith*, 494 U.S. at 884, because it creates the risk that

administrators will use their discretion to exempt individuals from complying with the law for secular reasons, but not religious reasons. For instance, in *Smith*, the Supreme Court distinguished generally applicable laws from an unemployment compensation statute under which applicants were eligible for benefits if they presented "good cause" for their unemployment, which allowed administrators, in their discretion, to refuse an exemption if an applicant could not work for religious reasons, but to grant an exemption if an applicant could not work for other personal reasons. 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion) and citing *Sherbert v. Verner*, 374 U.S. 398, 401 & n.4 (1963)). The Court observed that the context of the unemployment compensation system "lent itself to individualized government assessment of the reasons for the relevant conduct." *Id.* Similarly, the Court recently found a system of individualized exemptions to exist where an official had "sole discretion" to grant or deny exemptions to the anti-discrimination provision in contracts between the City of Philadelphia and adoption service providers. *Fulton*, 141 S. Ct. at 1878–79.

As other Circuits have noted, however, "an exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons." *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021) (internal quotation marks and alteration omitted); *see also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1081–82 (9th Cir. 2015) (finding that the challenged "rules do not afford unfettered discretion that could lead to religious discrimination because the provisions are tied to particularized, objective criteria"), *cert. denied*, 136 S. Ct. 2433 (2016); *cf. Intercommunity Ctr. for Justice & Peace v. I.N.S.*, 910 F.2d 42, 45 (2d Cir. 1990) (concluding that immigration law that prohibited knowingly employing an unauthorized immigrant did "not provide for a discretionary exemption that is applied in a manner that fails to accommodate free exercise concerns" despite its inclusion of an exemption for

employing certain household employees hired before November 1986). The "mere existence of an exemption procedure," absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny. *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007).

The *WTP* Plaintiffs argue that the medical exemption in Section 2.61 creates a mechanism for individualized exemptions. They are mistaken. The medical exemption here does not "'invite' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 141 S. Ct. at 1879 (quoting *Smith*, 494 U.S. at 884). Instead, the Rule provides for an objectively defined category of people to whom the vaccine requirement does not apply: employees who present a certification from a physician or certified nurse practitioner attesting that they have a pre-existing health condition that renders the vaccination detrimental to their health, in accordance with generally accepted medical standards, such as those published by ACIP,[28] for the period

[28] Under the generally accepted medical standards published by ACIP, cognizable contraindications to the COVID-19 vaccines are limited to "[s]evere allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the COVID-19 vaccine" and "[i]mmediate (within 4 hours) allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19 vaccine." *FAQs*, *supra* at 10 (citing ACIP standards). Precautions to the vaccines are limited to "[c]urrent moderate to severe acute illness[,] . . . [h]istory of an immediate allergic reaction to any other (not COVID-19) vaccine or injectable therapy (excluding allergy shots)[, and] [h]istory of myocarditis or pericarditis after receiving the first dose of an mRNA COVID-19 vaccine." *Id.* (citing ACIP standards). Additionally, individuals with a "contraindication to one type of COVID-19 vaccine (e.g., mRNA COVID-19 vaccines) have precautions to another type of COVID-19 vaccine (e.g., Janssen/Johnson & Johnson vaccine)." *Id.* (citing ACIP standards). An individual who has a contraindication to the vaccine cannot be safely vaccinated, but "[m]ost people deemed to have a precaution to a COVID-19 vaccine at the time of their vaccination appointment can and should be administered vaccine" after conducting a risk assessment with a healthcare provider. Centers for Disease Control and Prevention, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States: Contraindications and Precautions* (Oct. 25, 2021), https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-

during which the vaccination remains detrimental to their health. *See* 10 N.Y.C.R.R. § 2.61(d)(1). A written description of the nature and duration of the condition must be furnished, and the exemption must be documented. On its face, the Rule affords no meaningful discretion to the State or employers, and Plaintiffs have not put forth any evidence suggesting otherwise. For example, Plaintiffs have not plausibly alleged or offered evidence to suggest that employees are requesting, or that the State is allowing, medical exemptions that do not conform to the Rule or applicable standards.

That physicians and nurse practitioners must use their medical judgment to determine whether a particular individual has a contraindication or precaution against receiving the vaccine does not render the exemption discretionary. Indeed, *Smith* itself specifically held that a scheme that included a type of medical exemption—by not criminalizing the use of controlled substances when prescribed by a medical practitioner—was nonetheless generally applicable under the Free Exercise Clause. *See Smith*, 494 U.S. at 874. If the State can lawfully choose to apply the vaccination requirement to those with religious objections but not those medically unable to get vaccinated because the two are not comparable—and, as explained above, Plaintiffs have not established a likelihood of success on their argument to the contrary—then Section 2.61 appears to leave no room for the State to favor impermissible secular reasons for declining vaccination over religious reasons.[29]

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vaccines-us.html#Contraindications. The specificity of these limitations stands in contrast to the absence of limitations and specificity in the medical exemption provided in the Maine statute recently subject to review and consideration by the Supreme Court. *See Mills*, 2021 WL 4860328, at *5 (construing Me. Rev. Stat. tit. 22, § 802); *Mills*, 2021 WL 5027177, at *2 (Gorsuch, *J.*, dissenting from the denial of application for injunctive relief) (stating that the law does not "limit what may qualify as a valid 'medical' reason to avoid inoculation").

[29] In *Dahl v. Bd. of Trustees of Western Michigan Univ.*, — F.4th —, 2021 WL 4618519 (6th Cir. Oct. 7, 2021) (per curiam), the Sixth Circuit, under different factual circumstances, ruled that a student-athlete vaccine mandate that provided that medical and religious exemptions would be

* * *

Based on the foregoing, Plaintiffs have not established, at the preliminary injunction stage, that they are likely to succeed in showing that Section 2.61 is not neutral or generally applicable. Accordingly, rational basis review applies. *See Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–82). Section 2.61 easily meets that standard, which requires that the State have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal. *See Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Dep'ts, App. Div. of the Sup. Ct. of N.Y.*, 852 F.3d 178, 191 (2d Cir. 2017). Faced with an especially contagious variant of the virus in the midst of a pandemic that has now claimed the lives of over 750,000 in the United States and some 55,000 in New York, the State decided as an emergency measure to require vaccination for all employees at healthcare facilities who might become infected and expose others to the virus, to the extent they can be safely vaccinated. This was a reasonable exercise of the State's power to enact rules to protect the public health.[30] *See Jacobson*, 197 U.S. at 25; *Phillips*, 775 F.3d at 542–43.

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considered on an individual basis at the discretion of the University meant that the school's vaccine mandate was not generally applicable under *Fulton*. *Id.* at *1, *4. We of course are not bound by that analysis, and we believe *Dahl* to have addressed a factual setting significantly different from that presented here. In *Dahl*, the University was afforded so much discretion to rule on individual cases, and so few standards governed the exercise of that discretion, as to leave room for the University to apply potentially discriminatory standards, or at least to avoid a neutral application of generally applicable principles. *See id.* at *4. Here, we think the standards articulated by ACIP and binding the State employers are sufficiently well-defined to avoid grossly pretextual or discriminatory application—and Plaintiffs have not met their burden to show that is not the case. Examined at a proper perspective—one suitable to dealing with large populations in a public health crisis—we see no basis for adopting the *Dahl* court's approach here.

[30] We also observe that, irrespective of whether Section 2.61 is ultimately upheld at the conclusion of this litigation, private healthcare institutions may impose vaccination requirements of their own, subject to any relevant limitations imposed by Title VII and other applicable law but regardless of the limitations that the First Amendment imposes on the State.

II. Likelihood of Success on the Merits: Supremacy Clause and Title VII Claim

The *Dr. A.* Plaintiffs contend that Section 2.61 contravenes the Supremacy Clause because it is preempted by Title VII, which prohibits discrimination in employment on the basis of religion. 42 U.S.C. § 2000e-2(a)(1)–(2). To succeed on this type of preemption claim, plaintiffs must show that "local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010).[31]

Plaintiffs construe Section 2.61 to prohibit healthcare employers from making reasonable accommodations as otherwise required by Title VII. Plaintiffs cite the absence of an express religious exemption in Section 2.61 in support of their position that the Rule simply leaves "no room for Plaintiffs' employers even to consider their reasonable religious accommodation requests as required by federal law under Title VII." *Dr. A.* Appellees' Br. at 29 (emphasis omitted).[32]

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[31] "In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *N.Y. SMSA Ltd. P'ship*, 612 F.3d at 104 (internal quotation marks omitted). Plaintiffs here invoke conflict preemption.

[32] Although the *Dr. A.* Plaintiffs style their preemption claim as a challenge brought pursuant to the Supremacy Clause, the Supreme Court has held that the Supremacy Clause does not create an independent cause of action. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) ("[T]he Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action. It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so.") (internal quotation marks and citations omitted).

The District Court for the Northern District of New York agreed, ruling that Plaintiffs were likely to succeed on the merits of this claim. *See Dr. A.*, 2021 WL 4734404, at *6. The district court held that Section 2.61 "do[es] not make room for 'covered entities' to consider requests for reasonable religious accommodations," and instead requires all personnel at covered entities to be vaccinated. *Id.* The district court observed that the employers of some Plaintiffs had revoked previously afforded religious exemptions or religious accommodations to COVID-19-vaccine requirements, citing the State's adoption of Section 2.61. *Id.* In the district court's view, Plaintiffs adequately demonstrated that Section 2.61 "effectively foreclose[s] the pathway to seeking a religious exemption that is guaranteed under Title VII." *Id.*

Title VII makes it unlawful for employers "to discharge . . . or otherwise to discriminate against any individual" in his or her employment "because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). The statute defines "religion" to include "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on . . . the employer's business." *Id.* § 2000e(j); *see Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 66 (1977); *cf. EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 770 (2015).

The *Dr. A.* Plaintiffs argue, as described above, that the absence of a religious exemption in Section 2.61 prohibits them from seeking reasonable accommodations from their employers under Title VII for their sincerely held religious beliefs. Section 2.61 is silent, however, on the employment-related actions that employers may take in response to employees who refuse to be vaccinated for religious reasons. The State observes that "[n]othing in [Section 2.61] precludes employers from accommodating religious objectors by giving them . . . assignments—such as telemedicine—where they

would not pose a risk of infection to other personnel, patients, or residents." *Dr. A.* Appellants' Br. at 62. We agree with the State.

Section 2.61, on its face, does not bar an employer from providing an employee with a reasonable accommodation that removes the individual from the scope of the Rule. Section 2.61 does not require employers to violate Title VII because, although it bars an employer from granting a religious *exemption* from the vaccination requirement, it does not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement. *See also Mills*, 2021 WL 4860328, at *10 ("The appellants' Supremacy Clause argument rests on their assertion that the hospitals . . . have claimed that the protections of Title VII are inapplicable in the State of Maine. The record simply does not support that argument. . . . [T]he hospitals merely dispute that Title VII requires them to offer the appellants the religious exemptions they seek." (internal quotation marks and alteration omitted)).

Contrary to the *Dr. A*. Plaintiffs' interpretation of the statute, Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated. To avoid Title VII liability for religious discrimination, an employer "need not offer the accommodation the employee prefers." *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002). Instead, an employer must offer a *reasonable* accommodation that does not cause the employer an undue hardship. Once "any reasonable accommodation is provided, the statutory inquiry ends." *Id.* Because Section 2.61's text does not foreclose all opportunity for Plaintiffs to secure a reasonable accommodation under Title VII, the Rule does not conflict with federal law. Therefore, the district court's conclusion to the contrary constituted legal error.

The district court's conclusion also turned on clearly erroneous factual findings. At this stage, the *Dr. A.* Plaintiffs have submitted little in support of their broad allegations about the effect of Section 2.61. The district court reached the conclusion that accommodation by their employers was foreclosed upon the *Dr. A.* Plaintiffs' say-so, without any documentation supporting Plaintiffs' allegations that they were denied reasonable accommodations from their employers. The district court granted the *Dr. A.* Plaintiffs' motion for a preliminary injunction without a hearing and without knowing the identities of Plaintiffs' employers or the substance of Plaintiffs' interactions with their employers. It may turn out that the opportunities for a reasonable accommodation under Title VII for religious objectors to the vaccine are numerous, or it may be that there are so few as to be illusory. Perhaps accommodations for the medically ineligible leave few available for the religious objectors.[33] Or perhaps the requests for accommodations in each category will vary by employer, by part of the State, or by employee demographics. But without any data in the record, we cannot conclude that Plaintiffs have met their burden to show a likelihood of success on the merits, and we decline to draw any conclusion about the availability of reasonable accommodation based solely on surmise and speculation.

At this preliminary stage, we therefore conclude that the district court erred by finding that Plaintiffs are likely to succeed on their claim that Section 2.61 is preempted by Title VII and therefore violative of the Supremacy Clause.

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[33] Although the Rule does not prevent healthcare entities from taking additional precautions to minimize the transmission risk posed by medically exempt employees, healthcare entities may permit a medically exempt employee to continue normal job responsibilities provided they comply with requirements for personal protective equipment. *See FAQs*, *supra* at 10.

III. Likelihood of Success on the Merits: Rights to Privacy, Medical Freedom, and Bodily Autonomy Claim

The *WTP* Plaintiffs maintain on appeal that they are likely to succeed in establishing that Section 2.61 violates their fundamental rights to privacy, medical freedom, and bodily autonomy under the Fourteenth Amendment.[34] This argument also fails.

Both this Court and the Supreme Court have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional. *See Jacobson*, 197 U.S. at 25–31, 37; *Phillips*, 775 F.3d at 542–43. Plaintiffs' argument that the Supreme Court's decision in *Roman Catholic Diocese* "expressly overruled" *Jacobson* is a mystery, given that the majority did not even mention *Jacobson*. *WTP* Appellants' Br. at 35; *see generally Roman Catholic Diocese*, 141 S. Ct. 63.

Their alternative contention that *Jacobson* and *Phillips* have been implicitly overruled by the Supreme Court likewise finds no support in caselaw. In *Cruzan*, a case relied upon by Plaintiffs for the proposition that they have a fundamental constitutional right to refuse medical treatment, the Court expressly recognized its holding in *Jacobson* that "an individual's liberty interest in declining an unwanted smallpox vaccine" was outweighed there by "the State's interest in preventing disease." *Cruzan by Cruzan v.*

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[34] The *WTP* Plaintiffs' complaint describes these rights as arising from the First, Fourth, Fifth, and Fourteenth Amendments, but on appeal they assert that these rights are derived from either the Fourteenth Amendment alone or a combination of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Because the *WTP* Plaintiffs do not make any particularized argument for why the fundamental rights they assert may be implicated by constitutional provisions other than the Fourteenth Amendment, we evaluate only their challenge as to the Fourteenth Amendment.

Dir., Missouri Dep't of Health, 497 U.S. 261, 278 (1990). Plaintiffs provide no basis for concluding that the vaccination requirement here, considerably narrower than the city-wide mandate in *Jacobson*, violates a fundamental constitutional right.[35] Although individuals who object to receiving the vaccines on religious grounds have a hard choice to make, they do have a choice. Vaccination is a condition of employment in the healthcare field; the State is not forcibly vaccinating healthcare workers. As in *Phillips*, the instant "challenge to the mandatory vaccination regime is therefore no more compelling than Jacobson's was more than a century ago." 775 F.3d at 542. *Cf. Klaassen v. Trs. of Indiana Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) ("[S]uch [a substantive due process] argument depends on the existence of a fundamental right ingrained in the American legal tradition. Yet *Jacobson*, which sustained a criminal conviction for refusing to be vaccinated, shows that plaintiffs lack such a right.").

Accordingly, the *WTP* Plaintiffs have not established that they are likely to succeed on the merits of their Fourteenth Amendment claim.

IV. Irreparable Harm, the Public Interest, and the Balance of Equities

Plaintiffs are not entitled to a preliminary injunction because they cannot, on the present record, show a likelihood of success on the merits. We nonetheless briefly address the remaining preliminary injunction requirements: "irreparable harm absent

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[35] Plaintiffs' reliance on *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Lawrence v. Texas*, 539 U.S. 558 (2003), also fails to persuade. These cases do not establish a broad fundamental privacy right for all medical decisions made by an individual—and particularly not for a decision with such broad community consequences as declining vaccination against a highly contagious disease while working in contact with vulnerable people at healthcare facilities. This Court cannot find an overriding privacy right when doing so would conflict with *Jacobson*. Although in 1905, when it was decided, *Jacobson* might have been read more narrowly, for over 100 years it has stood firmly for the proposition that the urgent public health needs of the community can outweigh the rights of an individual to refuse vaccination. *Jacobson* remains binding precedent.

injunctive relief"; the "public interest weighing in favor of granting the injunction"; and "the balance of equities tip[ping] in [the movant's] favor," *Yang*, 960 F.3d at 127, and determine that Plaintiffs have not successfully met them.

A. Irreparable Harm

The law recognizes the harm that necessarily results when the State unconstitutionally burdens religious exercise. "Religious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation because a presumption of irreparable injury flows from a violation of constitutional rights." *Agudath Israel*, 983 F.3d at 636 (internal quotation marks and alteration omitted); *see also Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction."). Although Plaintiffs are subject to meaningful burdens on their religious practice if they choose to obtain the COVID-19 vaccine, because they have failed to demonstrate a likelihood of success on their First Amendment or other constitutional claims, their asserted harm is not of a constitutional dimension. Thus, Plaintiffs fail to meet the irreparable harm element simply by alleging an impairment of their Free Exercise right.

Plaintiffs also contend that they face imminent irreparable harm from loss of employment and professional standing if they refuse the COVID-19 vaccine on religious grounds. We acknowledge that Plaintiffs may possibly suffer significant employment consequences if they refuse on religious grounds to be vaccinated. It is well settled, however, that adverse employment consequences are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages. *See Sampson v. Murray*, 415 U.S. 61, 91–92 (1974) ("[L]oss of income and . . . the claim that her reputation would be damaged . . . falls far short of the type of irreparable injury which is a necessary predicate to the

issuance of a temporary injunction[.]"); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988) ("Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief."). Because Plaintiffs' economic harms under Title VII could be remedied with money damages, and reinstatement is a possible remedy as well, we conclude that Plaintiffs have failed to demonstrate that they will suffer irreparable harm absent injunctive relief.

We pause to recognize, should the issue remain on remand, that this case raises difficult, apparently unusual questions as to imminent irreparable harm. Perhaps, if they prevail at the conclusion of this litigation, Plaintiffs would seek lost wages, but it is not at all clear who would pay them. To the extent Plaintiffs allege that they will suffer adverse employment consequences or loss of professional standing if not provided accommodations under Title VII, Plaintiffs might seek money damages from their employers. Private medical-provider employers might make a persuasive argument that they should not have to pay because they were in effect compelled by law to terminate the employment. Absent a waiver, however, sovereign immunity would likely prevent Plaintiffs from obtaining money damages from the State. *See Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254 (2011).

We emphasize, however, that we do not place any weight on the issue of remediation of Plaintiffs' financial losses at this preliminary injunction stage. The district courts can consider the issue, should it be necessary to do so, upon a determination of the permanent injunction request, presumably upon further factual development and findings.

B. Public Interest and Balance of Equities

Plaintiffs have also failed to demonstrate that the public interest weighs in favor of enjoining enforcement of Section 2.61. When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge. *See New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 58–59 (2d Cir. 2020). Here, the State has an indisputably compelling interest in ensuring that the employees who care for hospital patients, nursing home residents, and other medically vulnerable people in its healthcare facilities are vaccinated against COVID-19, not just to protect them and those with whom they come into contact from infection, but also to prevent an overburdening of the healthcare system. Although Plaintiffs undoubtedly face a difficult choice if their employers deny religious accommodations—whether to be vaccinated despite their religious beliefs or whether to risk termination of their jobs—such hardships are outweighed by the State's interest in maintaining the safety within healthcare facilities during the pandemic.

Plaintiffs assert that the State "will suffer no harm as the New York healthcare system has operated for the last year without interruption or catastrophe" without requiring vaccination for healthcare workers. *WTP* Appellants' Br. at 11. Defining the relevant time frame in this way notably omits the first wave of the pandemic, during which New York hospitals were in crisis, with frontline nurses and physicians reportedly experiencing some of the highest rates of infection and death; New York City nursing homes experienced such a high number of deaths that their morgue capacity was exceeded. *See* Br. for *Amicus Curiae* Greater New York Hospital Association ("GNYHA *Amicus* Br.") at 3 (citing Miriam Mutambudzi et al., *Occupation and Risk of Severe COVID-19: Prospective Cohort Study of 120 075 UK Biobank Participants*, 78 Occupational & Envt'l Med. 307, 311 (2021)); New York State Office of the Attorney

General, *Nursing Home Response to COVID-19 Pandemic* 12 (Jan. 30, 2021), https://ag.ny.gov/sites/default/files/2021-nursinghomesreport.pdf.

But even within the past year, healthcare facilities in the State have been under strain. According to *amicus* Greater New York Hospital Association, not only has transmission of the virus continued in hospitals even with the use of personal protective equipment, testing, and other measures, *see* GNYHA *Amicus* Br. at 9, 12–14, but hospital workers have also experienced a "parallel pandemic" of burnout, anxiety, depression, and other mental health issues, *id.* at 16. Researchers have found that this phenomenon stems from "a perceived lack of control, treatment of other healthcare workers for COVID-19, and uncertainty about colleagues' infection status," and it has been accompanied by increased rates of resignation and retirement as well as incidents of self-harm. *Id.* at 16–17 (citing Ari Schechter et al., *Psychological Distress, Coping Behaviors, and Preferences for Support among New York Healthcare Workers During the COVID-19 Pandemic*, 66 Gen. Hosp. Psychiatry 1, 3 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7297159, and Wendy Dean, *Suicides of Two Health Care Workers Hint at the COVID-19 Mental Health Crisis to Come*, STAT News (Apr. 30, 2020), https://www.statnews.com/2020/04/30/suicides-two-health-care-workers-hint-at-covid-19-mental-health-crisis-to-come), 19 (citing Bridget Balch, *"Worst Surge We've Seen": Some Hospitals in Delta Hot Spots Close to Breaking Point*, AAMC (Aug. 24, 2021), https://www.aamc.org/news-insights/worst-surge-we-ve-seen-some-hospitals-delta-hot-spots-close-breaking-point).

Therefore, Plaintiffs have not demonstrated that "the balance of equities tips in [their] favor." *Yang*, 960 F.3d at 127. Because Section 2.61 furthers the State's compelling interest and Plaintiffs have not shown a likelihood of demonstrating that their constitutional rights are violated by the Rule, they have also failed to show that a preliminary injunction preventing the Rule's implementation serves the public interest.

Whether this issue will ultimately carry any weight when the district courts decide Plaintiffs' entitlement to a permanent injunction on remand, we need not and do not decide.

CONCLUSION

For the foregoing reasons, the order of the United States District Court for the Eastern District of New York is **AFFIRMED**. The order of the United States District Court for the Northern District of New York is **REVERSED**, and the preliminary injunction entered by that court is **VACATED**. These tandem cases are **REMANDED** to their respective district courts for further proceedings consistent with the Order entered on October 29, 2021, and this Opinion.

APPENDIX

Section 2.61. Prevention of COVID-19 transmission by covered entities

<Emergency action effective Aug. 26, 2021>

(a) Definitions.

(1) *Covered entities* for the purposes of this section, shall include:

(i) any facility or institution included in the definition of "hospital" in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers;

(ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies;

(iii) hospices as defined in section 4002 of the Public Health Law; and

(iv) adult care facility under the Department's regulatory authority, as set forth in Article 7 of the Social Services Law.

(2) *Personnel*, for the purposes of this section, shall mean all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.

(3) *Fully vaccinated*, for the purposes of this section, shall be determined by the Department in accordance with applicable federal guidelines and recommendations. Unless otherwise specified by the Department, documentation of vaccination must include the manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site, in one of the following formats:

(i) record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;

(ii) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or

(iii) any other documentation determined acceptable by the Department.

(c) [FN1] Covered entities shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed below. Documentation of such vaccination shall be made in personnel records or other appropriate records in accordance with applicable privacy laws, except as set forth in subdivision (d) of this section.

(d) Exemptions. Personnel shall be exempt from the COVID-19 vaccination requirements set forth in subdivision (c) of this section as follows:

(1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be

detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (1) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

(e) Upon the request of the Department, covered entities must report and submit documentation, in a manner and format determined by the Department, for the following:

(1) the number and percentage of personnel that have been vaccinated against COVID-19;

(2) the number and percentage of personnel for which medical exemptions have been granted;

(3) the total number of covered personnel.

(f) Covered entities shall develop and implement a policy and procedure to ensure compliance with the provisions of this section and submit such documents to the Department upon request.

(g) The Department may require all personnel, whether vaccinated or unvaccinated, to wear an appropriate face covering for the setting in which such personnel are working in a covered entity. Covered entities shall supply face coverings required by this section at no cost to personnel.

Credits

Emergency rulemaking eff. Aug. 26, 2021, expires Nov. 23, 2021.

[FN1]

So in original.

Current with amendments included in the New York State Register, Volume XLIII, Issue 40 dated October 6, 2021. Some sections may be more current, see credits for details.

N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61, 10 NY ADC 2.61

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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Dr. A, Nurse A., Dr. C., Nurse D., Dr. F., Dr. G., Therapist I., Dr. J., Nurse J., Dr. M., Nurse N., Dr. O., Dr. P., Technologist P., Dr. S., Nurse S., and Physician Liaison X.,

Plaintiffs,

-v- 1:21-CV-1009

KATHY HOCHUL, Governor of the State of New York, in her official capacity, DR. HOWARD A. ZUCKER, Commissioner of the New York State Department of Health, in his official capacity, and LETITIA JAMES, Attorney General of the State of New York, in her official capacity,

Defendants.

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DAVID N. HURD
United States District Judge

ORDER

On August 26, 2021, the New York State Department of Health ("DOH") promulgated a regulation that mandates COVID-19 vaccination of health care workers. This regulation requires personnel employed at general hospitals and nursing homes to receive their first dose of a COVID-19 vaccine

by September 27, 2021, and for personnel employed at other covered entities to receive a vaccine by October 7, 2021. Unlike a previously applicable Public Health Order, this new regulation excludes any religious exemption. The named plaintiffs are seventeen medical professionals employed in the State of New York who allege that their sincere religious beliefs compel them to refuse the COVID-19 vaccines that are currently available.

On September 13, 2021, plaintiffs filed this 42 U.S.C. § 1983 action alleging this "vaccination mandate" violates the First and Fourteenth Amendments, the Supremacy Clause, and the Equal Protection Clause of the U.S. Constitution. Plaintiffs sought to proceed pseudonymously. Plaintiffs also moved for a temporary restraining order ("TRO") and a preliminary injunction that would enjoin defendants from, *inter alia*, enforcing the vaccine mandate "to the extent it categorically requires health care employers to deny or revoke religious exemptions from COVID-19 vaccination mandates."

Upon review of plaintiffs' memorandum of law and supporting documentation, it is

ORDERED that

1. Plaintiffs' motion for a temporary restraining order is GRANTED;

2. Defendants, their officers, agents, employees, attorneys and successors in office, and all other persons in active concert or participation with them,

are temporarily ENJOINED from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with the vaccine mandate such that:

(a) The vaccine mandate is suspended in operation to the extent that the DOH is barred from enforcing any requirement that employers deny religious exemptions from COVID-19 vaccination or that they revoke any exemptions employers already granted before the vaccine mandate issued;

(b) The DOH is barred from interfering in any way with the granting of religious exemptions from COVID-19 vaccination going forward, or with the operation of exemptions already granted;

(c) The DOH is barred from taking any action, disciplinary or otherwise, against the licensure, certification, residency, admitting privileges or other professional status or qualification of any of the plaintiffs on account of their seeking or having obtained a religious exemption from mandatory COVID-19 vaccination; and

(d) As noted *supra*, since the August 26, 2021 regulation does not require hospital and nursing home employees to receive a vaccine until September 27, 2021, the TRO does not, as a practical matter, go into effect until that date.

3. Plaintiffs shall serve defendants with (1) this Order; (2) the operative complaint and supporting exhibits; and (3) the motion for a temporary restraining order and preliminary injunction no later than Thursday, September 16, 2021 at 12:00 p.m.;

4. Defendants are to advise the Court if they oppose plaintiffs' request for a preliminary injunction pending an expedited resolution of the merits of the main issue for a permanent injunction;

5. If yes, defendants shall file and serve all submissions in opposition to the plaintiffs' motion for a preliminary injunction before Wednesday, September 22, 2021 at 5:00 p.m.;

6. No reply is permitted;

7. Defendants shall further advise the Court if they oppose plaintiffs' request to proceed pseudonymously;

8. If yes, defendants shall file and serve all submissions in opposition to the plaintiffs' request to proceed pseudonymously before Wednesday, September 22, 2021 at 5:00 p.m.;

9. No reply is permitted; and

10. If yes, defendants shall SHOW CAUSE at an in-person oral argument to be held at 10:00 a.m. on Tuesday, September 28, 2021 at the United States Courthouse in Utica, New York why the TRO should not be converted to a

preliminary injunction in accordance with Rule 65 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

United States District Judge

Dated: September 14, 2021 at 10:00 a.m.
Utica, New York.

EXHIBIT 4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G., THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., TECHNOLOGIST P., DR. S., NURSE S., and PHYSICIAN LIAISON X.,

Plaintiffs,

-v- 1:21-CV-1009

KATHY HOCHUL, Governor of the State of New York, in her official capacity, DR. HOWARD A. ZUCKER, Commissioner of the New York State Department of Health, in his official capacity, and LETITIA JAMES, Attorney General of the State of New York, in her official capacity,

Defendants.

- -

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Ass't Attorneys General

DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

On August 26, 2021, the New York State Department of Health adopted an emergency regulation that required most healthcare workers to be vaccinated against COVID-19 within the next thirty days. N.Y. COMP. CODES R. & REGS. tit. 10, § 2.61(c) (2021). As relevant here, § 2.61 eliminated a religious exemption included in the first iteration of this mandate.

On September 13, 2021, seventeen healthcare workers employed in New York State ("plaintiffs"), all of whom object to the existing COVID-19 vaccines on religious grounds, filed this official-capacity 42 U.S.C. § 1983 action against New York State Governor Kathy Hochul ("Hochul"), New York State Health Commissioner Howard A. Zucker ("Zucker"), and New York State Attorney General Letitia James ("James") (collectively "defendants").

Plaintiffs' three-count verified complaint alleges that § 2.61 violates their constitutional rights because it effectively forbids employers from considering workplace religious accommodations under processes guaranteed by federal law. Plaintiffs sought to enjoin defendants from, *inter alia*, enforcing § 2.61 "to the extent it categorically requires health care employers to deny or revoke religious exemptions from COVID-19 vaccination mandates."

On September 14, 2021, the Court issued a temporary restraining order ("TRO") to that effect, *Dr. A. v. Hochul*, 2021 WL 4189533 (N.D.N.Y.), and ordered briefing on whether the TRO should be converted to a preliminary injunction pending a resolution of the merits of plaintiffs' constitutional claims seeking a permanent injunction. The TRO was extended for good cause to this date, October 12, 2021. Dkt. No. 15. The motion has been fully briefed and will be decided on the basis of the submissions without oral argument.

II. BACKGROUND[1]

On June 25, 2021, then-Governor Andrew Cuomo rescinded the COVID-19 public health emergency declaration that had been in effect across New York

[1] The facts are taken from plaintiffs' verified complaint, Dkt. No. 1, which is tantamount to an affidavit, *see* 28 U.S.C. § 1746, and from the declaration of Elizabeth Rausch-Phung, M.D., M.P.H., Dkt. No. 16. A review of these submissions did not reveal any genuine disputes over the essential facts necessary to decide the motion. *See, e.g.*, *In re Defend H20 v. Town Bd. of Town of E. Hampton*, 147 F. Supp. 3d 80, 96–97 (E.D.N.Y. 2015) (discussing circumstances in which an evidentiary hearing on a preliminary injunction is unnecessary).

State for the previous eighteen months. Compl. ¶ 16; N.Y. Exec. Order 210 (June 24, 2021). As defendants explain, Cuomo's decision was based on "declining hospitalization and [rates of COVID-19] positivity statewide, as well as success in vaccination rates." Rausch-Phung Decl., Dkt. No. 16 ¶ 19.

However, the end of the emergency declaration did not bring an end to defendants' exercise of their emergency powers.[2] Compl. ¶ 17. On August 18, 2021, Health Commissioner Zucker issued an "Order for Summary Action" that required general hospitals and nursing homes to "continuously require all covered personnel to be fully vaccinated against COVID-19." Ex. B to Compl. at 95–101 (the "August 18 Order"). The August 18 Order included a medical exemption as well as an explicit religious exemption:

> Religious exemption. Covered entities shall grant a religious exemption for COVID-19 vaccination for covered personnel if they hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer.

Id.; *see also* Compl. ¶ 20.

Just five days later, on August 23, 2021, New York State's Public Health & Health Planning Council (the "Health Council"), acting on a summary basis pursuant to its statutory authority under the Public Health

[2] The New York legislature has curbed the executive's authority to issue new COVID-related orders. *See* N.Y. Sess. Laws ch. 71 § 4.

Law, published a proposed emergency regulation that would quickly be adopted as § 2.61.[3] *Id.* ¶¶ 4–5. This proposal expanded the vaccination requirement set forth in the August 18 Order to reach personnel in other healthcare settings. Rausch-Phung Decl. ¶ 5. This proposal also eliminated the religious exemption found in Zucker's August 18 Order. *See id.*

On August 26, 2021, three days after its publication, the Health Council adopted § 2.61, which superseded the August 18 Order and became effective immediately. Rausch-Phung Decl. ¶ 5. According to defendants, the Health Council's emergency action was a necessary measure to control the continued spread of Delta and other SARS-CoV-2 variants. *Id.* ¶¶ 8–21.

The seventeen plaintiffs are "practicing doctors, M.D.s fulfilling their residency requirement, nurses, a nuclear medicine technologist, a cognitive rehabilitation therapist and a physician's liaison." Compl. ¶ 36; *see also id.* ¶¶ 38, 47, 56, 66, 74, 84, 91, 98, 108, 117, 128, 140, 149, 161, 171, 181, 188. They are employed by hospitals, nursing homes, and other New York State entities that are subject to § 2.61. *See id.* ¶ 10.

Plaintiffs hold the sincere religious belief that they "cannot consent to be inoculated . . . with vaccines that were tested, developed or produced with fetal cell[ ] line[s] derived from procured abortions." Compl. ¶ 35; *see also*

[3] August 23 is also the date on which Cuomo resigned from office, Compl. ¶ 14, and when the Food & Drug Administration ("FDA") granted approval to the first COVID-19 vaccine for those age sixteen and older, Rausch-Phung Decl. ¶ 33. Hochul has since assumed the governorship.

id. ¶ 37 (detailing beliefs held in common by plaintiffs). According to plaintiffs, the COVID-19 vaccines that are currently available violate these sincere religious beliefs "because they all employ fetal cell lines derived from procured abortion in testing, development or production." *Id.* ¶¶ 9, 36; *see also* Rausch-Phung Decl. ¶¶ 35–45 (acknowledging that fetal cell lines are widely used in pharmaceutical development and were used in the testing and production of current COVID-19 vaccines).

The complaint alleges that each plaintiff has been denied a religious exemption, or had an existing religious exemption revoked, on the basis of their employers' application of § 2.61. Compl. ¶¶ 39–42, 49–51, 58–60, 67–68, 77–78, 85, 92–94, 102, 111–12, 118–23, 129–31, 142–43, 154–56, 162–63, 173–74, 183–85, 189. The complaint further alleges that each plaintiff has been threatened with professional discipline, loss of licensure, admitting privileges, reputational harm, and/or the imminent termination of their employment as a result of their refusal to comply with § 2.61. *Id.* ¶¶ 43–46, 52–55, 61–65, 69–73, 79–83, 86–90, 95–97, 103–07, 113–16, 124–27, 135–39, 144–48, 157–60, 164–65, 168–70, 176–80, 186–87, 190–91.

III. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To win relief, the movant must ordinarily demonstrate: (1) a likelihood of irreparable

harm; (2) either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in their favor; (3) that the balance of hardships tips in their favor regardless of the likelihood of success; and (4) that an injunction is in the public interest. *Page v. Cuomo*, 478 F. Supp. 3d 355, 362–63 (N.D.N.Y. 2020).

However, in cases like this one, where the movants seek to enjoin government action taken in the public interest pursuant to a statutory or regulatory scheme, the less rigorous "serious questions" component of this legal standard is unavailable. *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014). As the Second Circuit has explained, "[t]his exception reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Id.* (citation omitted).

Defendants' opposition memorandum invokes a second exception to the general rules governing preliminary injunctive relief. Defs.' Opp'n, Dkt. No. 16-50 at 4, 11.[4] As defendants correctly note, a heightened standard can also apply when the requested injunction (1) is "mandatory"; *i.e.*, it will alter the status quo by compelling some positive action; or (2) "will provide the movant

[4] Pagination corresponds to CM/ECF.

with substantially all of the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Page*, 478 F. Supp. 3d at 363. When either condition is met, the movant must make a "clear" or "substantial" showing of a likelihood of success on the merits, and must also make a "strong showing" of irreparable harm. *Id.*

Upon review, however, it is not clear why this heightened requirement should apply to plaintiffs' request for preliminary injunctive relief. "An injunction that enjoins a defendant from enforcing a regulation clearly prohibits, rather than compels, government action by enjoining the future enforcement." *Hund v. Cuomo*, 501 F. Supp. 3d 185, 207 (W.D.N.Y. 2020) (cleaned up). Nor have defendants articulated how this heightened standard has been triggered. *See generally* Defs.' Opp'n. Accordingly, the ordinary rules applicable to "prohibitory" injunctions will be applied. *See, e.g.*, *Hund*, 501 F. Supp. 3d at 207 (rejecting application of heightened standard where plaintiff sought to enjoin application of COVID-19 Executive Order).

IV. DISCUSSION[5]

Since its ratification in 1791, the First Amendment has protected religious practitioners from government action that "discriminates against some or all

[5] Although Eleventh Amendment immunity sometimes poses a bar to § 1983 relief against state officials, the doctrine of *Ex parte Young* permits an official-capacity claim for prospective injunctive relief to remedy an ongoing violation of federal constitutional law. *See, e.g.*, *Avitabile v. Beach*, 277 F. Supp. 3d 326, 332 (N.D.N.Y. 2017).

religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). And since Congress amended the statute in 1972, Title VII of the Civil Rights Act of 1964 has explicitly required most employers to reasonably accommodate an employee's religious beliefs absent evidence that doing so would pose an undue hardship. 42 U.S.C. § 2000e(j).

Plaintiffs contend that § 2.61 conflicts with these longstanding federal protections. In plaintiffs' view, § 2.61 "flagrantly disallows the religious protections required by federal employment law and specifically deletes its own prior offering of religious exemptions for covered health care workers." Pls.' Mem., Dkt. No. 5-1 at 13. As plaintiffs explain, § 2.61 "forbids each of their employers from even considering requests for religious exemptions notwithstanding the contrary requirements of Title VII." *Id.* at 10 (emphases omitted). According to plaintiffs, "the specific events leading to [§ 2.61's] final version show that it effectively targets religious opposition to the available COVID-19 vaccines." *Id.* at 12.

A. Likelihood of Success & Irreparable Harm[6]

Plaintiffs have asserted § 1983 claims under the Free Exercise Clause, Compl. ¶¶ 192–209, the Supremacy Clause, *id.* ¶¶ 210–19, and the Equal Protection Clause, *id.* ¶¶ 220–37. To warrant preliminary injunctive relief, plaintiffs must show a likelihood of success on the merits of at least one of these constitutional claims. *See, e.g.*, *L.V.M. v. Lloyd*, 318 F. Supp. 3d 601, 618 (S.D.N.Y. 2018).[7]

As an initial matter, however, the parties dispute whether a presumption of irreparable harm should attach to these claims. Plaintiffs argue the Supreme Court has recognized that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Pls.' Mem. at 19 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). Defendants respond that the Second Circuit has not "consistently presumed irreparable harm in cases involving allegations of the

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[6] Defendants' threshold invocation of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), *Zucht v. King*, 260 U.S. 174 (1922), and *Prince v. Massachusetts*, 321 U.S. 158 (1944) is misplaced. Defs.' Mem. at 12–13. The Second Circuit has previously relied on this line of precedent to reject a Free Exercise Clause challenge to vaccination requirements for schoolchildren. *Phillips v. City of N.Y.*, 775 F.3d 538 (2d Cir. 2015). And early in the COVID-19 pandemic a number of district courts, including this one, relied on *Jacobson* to reject constitutional challenges to various COVID-19 emergency restrictions. *See, e.g.*, *Page v. Cuomo*, 478 F. Supp. 3d 355 (N.D.N.Y. 2020). More recently, however, the Supreme Court and the Second Circuit have both cautioned that courts should not rely on *Jacobson* or its progeny to grant "special deference to the executive when the exercise of emergency powers infringes on constitutional rights." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020).

[7] Because plaintiffs are likely to succeed on the merits of their Free Exercise and Supremacy Clause claims, the Court declines to reach the merits of the Equal Protection Claim. *See* Defs.' Mem. at 18–19.

abridgement of First Amendment rights" unless the injury flows from "a rule or regulation that directly limits speech." Defs.' Opp'n at 25 (quoting *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003)).

To be sure, the existing precedent in this area of law is less than perfectly clear. The question seems to arise most frequently in free speech cases, but the Second Circuit has also applied the presumption in other constitutional contexts. *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013) (identifying dispute over applicability of the presumption).

In short, as the Second Circuit explained in *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996), the favorable presumption of irreparable harm arises only *after* a plaintiff has shown a likelihood of success on the merits of a constitutional claim. *Id*. at 482 (characterizing the presumption as one that "flows from a violation of constitutional rights").

"Thus, when a plaintiff seeks injunctive relief based on an alleged constitutional deprivation, 'the two prongs of the preliminary injunction threshold merge into one . . . in order to show irreparable injury, plaintiff must show a likelihood of success on the merits.'" *Page*, 478 F. Supp. 3d at 364 (quoting *Turley v. Guiliani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000)).

1. The Supremacy Clause & Title VII

The Supremacy Clause declares that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl 2. Although it "is not the source of any federal rights and certainly does not create a cause of action," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) (cleaned up), the Supreme Court has long recognized that, "if an individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted," *id.* at 326 (citing *Ex parte Young*, 209 U.S. 123, 155–56 (1908)).

Plaintiffs contend that § 2.61 runs afoul of the Supremacy Clause because it is preempted by Title VII, which prohibits discrimination in employment on the basis of "religion." 42 U.S.C. § 2000e-2(a)(1)–(2). Under Title VII, "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate [ ] an employee's . . . religious observance or practice without undue hardship on the . . . employer's business." § 2000e(j).

This protection for religious belief means that "[a]n employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual's religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that

observance or practice without undue hardship." *Equal Emp. Opportunity Comm'n v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 776 (2015) (Alito, J., concurring). Importantly, however, "Title VII does not demand mere neutrality with regard to religious practices . . . . [r]ather, it gives them favored treatment." *Id.* at 775 (majority opinion). Thus, under certain circumstances, Title VII "requires otherwise-neutral policies to give way to the need for an accommodation." *Id.*

Plaintiffs argue that § 2.61 conflicts[8] with Title VII's religious protections because it "conspicuously eliminates (and thereby forbids) any opportunity for covered employees to even attempt to secure a reasonable accommodation for their sincerely held religious objections to the currently available COVID-19 vaccines." Pl.'s Mem. at 7. Defendants respond that there is a distinction between a so-called "religious exemption" and a "reasonable accommodation." Defs.' Opp'n at 15 –16. According to defendants, "Title VII does not entitle employees to a religious exemption—it only requires employers to make reasonable accommodation so long as it can be provided by the employer without undue hardship." *Id.* at 16.

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[8] "In general, three types of preemption exist: (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *N.Y. SMS Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) (cleaned up).

Upon review, plaintiffs have established at this early stage of the litigation that they are likely to succeed on the merits of this constitutional claim. Of course, defendants are correct that there is a substantial difference between a blanket "religious exemption" from a vaccination requirement and the "reasonable accommodation" for religious beliefs imposed on employers by Title VII. But defendants' assertion that § 2.61 "does not implicate Title VII at all" and "does not require covered entities to deny reasonable accommodation requests" fails to grapple with how the broad scope of the Health Council's mandate has allegedly impacted plaintiffs.

The plain terms of § 2.61 do not make room for "covered entities" to consider requests for reasonable religious accommodations. Instead, § 2.61 obligates all covered entities to "continuously require personnel to be fully vaccinated against COVID-19." And "personnel" is defined broadly, sweeping in "all persons employed or affiliated with a covered entity, whether paid or unpaid . . . who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease."

Plaintiffs allege that some of their employers have revoked existing religious exemptions and/or religious accommodations by pointing to the State's adoption of § 2.61. *See, e.g.*, Compl. ¶¶ 39–40, 77. Plaintiffs also allege that some of their employers have refused to consider exemption or

accommodation requests because of § 2.61. *See, e.g.*, *id.* ¶ 49. Although Title VII certainly does not require an employer in all cases to "accommodate" an employee by necessarily granting them an "exemption," the statute does require employers to entertain requests for religious accommodations and to "reasonably" accommodate those requests absent a showing of undue hardship. According to plaintiffs, their employers have refused to engage in that process because of § 2.61.

Defendants also argue that § 2.61's elimination of the religious exemption language found in the August 18 Order brings it more in line with healthcare workplace immunization requirements for measles and rubella. Although fetal cell lines were used in the development of the rubella vaccine, there is no religious exemption in the State regulations that require workers to be immunized against this pathogen. Rausch-Phung Decl. ¶¶ 44, 47–48.

However, this argument conflates the merits of plaintiffs' present constitutional claims with a hypothetical Title VII anti-discrimination claim for a religious accommodation. What matters here is not whether a religious practitioner would win or lose a future Title VII lawsuit. What matters is that plaintiffs' current showing establishes that § 2.61 has effectively foreclosed the pathway to seeking a religious accommodation that is guaranteed under Title VII.

In any event, plaintiffs have not alleged a religious objection to other workplace vaccination requirements. Nor have defendants explained why the State's approach to immunization against measles and rubella necessarily justifies an identical approach to SARS-CoV-2.[9] In sum, plaintiffs have established that § 2.61 stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Accordingly, plaintiffs are likely to succeed on the merits of this claim.

2. <u>The First Amendment & The Free Exercise Clause</u>

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The "free exercise" component of this First Amendment guarantee has been incorporated against the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp. Div., Dep't of*

[9] The State's healthcare regulatory framework is not monolithic when it comes to workplace immunization requirements. Although it may not be an explicit "religious exemption," the relevant regulation for "influenza season" only requires covered entities to "ensure that all personnel not vaccinated against influenza for the current influenza season wear a surgical or procedure mask while in areas where patients or residents are typically present." N.Y. COMP. CODES R. & REGS. tit. 10, § 2.59(d) (2014). It may be true that a hypothetical healthcare worker who sought a Title VII religious accommodation from immunization against rubella would be rebuffed by their employer on the basis of "undue hardship." But the same hypothetical worker who objected on religious grounds to vaccination against influenza—a respiratory disease broadly similar to COVID-19—could be "reasonably accommodated" with a surgical mask.

Hum. Res. of Or. v. Smith, 494 U.S. 872, 877 (1990). Accordingly, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714.

To that end, the Free Exercise Clause "protect[s] religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254 (2020) (citation omitted). However, the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 763 F.3d at 877 (citation omitted).

A neutral and generally applicable law is subject to rational basis review. *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020). Under that standard, the law "is presumed to be valid and will be sustained if the [burden imposed] by the statute is rationally related to a legitimate state interest." *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 186 n.2 (2d Cir. 2014) (citation omitted). "A law burdening religious conduct that is *not* both neutral and generally applicable, however, is subject to strict scrutiny." *Id.* at 193. Under that standard, the government must establish that the law is "justified by a compelling interest" and "narrowly tailored to advance that

interest." *Id*. at 186 n.2 (citation omitted). "Neutrality and general applicability are interrelated, and . . . failure to satisfy one requirement is a likely indication that the other has not been satisfied." *City of Hialeah*, 508 U.S. at 531.

A law is not neutral if it is "specifically directed at [a] religious practice." *Cent. Rabbinical Cong.*, 763 F.3d at 193 (citation omitted). To determine whether a law is neutral, the court begins with the text, "for the minimum requirement of neutrality is that a law not discriminate on its face." *City of Hialeah*, 508 U.S. at 533. A law discriminates on its face "if it refers to a religious practice without a secular meaning discernable from the language or context." *Id*. Importantly, though, even a facially neutral law may trigger heightened scrutiny if it "targets religious conduct for distinctive treatment." *Id*. at 534. Likewise, "[t]he general applicability requirement prohibits the government from 'in a selective manner impos[ing] burdens only on conduct motivated by religious belief." *Cent. Rabbinical Cong.*, 763 F.3d at 196 (citation omitted). Although "[a]ll laws are selective to some extent, . . . categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Id*. at 197 (citation omitted).

Plaintiffs contend that § 2.61 "effectively targets religious opposition to the available COVID-19 vaccines." Pls.' Mem. at 12. In plaintiffs' view, the

vaccination requirement "flagrantly disallows the religious protections required by federal employment law and specifically deletes its own prior offering of religious exemptions for covered health care workers." *Id*. at 13. Defendants respond that § 2.61 is facially neutral because it "contains no reference to religion" and "applies to every employee of the covered entities." Defs.' Opp'n at 17. According to defendants, the "object" of the vaccination requirement "is to protect public health and safety by reducing the incidence of COVID-19." *Id*. at 18.

Upon review, plaintiffs have established at this early stage of the litigation that § 2.61 is not a neutral law. As the Supreme Court has explained, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history" are all relevant circumstantial evidence in detecting a lack of neutrality. *City of Hialeah*, 508 U.S. at 540.

Zucker's August 18 Order, which was imposed on a summary basis, included medical *and* religious exemptions to COVID-19 vaccination. The Health Council's adoption of § 2.61, which was imposed on a similar summary basis just eight days later, amended the vaccination mandate to eliminate the religious exemption. This intentional change in language is the kind of "religious gerrymander" that triggers heightened scrutiny.

Plaintiffs have also established at this early stage of the litigation that § 2.61 is not generally applicable. A law is "not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." *Cent. Rabbinical Cong.*, 763 F.3d at 197; *see also Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) ("A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.").

Section 2.61's regulatory impact statement claims that "[u]nvaccinated personnel in [healthcare] settings have an unacceptably high risk of both acquiring COVID-19 and transmitting the virus to colleagues and/or vulnerable patients or residents, exacerbating staffing shortages, and causing unacceptably high risk of complications." Ex. A to Compl. at 78.

But as plaintiffs point out, the medical exemption that remains in the current iteration of the State's vaccine mandate expressly accepts this "unacceptable" risk for a non-zero segment of healthcare workers. Pls.' Mem. at 13. Although defendants claim that they expect the number of people in need of a medical exemption to be low, Rausch-Phung Decl. ¶¶ 65–66, the

Supreme Court has recently emphasized that "[c]omparability is concerned with the risks various activities pose," not the reasons for which they are undertaken. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Thus, absent further factual development the Court cannot conclude that § 2.61 satisfies the requirement of "general applicability."

Finally, plaintiffs have established at this early stage of the litigation that § 2.61 is likely to fail strict scrutiny. To satisfy strict scrutiny, defendants must show that the challenged law advances "interests of the highest order" and is "narrowly tailored" to achieve those interests. *Fulton v. City of Phila., Pa.*, 141 S. Ct. 1868, 1881 (2021) (quoting *City of Hialeah*, 508 U.S. at 546). "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Id.*

Defendants have satisfied the first component of this analysis. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("Stemming the spread of COVID-19 is unquestionably a compelling interest."). However, they have failed to establish that § 2.61—and in particular, its intentional omission of a religious exemption—is narrowly tailored to address that public health concern.

"Narrow tailoring requires the government to demonstrate that a policy is the 'least restrictive means' of achieving its objective." *Agudath Israel of Am.*, 983 F.3d at 633 (quoting *Thomas*, 450 U.S. at 718). The asserted justification

"must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). "And the government must show that it 'seriously undertook to address the problem with less intrusive tools readily available to it.'" *Agudath Israel of Am.*, 983 F.3d at 633 (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)).

Defendants have not made this showing. According to the "alternative approaches" component of § 2.61's regulatory impact statement, the Health Council considered two alternatives: (1) daily testing before each shift; and (2) wearing appropriately fitted N95 face masks at all times. Ex. A to Compl. at 81; *see also* Defs.' Opp'n at 21.

However, there is no adequate explanation from defendants about why the "reasonable accommodation" that must be extended to a medically exempt healthcare worker under § 2.61 could not similarly be extended to a healthcare worker with a sincere religious objection. *Fulton*, 141 S. Ct. at 1881 (cautioning courts to "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants").

Nor have defendants explained why they chose to depart from similar healthcare vaccination mandates issued in other jurisdictions that include the kind of religious exemption that was originally present in the August 18 Order. Pl.'s Mem. at 17 (citing Illinois and California COVID-19 regulations that include religious exemption language); *see also Roman Catholic Diocese*

of Brooklyn, 141 S. Ct. at 67 (finding tailoring requirement unsatisfied where, *inter alia*, the challenged restriction was "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic"); *Mast v. Fillmore Cty., Minn.*, 141 S. Ct. 2430, 2433 (2021) (Gorsuch, J., concurring) ("It is the government's burden to show this alternative won't work; not the [challenger's] to show it will.").

In sum, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures imposing lesser burdens on religious liberty would fail to achieve the government's interests, not simply that the chosen route was easier." *Agudath Israel of Am.*, 983 F.3d at 633 (cleaned up). Defendants have not done so. Accordingly, plaintiffs are likely to succeed on the merits of this constitutional claim.

B. <u>The Balance of Hardships & The Public Interest</u>

Plaintiffs have also satisfied the remaining elements necessary to warrant preliminary injunctive relief. Where, as here, a governmental defendant is the party opposing relief, "balancing of the equities merges into [the court's] consideration of the public interest." *SAM Party of N.Y. v. Kosinski*, 987 F.3d 267, 278 (2d Cir. 2021).

<u>First</u>, the public interest lies with enforcing the guarantees enshrined in the Constitution and federal anti-discrimination law. *See, e.g.*, *Paykina ex rel. E.L. v. Lewin*, 387 F. Supp. 3d 225, 245 (N.D.N.Y. 2019) ("The public

interest generally supports granting a preliminary injunction where . . . a plaintiff has established a clear likelihood of success on the merits and made a showing of irreparable harm.").

Second, the balance of hardships clearly favors plaintiffs. Defendants argue that a preliminary injunction will hinder its "ongoing efforts to curb the spread" of SARS-CoV-2. Defs.' Opp'n at 26. According to defendants, the spread of SARS-CoV-2 among health care workers "imposes staffing burdens on already strained hospital and healthcare operations due to quarantining requirements and potential length of illness when healthcare workers become infected." *Id.* at 26–27.

However, defendants acknowledge that § 2.61 still includes a medical exemption that requires covered entities to make a "reasonable accommodation." As plaintiffs point out, defendants have not shown that granting the same benefit to religious practitioners that was originally included in the August 18 Order "would impose any more harm—especially when Plaintiffs have been on the front lines of stopping COVID for the past 18 months while donning PPE and exercising other proper protocols in effectively slowing the spread of the disease." Pls.' Mem. at 20.

V. CONCLUSION[10]

The question presented by this case is not whether plaintiffs and other individuals are entitled to a religious exemption from the State's workplace vaccination requirement. Instead, the question is whether the State's summary imposition of § 2.61 conflicts with plaintiffs' and other individuals' federally protected right to seek a religious accommodation from their individual employers.

The answer to this question is clearly yes. Plaintiffs have established that § 2.61 conflicts with longstanding federal protections for religious beliefs and that they and others will suffer irreparable harm in the absence of injunctive relief. *Tandon*, 141 S. Ct. at 1297 (finding irreparable harm from loss of free exercise rights for even minimal periods of time). Plaintiffs have also satisfied the remaining elements necessary to obtain preliminary relief.

To reiterate, these conclusions have nothing to do with how an individual employer should handle an individual employee's religious objection to a workplace vaccination requirement. But they have everything to do with the proper division of federal and state power. *Cf. Arizona v. United States*, 567 U.S. 387, 398 (2012) ("Federalism, central to the constitutional design, adopts

[10] The bond requirement is waived. *See* FED. R. CIV. P. 65(c).

the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.").

In granting a preliminary injunction, the Court recognizes that it may not have the final word. Under 28 U.S.C. § 1292(a)(1), "Congress permits, as an exception to the general rule, an immediate appeal from an interlocutory order that either grants or denies a preliminary injunction." *N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989). Because the issues in dispute are of exceptional importance to the health and the religious freedoms of our citizens, an appeal may very well be appropriate.

Therefore, it is

ORDERED that

1. Plaintiffs' motion to proceed pseudonymously is GRANTED[11];

2. Plaintiffs' motion for a preliminary injunction is GRANTED;

3. Defendants, their officers, agents, employees, attorneys and successors in office, and all other persons in active concert or participation with them, are preliminarily ENJOINED from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with § 2.61 such that:

[11] Plaintiffs requested leave to proceed pseudonymously. Compl. ¶¶ 26–34. Defendants do not oppose. Defs.' Opp'n at 3 n.2.

(a) Section 2.61 is suspended in operation to the extent that the Department of Health is barred from enforcing any requirement that employers deny religious exemptions from COVID-19 vaccination or that they revoke any exemptions employers already granted before § 2.61 issued;

(b) The Department of Health is barred from interfering in any way with the granting of religious exemptions from COVID-19 vaccination going forward, or with the operation of exemptions already granted; and

(c) The Department of Health is barred from taking any action, disciplinary or otherwise, against the licensure, certification, residency, admitting privileges or other professional status or qualification of any of the plaintiffs on account of their seeking or having obtained a religious exemption from mandatory COVID-19 vaccination.

IT IS SO ORDERED.

Dated: October 12, 2021
Utica, New York.

David N. Hurd
U.S. District Judge

EXHIBIT 5

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

- -

Dr. A, Nurse A., Dr. C., Nurse D., Dr. F., Dr. G., Therapist I., Dr. J., Nurse J., Dr. M., Nurse N., Dr. O., Dr. P., Technologist P., Dr. S., Nurse S., and Physician Liaison X.,

Plaintiffs,

-v- 1:21-CV-1009

KATHY HOCHUL, Governor of the State of New York, in her official capacity, DR. HOWARD A. ZUCKER, Commissioner of the New York State Department of Health, in his official capacity, and LETITIA JAMES, Attorney General of the State of New York, in her official capacity,

Defendants.

- -

DAVID N. HURD
United States District Judge

ORDER VACATING PRELIMINARY INJUNCTION

On August 26, 2021, the New York State Department of Health adopted an emergency regulation that required most healthcare workers to be vaccinated against COVID-19 within thirty days. N.Y. COMP. CODES

R. & REGS. tit. 10, § 2.61(c) (2021). As relevant here, § 2.61 eliminated a religious exemption included in the first iteration of the mandate.

On September 13, 2021, seventeen healthcare workers employed in New York State ("plaintiffs"), all of whom object to the existing COVID-19 vaccines on religious grounds, filed this official-capacity 42 U.S.C. § 1983 action against New York State Governor Kathy Hochul ("Hochul"), New York State Health Commissioner Howard A. Zucker ("Zucker"), and New York State Attorney General Letitia James ("James").

Plaintiffs' three-count verified complaint alleges that § 2.61 violates their constitutional rights because it effectively forbids employers from considering workplace religious accommodations under processes guaranteed by federal law. Plaintiffs sought to enjoin defendants from, *inter alia*, enforcing § 2.61 "to the extent it categorically requires health care employers to deny or revoke religious exemptions from COVID-19 vaccination mandates."

On September 14, 2021, the Court issued a temporary order restraining defendants from enforcing § 2.61 to the extent it categorically required health care employers to deny or revoke a religious exemption from COVID-19 vaccination. *Dr. A. v. Hochul*, 2021 WL 4189533 (N.D.N.Y) (emphasis added). After additional briefing, the temporary restraining order was

converted to a preliminary injunction on October 12, 2021.[1] *Dr. A. v. Hochul*, --F. Supp. 3d--, 2021 WL 4734404 (N.D.N.Y.). Defendants appealed.

On November 1, 2021, a panel of the U.S. Court of Appeals for the Second Circuit ordered the preliminary injunction vacated. Dkt. No. 26. As relevant here, the panel opinion concluded that plaintiffs had failed to establish § 2.61 was not a neutral law of general applicability and therefore subjected it to only rational basis review. Dkt. No. 27 at 35.

Relying on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Phillips v. City of N.Y.*, 775 F.3d 538 (2d Cir. 2015) (per curiam), the panel held that § 2.61 "was a reasonable exercise of the State's power to enact rules to protect the public health." Dkt. No. 27 at 35.

The panel opinion went on to conclude that plaintiffs had also failed to establish that § 2.61 conflicts with Title VII or federal law because it "does not prevent employees from seeking a religious accommodation allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." Dkt. No. 27 at 38 (emphasis added). Therefore, plaintiffs no longer need the preliminary injunction.

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[1] The complaint alleged that some of plaintiffs' employers had revoked existing accommodations, and that other employers had refused to consider new requests for accommodation, on the basis of the State's adoption of § 2.61. Those factual assertions stood uncontested in the preliminary injunction record because plaintiffs' complaint was verified. However, in light of the Second Circuit's opinion, these arbitrary denials can no longer happen.

A certified copy of the Second Circuit's order issued on November 4, 2021. Dkt. No. 27.

Therefore, it is

ORDERED that

The preliminary injunction entered in favor of plaintiffs on October 12, 2021 is VACATED.

IT IS SO ORDERED.

United States District Judge

Dated: November 5, 2021
Utica, New York.

EXHIBIT 6

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I
Current through PL 117-52.

End of Document

EXHIBIT 7

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights (Refs & Annos)
Subchapter VI. Equal Employment Opportunities (Refs & Annos)

42 U.S.C.A. § 2000e-7

§ 2000e-7. Effect on State laws

Currentness

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

CREDIT(S)

(Pub.L. 88-352, Title VII, § 708, July 2, 1964, 78 Stat. 262.)

Notes of Decisions (51)

O'CONNOR'S ANNOTATIONS

California Fed. S&L Ass'n v. Guerra, 479 U.S. 272, 290 n.29 (1987). "We conclude that 'permit' in [Title VII] §708 [now 42 U.S.C. §2000e-7] must be interpreted to pre-empt only those state laws that expressly *sanction* a practice unlawful under Title VII; the term does not pre-empt state laws that are silent on the practice."

42 U.S.C.A. § 2000e-7, 42 USCA § 2000e-7
Current through PL 117-52.

End of Document

EXHIBIT 8

STATE OF NEW YORK : DEPARTMENT OF HEALTH

IN THE MATTER

OF

COVERED ENTITIES IN THE PREVENTION AND CONTROL OF THE 2019 NOVEL CORONAVIRUS

ORDER FOR SUMMARY ACTION

WHEREAS the 2019 Novel Coronavirus ("COVID-19") is an infection associated with fever and signs and symptoms of pneumonia and other respiratory illness that is easily transmitted from person to person, predominantly through droplet transmission, and has significant public health consequences; and

WHEREAS COVID-19 is a global pandemic that, to date, has resulted in 2,195,903 documented cases and 43,277 deaths in New York State alone; and

WHEREAS the Centers for Disease Control and Prevention (CDC) has identified a concerning national trend of increasing circulation of the Delta COVID-19 variant; and

WHEREAS the U.S. Food and Drug Administration (FDA) granted Emergency Use Authorizations (EUA) for Pfizer -BioNTech, Moderna, and Janssen COVID-19 vaccines which have been shown to be safe and effective as determined by data from the manufacturers and findings from large clinical trials; and

WHEREAS while New York State has aggressively promoted vaccination since COVID-19 vaccines first became available in December 2020, current vaccination rates are not high enough to prevent the spread of the Delta variant, which is approximately twice as transmissible as the original SARS-CoV-2 strain; and

WHEREAS data show that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 as are vaccinated individuals; and

WHEREAS those who are unvaccinated have over 10 times the risk of being seriously ill and hospitalized with COVID-19; and

WHEREAS since early July, cases have risen 10-fold, and 95 percent of sequenced recent positives in New York State were the Delta variant; and

WHEREAS certain settings, such as healthcare facilities, pose increased challenges and urgency for controlling the spread of this disease because of the vulnerable patient and resident populations that they serve; and

WHEREAS unvaccinated personnel in such settings have an unacceptably high risk of both acquiring COVID-19 and transmitting such virus to colleagues and/or vulnerable patients or residents; and

WHEREAS based upon the foregoing, the Commissioner of Health of the State of New York is of the Opinion that all entities identified in this Order ("covered entities"), must immediately implement and comply with the requirements identified herein, and that failure to do so constitutes a danger to the health, safety, and welfare of the people of the State of New York; and

WHEREAS the Commissioner of Health of the State of New York has determined that requiring covered entities to immediately implement and comply with the requirements set forth herein and cannot be achieved through alternative means, including the adoption of the Public Health and Health Planning Council of emergency regulations, without delay, which would be prejudicial to health, safety, and welfare of the people of the State of New York; and

WHEREAS it therefore appears to be prejudicial to the interest of the people to delay action for fifteen (15) days until an opportunity for a hearing can be provided in accordance with the provisions of Public Health Law Section (PHL) 12-a.

NOW, THEREFORE, THE HEALTH COMMISSIONER HEREBY ORDERS THAT: Pursuant to PHL § 16:

(a) Definitions.

(1) Covered entity shall mean a general hospital or nursing home pursuant to section 2801 of the Public Health Law.

(2) Covered Personnel. All persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if

they were infected with COVID-19, they could potentially expose, patients, residents, or personnel working for such entity to the disease.

(3) Fully vaccinated. Covered personnel are considered fully vaccinated for COVID-19 ≥ 2 weeks after receiving either (1) the second dose in a 2-dose series (e.g., Pfizer-BioNTech or Moderna), or (2) a single-dose vaccine (e.g., Johnson & Johnson [J&J]/Janssen), authorized for emergency use or approved by the U.S. Food and Drug Administration, and holds an emergency use listing by the World Health Organization.

(4) Documentation of vaccination shall include:

(i) a record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;

(ii) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or

(iii) any other documentation determined acceptable by the Department. Unless otherwise specified by the Department.

(iv) The following elements, unless otherwise specified by the Department: manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site.

(b) Covered entities shall continuously require all covered personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021. Documentation of such vaccination shall be made in personnel records or other appropriate records in accordance with applicable privacy laws, except as set forth in section (c) of this order.

(c) Limited exemptions to vaccination:

1. Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to a specific member of a covered entity's personnel, based upon a specific pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be subject to a reasonable accommodation of such health condition only until such immunization is found no longer to be detrimental to the health of such member. The nature and duration of the medical exemption must be stated in the personnel employment medical record and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services). Covered entities shall document medical exemptions and any reasonable accommodation in personnel records or other appropriate records in accordance with applicable privacy laws by September 27, 2021, and continuously, as needed, thereafter.
2. Religious exemption. Covered entities shall grant a religious exemption for COVID-19 vaccination for covered personnel if they hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the

employer. Covered entities shall document such exemptions and such reasonable accommodations in personnel records or other appropriate records in accordance with applicable privacy laws by September 27, 2021, and continuously, as needed, thereafter.

(d) Upon the request of the Department, covered entities must report the number and percentage of covered personnel that have been vaccinated against COVID-19 and the number of personnel for which medical or religious exemptions have been granted by covered entities in a manner and format determined by the Department.

(e) Covered entities shall develop and implement a policy and procedure to ensure compliance with the provisions of Order.

(f) The Department may require all covered personnel, whether vaccinated or unvaccinated, to wear acceptable face coverings for the setting in which they work. Covered entities shall supply acceptable face coverings required by this section at no cost to covered personnel.

FURTHER, I DO HEREBY give notice that any entity that receives notice of and is subject to this Order is provided with an opportunity to be heard at 10:00 a.m. on September 2, 2021, via videoconference, to present any proof that failure to implement and comply with the requirements of this Order does not constitute a danger to the health of the people of the State of New York. If any such entity desires to participate in such a hearing, please inform the Department by written notification to **Vaccine.Order.Hearing@health.ny.gov**, New York State Department of Health, Corning Tower, Room 2438, Governor Nelson A. Rockefeller Empire

State Plaza, Albany, New York 12237, within five (5) days of their receipts of this Order. Please include in the notification the email addresses of all individuals who will be representing or testifying for the entity at the hearing so that an invitation to access the hearing remotely can be provided.

DATED: Albany, New York
August 18, 2021

NEW YORK STATE DEPARTMENT OF HEALTH

Howard Zucker M.D.

BY: _____
HOWARD A. ZUCKER, M.D., J.D.
Commissioner of Health

EXHIBIT 9

Prevention of COVID-19 Transmission by Covered Entities

Effective date: 8/26/21

Pursuant to the authority vested in the Public Health and Health Planning Council and the Commissioner of Health by Public Health Law Sections 225, 2800, 2803, 3612, and 4010, as well as Social Services Law Sections 461 and 461-e, Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended, to be effective upon filing with the Department of State, to read as follows:

Part 2 is amended to add a new section 2.61, as follows:

2.61. Prevention of COVID-19 transmission by covered entities.

(a) Definitions.

(1) "Covered entities" for the purposes of this section, shall include:

(i) any facility or institution included in the definition of "hospital" in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers;

(ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies;

(iii) hospices as defined in section 4002 of the Public Health Law; and

(iv) adult care facility under the Department's regulatory authority, as set forth in Article 7 of the Social Services Law.

(2) "Personnel," for the purposes of this section, shall mean all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.

(3) "Fully vaccinated," for the purposes of this section, shall be determined by the Department in accordance with applicable federal guidelines and recommendations. Unless otherwise specified by the Department, documentation of vaccination must include the manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site, in one of the following formats:

(i) record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;

(ii) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or

(iii) any other documentation determined acceptable by the Department.

(c) Covered entities shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed below. Documentation of such vaccination shall be made in personnel records or other appropriate records in accordance with applicable privacy laws, except as set forth in subdivision (d) of this section.

(d) Exemptions. Personnel shall be exempt from the COVID-19 vaccination requirements set forth in subdivision (c) of this section as follows:

(1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (i) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur

continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

(e) Upon the request of the Department, covered entities must report and submit documentation, in a manner and format determined by the Department, for the following:

(1) the number and percentage of personnel that have been vaccinated against COVID-19;

(2) the number and percentage of personnel for which medical exemptions have been granted;

(3) the total number of covered personnel.

(f) Covered entities shall develop and implement a policy and procedure to ensure compliance with the provisions of this section and submit such documents to the Department upon request.

(g) The Department may require all personnel, whether vaccinated or unvaccinated, to wear an appropriate face covering for the setting in which such personnel are working in a covered entity. Covered entities shall supply face coverings required by this section at no cost to personnel.

Subparagraph (vi) of paragraph (10) of subdivision (b) of Section 405.3 of Part 405 is added to read as follows:

(vi) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of this Title, in accordance with applicable privacy laws, and making

such documentation immediately available upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (5) of subdivision (a) of Section 415.19 of Part 415 is added to read as follows:

(5) collects documentation of COVID-19 or documentation of a valid medical exemption to such vaccination, for all personnel pursuant to section 2.61 of this title, in accordance with applicable privacy laws, and making such documentation immediately available upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (7) of subdivision (d) of Section 751.6 is added to read as follows:

(7) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of this Title, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (6) of subdivision (c) of Section 763.13 is added to read as follows:

(6) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of this Title, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (7) of subdivision (d) of Section 766.11 is added to read as follows:

(7) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of this Title, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (8) of subdivision (d) of Section 794.3 is added to read as follows:

(8) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of this Title, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (v) of subdivision (q) of Section 1001.11 is added to read as follows:

(v) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of this Title, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (18) of subdivision (a) of Section 487.9 of Title 18 is added to read as follows:

(18) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of Title 10, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (14) of subdivision (a) of Section 488.9 of Title 18 is added to read as follows:

(14) documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of Title 10, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

Paragraph (15) of subdivision (a) of Section 490.9 of Title 18 is added to read as follows:

(15) Operator shall collect documentation of COVID-19 vaccination or a valid medical exemption to such vaccination, pursuant to section 2.61 of Title 10, in accordance with applicable privacy laws, and making such documentation available immediately upon request by the Department, as well as any reasonable accommodation addressing such exemption.

REGULATORY IMPACT STATEMENT

Statutory Authority:

The authority for the promulgation of these regulations is contained in Public Health Law (PHL) Sections 225(5), 2800, 2803(2), 3612 and 4010 (4). PHL 225(5) authorizes the Public Health and Health Planning Council (PHHPC) to issue regulations in the State Sanitary Code pertaining to any matters affecting the security of life or health or the preservation and improvement of public health in the state of New York, including designation and control of communicable diseases and ensuring infection control at healthcare facilities and any other premises.

PHL Article 28 (Hospitals), Section 2800 specifies that "hospital and related services including health-related service of the highest quality, efficiently provided and properly utilized at a reasonable cost, are of vital concern to the public health. In order to provide for the protection and promotion of the health of the inhabitants of the state, pursuant to section three of article seventeen of the constitution, the department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services, and all public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facilities for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition or for the rendering of health-related service shall be subject to the provisions of this article."

PHL Section 2803(2) authorizes PHHPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, to implement the purposes and provisions of PHL Article 28, and to establish minimum standards governing the operation of health care facilities.

PHL Section 3612 authorizes PHHPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies. PHL Section 4010 (4) authorizes PHHPC to adopt and amend rules and regulations, subject to the approval of the Commissioner, with respect to hospice organizations.

Social Service Law (SSL) Section 461 requires the Department to promulgate regulations establishing general standards applicable to Adult Care Facilities (ACF). SSL Section 461-e authorizes the Department to promulgate regulations to require adult care facilities to maintain certain records with respect to the facilities residents and the operation of the facility.

Legislative Objectives:

The legislative objective of PHL Section 225 empowers PHHPC to address any issue affecting the security of life or health or the preservation and improvement of public health in the state of New York, including designation and control of communicable diseases and ensuring infection control at healthcare facilities and any other premises. PHL Article 28 specifically addresses the protection of the health of the residents of the State by assuring the efficient provision and proper utilization of health services of the highest quality at a reasonable cost. PHL Article 36 addresses the services rendered by certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies. PHL Article 40 declares that hospice is a socially and financially beneficial alternative to conventional

curative care for the terminally ill. Lastly, the legislative objective of SSL Section 461 is to promote the health and well-being of residents of ACFs.

Needs and Benefits:

The Centers for Disease Control and Prevention (CDC) has identified a concerning national trend of increasing circulation of the SARS-CoV-2 Delta variant. Since early July, cases have risen 10-fold, and 95 percent of the sequenced recent positives in New York State were the Delta variant. Recent New York State data show that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals. Those who are unvaccinated have over 11 times the risk of being hospitalized with COVID-19.

The COVID-19 vaccines are safe and effective. They offer the benefit of helping to reduce the number of COVID-19 infections, including the Delta variant, which is a critical component to protecting public health. Certain settings, such as healthcare facilities and congregate care settings, pose increased challenges and urgency for controlling the spread of this disease because of the vulnerable patient and resident populations that they serve. Unvaccinated personnel in such settings have an unacceptably high risk of both acquiring COVID-19 and transmitting the virus to colleagues and/or vulnerable patients or residents, exacerbating staffing shortages, and causing unacceptably high risk of complications.

In response to this significant public health threat, through this emergency regulation, the Department is requiring covered entities to ensure their personnel are fully vaccinated against COVID-19, and to document evidence thereof in appropriate records. Covered entities are also required to review and make determinations on medical exemption requests, and provide

reasonable accommodations therefor to protect the wellbeing of the patients, residents and personnel in such facilities. Documentation and information regarding personnel vaccinations as well as exemption requests granted are required to be provided to the Department immediately upon request.

Costs for the Implementation of and Continuing Compliance with these Regulations to the Regulated Entity:

Covered entities must ensure that personnel are fully vaccinated against COVID-19 and document such vaccination in personnel or other appropriate records. Covered entities must also review and make determinations on requests for medical exemptions, which must also be documented in personnel or other appropriate records, as well as any reasonable accommodations. This is a modest investment to protect the health and safety of patients, residents, and personnel, especially when compared to both the direct medical costs and indirect costs of personnel absenteeism.

Cost to State and Local Government:

The State operates several healthcare facilities subject to this regulation. Most county health departments are licensed under Article 28 or Article 36 of the PHL and are therefore also subject to regulation. Similarly, certain counties and the City of New York operate facilities licensed under Article 28. These State and local public facilities would be required to ensure that personnel are fully vaccinated against COVID-19 and document such vaccination in personnel or other appropriate records. They must also review and make determinations on requests for

medical exemptions, which must also be documented in personnel or other appropriate records, along with any reasonable accommodations.

Although the costs to the State or local governments cannot be determined with precision, the Department does not expect these costs to be significant. State facilities should already be ensuring COVID-19 vaccination among their personnel, subject to State directives. Further, these entities are expected to realize savings as a result of the reduction in COVID-19 in personnel and the attendant loss of productivity and available staff.

Cost to the Department of Health:

There are no additional costs to the State or local government, except as noted above. Existing staff will be utilized to conduct surveillance of regulated parties and to monitor compliance with these provisions.

Local Government Mandates:

Covered entities operated by local governments will be subject to the same requirements as any other covered entity subject to this regulation.

Paperwork:

This measure will require covered entities to ensure that personnel are fully vaccinated against COVID-19 and document such vaccination in personnel or other appropriate records. Covered entities must also review and make determinations on requests for medical exemptions, which must also be documented in personnel or other appropriate records along with any reasonable accommodations.

Upon the request of the Department, covered entities must report the number and percentage of total covered personnel, as well as the number and percentage that have been vaccinated against COVID-19 and those who have been granted a medical exemption, along with any reasonable accommodations. Facilities and agencies must develop and implement a policy and procedure to ensure compliance with the provisions of this section, making such documents available to the Department upon request.

Duplication:

This regulation will not conflict with any state or federal rules.

Alternative Approaches:

One alternative would be to require covered entities to test all personnel in their facility before each shift worked. This approach is limited in its effect because testing only provides a person's status at the time of the test and testing every person in a healthcare facility every day is impractical and would place an unreasonable resource and financial burden on covered entities if PCR tests couldn't be rapidly turned around before the commencement of the shift. Antigen tests have not proven as reliable for asymptomatic diagnosis to date.

Another alternative to requiring covered entities to mandate vaccination would be to require covered entities to mandate all personnel to wear a fit-tested N95 face covering at all times when in the facility, in order to prevent transmission of the virus. However, acceptable face coverings, which are not fit-tested N95 face coverings have been a long-standing requirement in these covered entities, and, while helpful to reduce transmission it does not prevent transmission

and; therefore, masking in addition to vaccination will help reduce the numbers of infections in these settings even further.

Federal Requirements:

There are no minimum standards established by the federal government for the same or similar subject areas.

Compliance Schedule:

These emergency regulations will become effective upon filing with the Department of State and will expire, unless renewed, 90 days from the date of filing. As the COVID-19 pandemic is consistently and rapidly changing, it is not possible to determine the expected duration of need at this point in time. The Department will continuously evaluate the expected duration of these emergency regulations throughout the aforementioned 90-day effective period in making determinations on the need for continuing this regulation on an emergency basis or issuing a notice of proposed rule making for permanent adoption. This notice does not constitute a notice of proposed or revised rule making for permanent adoption.

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REGULATORY FLEXIBILITY ANALYSIS

Effect on Small Business and Local Government:

This regulation will not impact local governments or small businesses unless they operate a covered entity as defined in the emergency regulation. Currently, 5 general hospitals, 79 nursing homes, 75 certified home health agencies (CHHAs), 20 hospices and 1,055 licensed home care service agencies (LHCSAs), and 483 adult care facilities (ACFs) are small businesses (defined as 100 employees or less), independently owned and operated affected by this rule. Local governments operate 19 hospitals, 137 diagnostic and treatment facilities, 21 nursing homes, 12 CHHAs, at least 48 LHCSAs, 1 hospice, and 2 ACFs.

Compliance Requirements:

Covered entities are required to ensure their personnel are fully vaccinated against COVID-19, and to document evidence thereof in appropriate records. Covered entities are also required to review and make determinations on medical exemption requests, along with any reasonable accommodations.

Upon the request of the Department, covered entities must report the number and percentage of total covered personnel, as well as the number and percentage that have been vaccinated against COVID-19 and those who have been granted a medical exemption, along with any reasonable accommodations. Facilities and agencies must develop and implement a policy and procedure to ensure compliance with the provisions of this section, making such documents available to the Department upon request.

Professional Services:

There are no additional professional services required as a result of this regulation.

Compliance Costs:

Covered entities must ensure that personnel are fully vaccinated against COVID-19 and document such vaccination in personnel or other appropriate records. Covered entities must also review and make determinations on requests for medical exemptions, which must also be documented in personnel or other appropriate records, along with any reasonable accommodations. This is a modest investment to protect the health and safety of patients, residents, and personnel, especially when compared to both the direct medical costs and indirect costs of personnel absenteeism.

Economic and Technological Feasibility:

There are no economic or technological impediments to the rule changes.

Minimizing Adverse Impact:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19 within the Department since March of 2020. Further, the Department currently has an emergency regulation in place, which requires nursing homes and adult care facilities to offer COVID-19 vaccination to personnel and residents, which has helped to facilitated vaccination of personnel. Further, it is the Department's understanding that many facilities across the State have begun to impose mandatory vaccination policies. Lastly, on August 18, 2021, President Biden announced that as a condition of participating in the Medicare and Medicaid programs, the United States Department of Health and Human Services will be developing regulations requiring nursing homes to mandate COVID-19 vaccination for workers.

Small Business and Local Government Participation:

Due to the emergent nature of COVID-19, small businesses and local governments were not consulted. If these regulations are proposed for permanent adoption, all parties will have an opportunity to provide comments during the notice and comment period.

RURAL AREA FLEXIBILITY ANALYSIS

Type and Estimated Numbers of Rural Areas:

While this rule applies uniformly throughout the state, including rural areas, for the purposes of this Rural Area Flexibility Analysis (RAFA), "rural area" means areas of the state defined by Exec. Law § 481(7) (SAPA § 102(10)). Per Exec. Law § 481(7), rural areas are defined as "counties within the state having less than two hundred thousand population, and the municipalities, individuals, institutions, communities, and programs and such other entities or resources found therein. In counties of two hundred thousand or greater population 'rural areas' means towns with population densities of one hundred fifty persons or less per square mile, and the villages, individuals, institutions, communities, programs and such other entities or resources as are found therein."

The following 42 counties have an estimated population of less than 200,000 based upon 2019 United States Census projections:

Allegany County	Greene County	Schoharie County
Broome County	Hamilton County	Schuyler County
Cattaraugus County	Herkimer County	Seneca County
Cayuga County	Jefferson County	St. Lawrence County
Chautauqua County	Lewis County	Steuben County
Chemung County	Livingston County	Sullivan County
Chenango County	Madison County	Tioga County
Clinton County	Montgomery County	Tompkins County
Columbia County	Ontario County	Ulster County
Cortland County	Orleans County	Warren County
Delaware County		

Essex County	Oswego County	Washington County
Franklin County	Otsego County	Wayne County
Fulton County	Putnam County	Wyoming County
Genesee County	Rensselaer County	Yates County
	Schenectady County	

The following counties of have population of 200,000 or greater, and towns with population densities of 150 person or fewer per square mile, based upon 2019 United States Census population projections:

Albany County	Niagara County	Saratoga County
Dutchess County	Oneida County	Suffolk County
Erie County	Onondaga County	
Monroe County	Orange County	

Reporting, recordkeeping, and other compliance requirements; and professional services:

Covered entities are required to ensure their personnel are fully vaccinated against COVID-19, and to document evidence thereof in appropriate records. Covered entities are also required to review and make determinations on medical exemption requests, along with any reasonable accommodations.

Upon the request of the Department, covered entities must report the number and percentage of total covered personnel, as well as the number and percentage that have been vaccinated against COVID-19 and those who have been granted a medical exemption, along with any reasonable accommodations. Facilities and agencies must develop and implement a policy

and procedure to ensure compliance with the provisions of this section, making such documents available to the Department upon request.

Compliance Costs:

Covered entities must ensure that personnel are fully vaccinated against COVID-19 and document such vaccination in personnel or other appropriate records. Covered entities must also review and make determinations on requests for medical exemptions, which must also be documented in personnel or other appropriate records, along with any reasonable accommodations. This is a modest investment to protect the health and safety of patients, residents, and personnel, especially when compared to both the direct medical costs and indirect costs of personnel absenteeism.

Minimizing Adverse Impact:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19 within the Department since March of 2020. Further, the Department currently has an emergency regulation in place, which requires nursing homes and adult care facilities to offer COVID-19 vaccination to personnel and residents, which has helped to facilitated vaccination of personnel. Further, it is the Department's understanding that many facilities across the State have begun to impose mandatory vaccination policies. Lastly, on August 18, 2021, President Biden announced that as a condition of participating in the Medicare and Medicaid programs, the United States Department of Health and Human Services will be developing regulations requiring nursing homes to mandate COVID-19 vaccination for workers.

Rural Area Participation:

Due to the emergent nature of COVID-19, parties representing rural areas were not consulted. If these regulations are proposed for permanent adoption, all parties will have an opportunity to provide comments during the notice and comment period.

JOB IMPACT STATEMENT

Nature of Impact:

Covered entities may terminate personnel who are not fully vaccinated and do not have a valid medical exemption and are unable to otherwise ensure individuals are not engaged in patient/resident care or expose other covered personnel.

Categories and numbers affected:

This rule may impact any individual who falls within the definition of "personnel" who is not fully vaccinated against COVID-19 and does not have a valid medical exemption on file with the covered entity for which they work or are affiliated.

Regions of adverse impact:

The rule would apply uniformly throughout the State and the Department does not anticipate that there will be any regions of the state where the rule would have a disproportionate adverse impact on jobs or employment.

Minimizing adverse impact:

As part of ongoing efforts to address the COVID-19 pandemic, regulated parties have been a partner in implementing measures to limit the spread and/or mitigate the impact of COVID-19 within the Department since March of 2020. Further, the Department currently has an emergency regulation in place, which requires nursing homes and adult care facilities to offer COVID-19 vaccination to personnel and residents, which has helped to facilitated vaccination of personnel. Further, it is the Department's understanding that many facilities across the State

have begun to impose mandatory vaccination policies. Lastly, on August 18, 2021, President Biden announced that as a condition of participating in the Medicare and Medicaid programs, the United States Department of Health and Human Services will be developing regulations requiring nursing homes to mandate COVID-19 vaccination for workers.

EMERGENCY JUSTIFICATION

The Centers for Disease Control and Prevention (CDC) has identified a concerning national trend of increasing circulation of the SARS-CoV-2 Delta variant. Since early July, cases have risen 10-fold, and 95 percent of the sequenced recent positives in New York State were the Delta variant. Recent New York State data show that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals. Those who are unvaccinated have over 11 times the risk of being hospitalized with COVID-19.

The COVID-19 vaccines are safe and effective. They offer the benefit of helping to reduce the number of COVID-19 infections, including the Delta variant, which is a critical component to protecting public health. Certain settings, such as healthcare facilities and congregate care settings, pose increased challenges and urgency for controlling the spread of this disease because of the vulnerable patient and resident populations that they serve. Unvaccinated personnel in such settings have an unacceptably high risk of both acquiring COVID-19 and transmitting the virus to colleagues and/or vulnerable patients or residents, exacerbating staffing shortages, and causing unacceptably high risk of complications.

In response to this significant public health threat, through this emergency regulation, the Department is requiring covered entities to ensure their personnel are fully vaccinated against COVID-19, and to document evidence thereof in appropriate records. Covered entities are also required to review and make determinations on medical exemption requests, and provide reasonable accommodations therefor to protect the wellbeing of the patients, residents and personnel in such facilities. Documentation and information regarding personnel vaccinations as well as exemption requests granted are required to be provided to the Department immediately upon request.

Based on the foregoing, the Department has determined that these emergency regulations are necessary to control the spread of COVID-19 in the identified regulated facilities or entities. As described above, current circumstances and the risk of spread to vulnerable resident and patient populations by unvaccinated personnel in these settings necessitate immediate action and, pursuant to the State Administrative Procedure Act Section 202(6), a delay in the issuance of these emergency regulations would be contrary to public interest.

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

DR. A., NURSE A., DR. C., NURSE D., DR. F., DR. G, THERAPIST I., DR. J., NURSE J., DR. M., NURSE N., DR. O., DR. P., TECHNOLOGIST P., DR. S., NURSE S. and **PHYSICIAN LIAISON X.**, Plaintiffs, v. **KATHY HOCHUL**, Governor of the State of New York, in her official capacity; **HOWARD A. ZUCKER**, Commissioner of the New York State Department of Health, in his official capacity; and **LETITIA JAMES**, Attorney General of the State of New York, in her official capacity, Defendants.	)	Case No. 1:21-cv-1009 (DNH/ML)

VERIFIED COMPLAINT

Plaintiffs herein, proceeding under pseudonyms for the reasons set forth below, complain of the Defendants as follows:

NATURE OF ACTION

1. This action seeks injunctive and declaratory relief from a New York State Department of Health (DOH) regulation, promulgated on August 26, 2021, that purports to nullify Title VII and the parallel protections of the New York State Human Rights Law and the New York City Human Rights Law by mandating the COVID-19 vaccination of health care professionals with no exemption for sincere religious beliefs that compel the refusal of such vaccination (the "Vaccine Mandate").

2. This "emergency" regulation, promulgated almost three months after the former Governor of New York *ended* the COVID-related "state disaster emergency" and rescinded all his pertinent executive orders, negates even the protection for sincere religious beliefs in a prior DOH regulation promulgated only days before, when the former Governor was still in office.

3. Plaintiffs have moved this Court for temporary and preliminary injunctive relief in view of the September 27, 2021 deadline for compliance with the Vaccine Mandate, after which plaintiffs, whose religious beliefs compel abstention from COVID-19 vaccination, will be harmed irreparably by loss of employment and professional standing.

JURISDICTION AND VENUE

4. This action arises under the First and Fourteenth Amendments to the United States Constitution and is brought pursuant to 42 U.S.C. § 1983. This action also arises under federal statutory laws, namely 42 U.S.C. § 1985(3) and 42 U.S.C. § 2000e-2

5. This Court has jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 1331 and 1343.enue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because two of the defendants reside in this District and a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this District.

6. This Court is authorized to grant declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, implemented through Rule 57 of the Federal Rules of CivilProcedure.

7. This Court is authorized to grant Plaintiffs' prayer for temporary, preliminary, and permanent injunctive relief pursuant to Rule 65 of the Federal Rules of CivilProcedure.

8. This Court is authorized to grant Plaintiffs' prayer for relief regarding costs, including a reasonable attorney's fee, pursuant to 42 U.S.C. § 1988.

THE PARTIES

Plaintiffs

9. As more particularly alleged below, the plaintiffs herein are medical professionals whose sincere religious beliefs compel them to refuse vaccination with the available COVID-19 vaccines, all of which employ aborted fetus cell lines in their testing, development, or production.

10. All of the plaintiffs are employed by entities with 15 more employees covered by Title VII, which mandates the reasonable accommodation of sincere religious beliefs. Eight of the seventeen plaintiffs reside and work in this District, while the others reside and/or work variously in the Southern, Eastern and Western Districts.

Defendants

11. Defendant Kathy Hochul (Hochul) is Governor of the State of New York who, as the State's chief executive, is responsible for the execution of its laws and regulations, including the challenged vaccine mandate, and for the approval of all executive branch policies and directives, including those of the DOH pertaining to the vaccine mandate. At all pertinent times Hochul has acted and will act under color of state law. Defendant Hochul's principal place of business is located at the State Capitol Building, Albany, New York. She is sued in her official capacity.

12. Defendant Howard A. Zucker (Zucker) is Commissioner of Health for the DOH. He is responsible for promulgation and enforcement of the challenged vaccine mandate. At all pertinent times Zucker has acted and will act under color of state law. Defendant Zucker's principal place of business is located at 3959 Broadway, New York, NY 10032. He is sued in his official capacity.

13. Defendant LETITIA JAMES (James) is the Attorney General for the State of New York, the State's highest-ranking law enforcement officer charged with overall supervision of the enforcement of the challenged vaccine mandate and other laws of the State of New York. At all times relevant to this Complaint, James is and was acting under color of State law. Defendant James' principal place of business is located at the State Capitol Building, Albany, New York. She is sued in her official capacity.

BACKGROUND

> "*No one should be forced to be vaccinated against their will* both because of *the constitutional right to refuse treatment*, and pragmatically because forced vaccination will deter at least some people from seeking medical help when they need it."
>
> "Following this flawed logic, several state-based proposals have sought to address any 'public health emergency,' … [by] resort[ing] to *punitive, police-state tactics*, such as forced examinations, *vaccination* and treatment, and criminal sanctions for those individuals who did not follow the rules."
>
> -The American Civil Liberties Union in 2008
> (before it became the Anti-Civil Liberties Union)

The Cuomo Administration and the "Public Health Emergency" Come to an End

14. On August 23, 2021, the People of the State of New York were definitively rescued from the nearly eighteen-month-long medical dictatorship of ex-Governor Cuomo, who resigned in disgrace and forfeited the Emmy Award for his press conference "performances" as the savior of New York from the coronavirus.[1]

15. The legacy of Cuomo's medical dictatorship was the second highest COVID death rate per 100,000 in the country—with New Jersey in first place under the equally draconian and

[1] *See* Nick Niedzwiaek, "Cuomo Loses Emmy following scandal, resignation," POLITICO, August 24, 2021, https://www.politico.com/states/new-york/albany/story/2021/08/24/cuomo-loses-emmy-following-scandal-resignation-1390423

still-ongoing medical dictatorship of Governor Murphy.[2] There is an ongoing FBI investigation into official concealment of the 15,000 COVID deaths caused by Cuomo's order to return COVID-positive patients to nursing homes after their discharge from the hospital.[3]

16. On June 25, 2021, two months before his last day in office, Cuomo finally rescinded his declaration of a "State disaster emergency"—fifteen months after it was issued—along with all the executive orders that followed. There is no longer a public health emergency in the State of New York. Despite the incessant media fearmongering over the "Delta variant" and now the "Mu variant," on September 7, 2021, only 47 deaths out of a state population of almost 20,000,000 could be attributed (however loosely) to the virus.[4]

The Vaccination Mandate
Supersedes the Prior Health Order

17. The end of the Cuomo administration, however, has apparently not been accompanied by any institutional awareness of the failure of his policies to improve the lot of New Yorkers during the pandemic as compared to virtually every other State in the Union. On the contrary, the defendant Health Commissioner, Howard A. Zucker, and Cuomo's successor as Governor, defendant Governor Kathy Hochul (Hochul), continue to behave as if the "disaster emergency" had never ended—and never will end.

18. Solely on the pretext of what the DOH's Public Health and Health Planning Council ("the Health Council") deems "a concerning national trend of increasing circulation of the SARS-CoV-2 Delta variant," Zucker and the DOH, with the assistance of defendant

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[2] *See* https://www.statista.com/statistics/1109011/coronavirus-covid19-death-rates-us-by-state/. New York was only recently bumped to third worst in the nation, but only barely, by Mississippi.
[3] *See* Michael Gold and Ed Shanahan, "What We Know About Cuomo's Nursing Home Scandal," August 4, 2021, https://www.nytimes.com/article/andrew-cuomo-nursing-home-deaths.html
[4] *See* https://www.worldometers.info/coronavirus/usa/new-york/

Attorney General Letitia James and the approval of Hochul as the State's chief executive, are now enforcing the Health Council's proposed COVID-19 "emergency" regulation, the aforesaid Vaccine Mandate, effective only days ago, on August 26, 2021.

19. The Vaccine Mandate orders the COVID-19 vaccination of the "personnel" of all "covered entities" in the field of medical and health services, including the Plaintiffs and all the hospitals, clinics, or private practices with which they are associated. *See* Exhibit A to this Complaint and NYCRR, Title 10, Part 2, § 2.61 ("the Vaccine Mandate").

20. The Vaccine Mandate excludes any religious exemption from COVID-19 vaccination but permits medical exemptions. Yet, only days before, the superseded Public Health Order issued in the waning days of the Cuomo administration (the "prior Health Order")—one of the few things he got right—provided a broad and indeed constitutionally required religious exemption:

> Religious exemption. Covered entities *shall grant a religious exemption* for COVID-19 vaccination for covered personnel if they hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer. Covered entities shall document such exemptions and such reasonable accommodations in personnel records or other appropriate records in accordance with applicable privacy laws by September 27, 2021, and continuously, as needed, thereafter.

See Exhibit B to this Complaint (emphasis added)

21. The Vaccination Mandate declares that "Covered entities shall *continuously* require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for other covered entities absent receipt of an exemption." Mandate at 2.61 (c) (emphasis added).

22. Ominously enough, by "continuously… fully vaccinated" the Vaccine Mandate

appears to contemplate however many "booster shots" of COVID vaccine federal and state health bureaucrats demand: "'Fully vaccinated,' for the purposes of this section, shall be determined by the Department in accordance with applicable federal guidelines and recommendations." Id. at § 3.

23. In the State of Israel, where COVID vaccines are already failing massively to "contain the virus," the national government has announced that "fully vaccinated" now means *three* shots.[5] Or perhaps *four* shots very soon, as Israel's top health expert suggests.[6] In this country, the Biden administration is already promoting the three shots = "fully vaccinated" narrative: "It will make you safer, and for longer, and it will help us end the pandemic faster," said Biden said in a speech on August 18.[7]

24. As pleaded more particularly below, the Vaccine Mandate purports to override federal protections under Title VII, commanding employers to deny religious accommodation of sincere religious objections to vaccination—a blatant violation of the Supremacy Clause as well as the Free Exercise Clause. The Vaccine Mandate even nullifies parallel state law protections under the New York Human Rights Law and the New York City Human Rights Law.

25. Only days after the prior Health Order had declared "Covered entities *shall* grant a religious exemption" in recognition of federal and state law, the Vaccine Mandate effectively declared that "covered entitles" *shall not* grant a religious exemption. The targeting of a large

[5] "Three doses not two: Israel sets new benchmark for full vaccination. It is on India's horizon as well," *The Times of India*, September 1, 2021 @ https://timesofindia.indiatimes.com/blogs/toi-editorials/three-doses-not-two-israel-sets-new-benchmark-for-full-vaccination-it-is-on-indias-horizon-as-well/

[6] "New normal: Israel's health expert says fourth shot of Covid vaccine needed," September 5, 2021, Wio News, https://www.wionews.com/world/new-normal-israels-health-expert-says-fourth-shot-of-covid-vaccine-needed-410904

[7] https://www.politico.com/news/2021/08/18/biden-recommends-covid-booster-shots-505911

class of religious objectors to mandatory vaccination among health professionals, who are very knowledgeable on this subject—and notably at least 20% of the health care workforce in New York[8]—is plainly evident. Yet any ill-informed college student can obtain a religious exemption from a panoply of vaccinations simply by filing a statement that "he/she objects to immunization due to his/her religious beliefs." *See* Public Health Law § 2165.

Reasons for Proceeding with Pseudonyms

26. The same "front line" health care workers hailed as heroes by the media for treating COVID patients before vaccines were available, including the Plaintiffs herein, are now vilified by the same media as pariahs who must be excluded from society until they are vaccinated against their will.

27. The Vaccine Mandate emerges in the context of an atmosphere of fear and irrationality in which the unvaccinated are threatened with being reduced to a caste of untouchables if they will not consent to being injected, even "continuously," with vaccines that violate their religious beliefs, are clearly not as effective as promised, and have known and increasingly evident risks of severe and even life-threatening side effects, including blood clots[9] and what the CDC admits is "a 'likely association' between a rare heart inflammatory condition in adolescents and young adults [under age 30] mostly after they've received their second Covid-19 vaccine shot…"[10]

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[8] *See* letter to defendants Zucker and Hochul from numerous members of the State Assembly @ https://www.scribd.com/document/523955400/COVID-Vaccination-Letter#from_embed

[9] Cf. authoritative study in the prestigious journal *Nature*: "Antibody epitopes in vaccine-induced immune thrombotic thrombocytopaenia," July 7, 2021; available at https://www.nature.com/articles/s41586-021-03744-4

[10] *See* Berkeley Lovelace, Jr. "CDC safety group says there's a likely link between rare heart inflammation in young people after Covid shot," CNBC, June 23, 2021 @ https://tinyurl.com/sse5zsr9

28. With caution thrown to the winds, everyone—the young and healthy, the old, the previously recovered and naturally immune, even pregnant and breastfeeding women—is now being pressured by governments, businesses and educational institutions to submit to COVID-19 vaccination with no assessment of the risks or benefits for each individual or any consideration of medical necessity or contraindication in each particular case. Even the smallest children, at virtually no risk from the virus, are to be vaccinated as soon as a rushed approval can be obtained from the FDA.

29. For the sake of forcing people to be inoculated with novel vaccines regardless of risk or benefit, college admissions are being revoked, career paths blocked, employment terminated, and lives ruined on a vast scale. Nothing like this has ever been seen in our nation.

30. And yet the CDC now admits that the COVID vaccines do not prevent viral transmission or infection, especially by the "Delta variant."[11]

31. As things now stand, according to "public health authorities" the vaccinated can infect the unvaccinated, the unvaccinated can infect the vaccinated, both the vaccinated and the unvaccinated can infect each other, and everyone must wear masks indoors in "high transmission" areas—that is, virtually the entire country[12]—as if no one at all had been vaccinated.[13] And with both the "fully vaccinated" and the unvaccinated still contracting COVID, "continuous" "booster shots" of the same less-than-miraculous vaccines, to which

[11]Frank Diamond, *Infection Control Today*, "Vaccines Not as Effective against the Delta Variant, say CDC Data," August 25, 2021 @ https://www.infectioncontroltoday.com/view/vaccines-not-as-effective-against-delta-variant-says-cdc-data

[12]*See* CDC Map at https://www.usatoday.com/in-depth/graphics/2021/07/29/cdc-mask-guidelines-map-high-covid-transmission-county/5400268001/

[13]*See* "When You've Been Fully Vaccinated," https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html

plaintiffs have the same religious objections, are doubtless on the way, accompanied by further government mandates.

32. In the midst of this regulatory muddle, combined with unreasoning official coercion and widespread, media-generated panic, plaintiffs seek leave of court to proceed anonymously as they run the risk of ostracization, threats of harm, immediate firing and other retaliatory consequences if their names become known. This is shown by the following examples of a pervasive climate of fear and loathing of the unvaccinated:

- MSNBC guest Frank Schaeffer stating that those who are "anti-vaccine" are "bio terrorists" who should be the target of "Drone strikes."[14]

- In the Eastern District of New York, where two of the Plaintiffs reside, an explicit death threat was made in a comment that had to be deleted (likely for fear of liability on the part of the publishers) (Exhibit C)[15]

- Mayor de Blasio, announcing his "vaccine passport" for New York City, which affects several of the plaintiffs herein, declared that "If you want to participate in our society fully, you've got to get vaccinated."[16]

- On ABC News, commentator Margaret Hoover declared that government, by withholding all benefits from the unvaccinated, should "just make it almost impossible for people to—to live their lives without being protected and protecting the rest of us."[17]

- On CNN, commentator Don Lemon stated to Chris Cuomo that "[If ou] don't get the vaccine, you can't go to the supermarket. Don't have the vaccine, can't go to the ball game. Don't have a vaccine, can't go to work. You don't have a vaccine, can't come here. No shirt, no shoes, no service."[18]

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[14] https://www.breitbart.com/politics/2021/09/10/msnbc-guest-calls-drone-strikes-americans-opposed-vaccine-mandates/

[15] https://riverheadlocal.com/2021/09/04/protest-outside-riverhead-hospital-draws-crowd-of-vaccine-mandate-opponents/

[16] *See* video @ https://tinyurl.com/j4npw5c h

[17] This Week," July 25, 2021, https://abcnews.go.com/Politics/week-transcript-25-21-speaker-nancy-pelosi-sen/story?id=79045738

[18] https://www.realclearpolitics.com/video/2021/08/01/don_lemon_no_shirt_no_shoes_no_vaccine_no_service.html

- On his late night "comedy" show Jimmy Kimmel stated that the unvaccinated who contract COVID should be allowed to die rather than being admitted to the hospital: "Rest in peace, wheezy."[19] The audience roared its approval. Kimmel offered no such advice to the millions who seek emergency medical treatment after disregarding constant public health warnings against smoking, drinking, drug abuse, and junk food-induced Type II diabetes.

- In *The Week*, Ryan Cooper declared that "Anti-vaxxers" (i.e. people who decline the COVID vaccines) "should be exiled from society until they get their shots, and their efforts to intimidate people against controlling the pandemic should be met with massive resistance."[20]

33. Furthermore, plaintiffs' allegations below involve sensitive personal medical information concerning their vaccination status, the presence of antibodies, and whether they are breastfeeding or intending to become pregnant.

34. Under these circumstances, plaintiffs clearly meet the criteria for permission to proceed anonymously. *See* Memorandum of Law in Support of this application.

Plaintiffs' Common Religious Beliefs Opposing Compulsory COVID-19 Vaccination

35. The following allegations detail plaintiffs' sincere religious conviction that they cannot consent to be inoculated, "continuously" or otherwise, with vaccines that were tested, developed or produced with fetal cells line derived from procured abortions, and the drastic consequences they now face absent emergency injunctive relief.

36. The seventeen plaintiffs in this action—practicing doctors, M.D.s fulfilling their residency requirement, nurses, a nuclear medicine technologist, a cognitive rehabilitation therapist and a physician's liaison—are united in their conscientious religious objection as Christians to being inoculated at all, much less "continuously," with any of the available

[19] https://www.westernjournal.com/late-night-host-ghoulishly-mocks-sick-unvaccinated-rest-peace-wheezy/

[20] https://theweek.com/coronavirus/1002909/theres-1-obvious-solution-to-the-delta-variant-mandatory-vaccination

COVID-19 vaccines because they all employ fetal cell lines derived from procured abortion in testing, development or production of the vaccines. In particular:

- Johnson & Johnson/Janssen: Fetal cell cultures are used to produce and manufacture the J&J COVID-19 vaccine and the final formulation of this vaccine includes residual amounts of the fetal host cell proteins (≤0.15 mcg) and/or host cell DNA (≤3 ng).
- Pfizer/BioNTech: The HEK-293 abortion-related cell line was used in research related to the development of the Pfizer COVID-19 vaccine.
- Moderna/NIAID: Aborted fetal cell lines were used in both the development and testing of Moderna's COVID-19 vaccine.

37. Plaintiffs hold in common the following sincere religious beliefs concerning abortion-connected vaccines:

a) They oppose abortion under any circumstances, as they believe that abortion is the intrinsically evil killing of an innocent, and thus they also oppose the use of abortion-derived fetal cell lines for medical purposes and abortion-derived fetal stem cell research.

b) It would be a violation of their deeply held religious beliefs and moral consciences to take any of the available COVID-19 vaccines given their use of abortion-derived fetal cell lines in testing, development, or production.

c) By receiving one of the COVID vaccines currently available, all of which are abortion-connected, they believe they would be cooperating with the evil of abortion in a manner that violates their consciences and that they would sin gravely if they acted against their consciences by taking any of these vaccines.

d) They agree with the teaching of spiritual leaders, including certain Catholic bishops, who urge Christians to refuse said vaccines to avoid cooperation in

abortion and to bear witness against it without compromise, and who defend the right to a religious exemption from vaccination with such vaccines.

e) They do not accept the opinion—expressed by certain other Catholic bishops, the Pope included—that there is a therapeutically proportional reason to resort to abortion-connected vaccines which can justify "remote" cooperation in abortion. They reject as a matter of religious conviction *any* medical cooperation in abortion, no matter how "remote."[21]

f) They believe in the primacy of conscience in this matter. While one may personally conclude that recourse to abortion-connected vaccines can be justified in his or her case, vaccination is not morally obligatory and *must* be voluntary, and those who in conscience refuse vaccination need only take other protective measures to avoid spreading the virus.[22]

g) Although they are not "anti-vaxxers" who oppose all vaccines, they believe as a matter of religious conviction that the ensouled human person, made in the image and likeness of God, is inviolable as a temple of the Holy Ghost and that civil authorities have no right to *force* anyone to be medicated or vaccinated against his or her will, whether or not the medication or vaccine is abortion-connected.

[21]*See*, Exhibit D (collecting statements of Catholic prelates, who call for conscientious abstention from abortion-connected vaccines).

[22]*See*, "Note on the Morality of Using Some Anti-COVID-19 Vaccines," https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20201221_nota-vaccini-anticovid_en.html

h) A risk-benefit analysis factors into each person's formulation of a conscientious religious position on the morality of vaccinations.[23] Plaintiffs are all aware of the vaccines' side effects, which can be quite serious, their fading efficacy, requiring "booster shots," their evident inability to prevent transmission or infection, (*see* Exhibit F)[24] and the fact that natural immunity is likely more protective than injections with the available COVID-19 vaccines.[25] These medical facts inform Plaintiffs' religious conviction against involuntary or coerced vaccination as an invasion of bodily autonomy contrary to their religious beliefs. Given that the Vaccine Mandate requires that employers insure that employees are "continuously" "fully vaccinated"—as many times as the government advises—Plaintiffs now reasonably fear that "booster shots" of the same vaccines they consider immoral will soon be demanded by the government as a condition of employment and even normal life in society, as is already the case with the original vaccines.

Plaintiff "Dr. A."

38. Plaintiff A., M.D. ("Dr. A."), who is Catholic, is a board-certified Anatomic and Clinical Pathologist on staff at a private hospital in the Northern District, where he performs pathology testing and diagnosis under contract with the hospital.

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[23]*See*, "A Letter from the Colorado Bishops on COVID-19 Vaccine Mandates," August 5, 2021 @ https://cocatholicconference.org/a-letter-from-the-bishops-on-covid-19-vaccine-mandates/

[24] On August 5, 2021, during a CNN interview, CDC Director Rochelle Walensky stated that because of the new spread of the delta variant, "what [the COVID vaccines] can't do anymore is *prevent transmission*," (emphasis added), http://www.cnn.com/TRANSCRIPTS/2108/05/sitroom.02.html; *see also* Exhibit F (reproducing transcript of this interview).

[25]*See*, Exhibit E (on the science pertaining to natural versus vaccine-induced immunity).

39. On August 12, 2021, Dr. A., who seeks a religious exemption from COVID vaccination based on the religious beliefs enumerated in ¶ 37 (a)-(h), was informed by the hospital administration via email that the hospital would be mandating the Covid-19 vaccination for all employees and medical staff members who provide on-site care. Unvaccinated staff members could refuse the vaccine without penalty but would be required to undergo weekly testing.

40. This policy changed on or about August 20, 2021, due to the DOH's issuance of the prior Health Order, which eliminated testing in lieu of vaccination but did allow both medical and religious exemptions.

41. On August 27, 2021, however, the hospital policy changed again after DOH issued the Vaccinate Mandate removing the religious exemption provision under the prior Health Order.

42. Knowing that religious exemptions had been banned by the DOH, on August 31, 2021, Dr. A. sent the hospital administration the required form for a medical exemption instead, but has not yet received a reply.

43. Refusal to receive an abortion-connected COVID-19 vaccine will imminently result in the loss of Dr. A's position at the hospital and this termination of employment would have to be mentioned in Dr. A.'s license renewal statements, which could trigger disciplinary proceedings against him.

44. Dr. A. is now also at risk of disciplinary charges by the DOH or otherwise that could result in loss of his license if he refuses, as he must, vaccination with any of the currently available abortion-connected vaccines. There is also the threat that the DOH will make COVID-

19 vaccination a condition of renewal or threaten license suspension or revocation in order further to coerce Dr. A. to be vaccinated with a vaccine he cannot take in good conscience.

45. The imminent loss of his position and staff privileges at the hospital with which Dr. A. is affiliated will make it impossible to conduct his practice and will also render him unemployable anywhere in the State of New York as no other hospital would place him on the pathology staff under the Vaccine Mandate.

46. Dr. A. will suffer imminent irreparable harm to his occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Nurse A."

47. Plaintiff A., R.N. ("Nurse A."), who is Catholic, is a registered nurse, licensed in the State of New York, who works in a major medical center in the Southern District.

48. Nurse A. has cared for numerous dialysis patients with COVID during the pandemic without need of vaccination.

49. On August 20, 2021, Nurse A. received a religious exemption from COVID vaccination from her hospital, based on the religious beliefs enumerated in ¶ 37 (a)-(h),On August 30, 2021, however, Nurse A. received an email revoking her religious exemption because of the Vaccine Mandate, which email stated that her hospital "must follow NYS DOH requirements as they evolve. This means that [the hospital] can no longer consider any religious exemptions to the COVID vaccination *even those previously approved*."

50. Said email further warned that "employees who do not comply with the vaccination program by the deadlines above will be placed off duty for seven days without pay, and given

those seven days to meet the program requirements. Employees who choose not to meet the program requirements after seven days will be deemed to have opted to resign."

51. Nurse A. has been given a deadline of September 15, 2021 to receive the "first dose" of COVID vaccine.

52. Termination of Nurse A.'s employment will be devastating to her and her family. Nurse A. will also be unemployable anywhere in the State of New York as no other hospital would hire her under the Vaccine Mandate.

53. Nurse A.'s termination will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against her. There is also the threat that the DOH will make COVID-19 vaccination a condition of her license renewal to further coerce compliance.

54. Nurse A. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation as measure of coercion to take a vaccine that in her informed medical judgment she cannot take in good conscience.

55. Nurse A. will suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Dr. C."

56. Plaintiff C, M.D. ("Dr. C."), who is Catholic, is a board-certified ophthalmologist who is an attending physician with admitting privileges at a private hospital in the Northern District, and he also directs a large private surgical practice.

57. During 2020, Dr. C.'s large practice group performed almost 10,000 surgeries without a single case or outbreak of COVID-19 traceable to his practice and without vaccination of anyone on staff.

58. Prior to the Vaccine Mandate, religious exemption and periodic testing in lieu of vaccination were allowed under the prior Health Order that the Vaccine Mandate superseded, as to which exemption Plaintiff Dr. C. was in discussions with hospital management.

59. Plaintiff Dr. C. has now been advised by said hospital that on account of the Vaccine Mandate he must be COVID-vaccinated by September 27, 2021, and that there is no religious exemption.

60. Dr. C.'s written request for an exemption, reflecting the religious beliefs enumerated in ¶ 37 (a)-(h), was thus denied on September 1, the same day it was submitted.

61. The imminent loss of admitting privileges at the hospital with which Dr. C is affiliated will make it impossible to conduct his practice, as he cannot conduct ophthalmic and maxillofacial surgery without the ability to admit patients to a hospital if the need arises.

62. The imminent loss of privileges will also render Dr. C. unemployable anywhere in the State of New York as no other hospital would grant him privileges under the Vaccine Mandate.

63. The imminent loss of privileges will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against Dr. C. There is also the threat that the DOH will make COVID-19 vaccination a condition of license renewal in a further bid to coerce compliance.

64. Dr. C. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation, for refusing to obey the Vaccine Mandate by taking a vaccine that in his informed medical judgment he cannot take in good conscience.

65. Dr. C. will suffer imminent irreparable harm to his occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Nurse D."

66. Plaintiff D., R.N. ("Nurse D."), who is Catholic, is a registered nurse, licensed in the State of New York, who works at a private hospital in the Northern District. She has two sons and a husband, and her job is a vital source income and health and dental insurance for her family.

67. Nurse D. attempted to obtain a religious exemption from her hospital, based on the religious beliefs enumerated in ¶ 37 (a)-(h), but it was denied on account of the Vaccine Mandate. She has been advised by management that if she is not vaccinated by September 27, she will be deemed to have "voluntarily resigned."

68. In a memo issued September 7, 2021, management further advised that the employment of Nurse D. and any other employee refusing vaccination under the Vaccine Mandate will end on September 28, the separation will be "deemed" to be voluntary, meaning no unemployment benefits, and all health and other benefits will terminate.

69. Termination of Nurse D's employment will be devastating to her and her family. Nurse D. has more than $50,000 of student loans from her nursing program alone.

70. Nurse D. will also be unemployable anywhere in the State of New York as no other hospital would hire her under the Vaccine Mandate.

71. Nurse D.'s termination will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against her. There is also the threat that the DOH will make COVID-19 vaccination a condition of her license renewal to further coerce compliance.

72. Nurse D. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation as measure of coercion to take a vaccine that in her informed medical judgment she cannot take in good conscience.

73. Nurse D. will suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Dr. F."

74. Plaintiff F., D.D.S., M.D. ("Doctor F."), who is Catholic, is a board-certified Oral and Maxillofacial Surgeon, licensed in dentistry and medicine in the State of New York.

75. Dr. F. is employed by a private hospital in the Northern District, where he is on staff and has admitting privileges in addition to his private practice.

76. Dr. F. and his partners have treated numerous patients who were sick with COVID without need of vaccination. Patients with COVID were not turned away but received dental treatment that was urgently needed. Dr. F.'s clinic is vital to the region in which it is located and cannot turn away patients in need of urgent care.

77. Although he was granted a religious exemption from COVID vaccination under the prior Health Order, the Vaccine Mandate has forced his hospital employer to revoke it and he was notified by hospital administration that if he fails to provide proof of vaccination by September 21, 2021, his hospital privileges will be suspended.

78. In addition to the concerns about the scientific questions pertaining to the available COVID-19 vaccines noted in ¶ 37(h), Dr. F. also knows of two people who have died, one who had a heart attack, and many others who have been injured following injection with a COVID

vaccine. These medical facts inform Dr. F's religious objection to involuntary vaccination of any kind, including COVID vaccines, although he is not "anti-vax" in general.

79. The imminent loss of admitting privileges at the hospital with which Dr. F is affiliated will make it impossible to conduct his practice, as he cannot conduct oral and maxillofacial surgery without the ability to admit patients to a hospital if the need arises.

80. The imminent loss of privileges will also render Dr. F. unemployable anywhere in the State of New York as no other hospital would grant him privileges under the Vaccine Mandate, which he cannot in conscience obey.

81. The imminent loss of privileges will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against Dr. F. There is also the threat that the DOH will make COVID-19 vaccination a condition of license renewal in a further bid to coerce compliance with the Vaccine Mandate.

82. Dr. F. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation—yet another measure of coercion to take a vaccine that in his informed medical judgment he cannot take in good conscience.

83. Dr. F. will suffer imminent irreparable harm to his occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff Dr. "G."

84. Plaintiff G., M.D. ("Dr. G."), who is Catholic, is a board-certified specialist in Internal Medicine, licensed in the State of New York, who is employed by two private hospitals operated by a health service in the Western District at which he has staff and admitting

privileges. Dr. G also directs an internal medicine residency program in which he instructs dozens of M.D.s who are fulfilling their residency requirements.

85. Dr. G., who seeks a religious exemption from COVID vaccination based on the beliefs enumerated in ¶ 37 (a)-(h), has been informed by the Medical Affairs Department that there is no religious exemption from the Vaccine Mandate and that if he is not "fully vaccinated" by September 27 he will not be allowed to enter any of the buildings of the health service, including the hospitals in which he works and teaches.

86. The imminent loss of Dr. G.'s positions and admitting privileges at the hospitals with which he is affiliated will make it impossible for him to conduct his practice.

87. The imminent loss of his positions and privileges will also render Dr. G. unemployable anywhere in the State of New York as no other hospital would grant him privileges under the Vaccine Mandate, which he cannot in conscience obey.

88. The imminent loss of privileges and the termination of his employments will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against Dr. G. There is also the threat that the DOH will make COVID-19 vaccination a condition of his license renewal.

89. Dr. G. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation as a further measure of coercion to take a vaccine that in his informed medical judgment he cannot take in good conscience.

90. Dr. G. will suffer imminent irreparable harm to his occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Therapist I."

91. Plaintiff I. ("Therapist I."), who is Catholic, is a certified brain injury specialist who provides cognitive rehabilitation and other assistance to patients, groups of patients, their families and visitors at a facility located in the Northern District.

92. In October of 2020, Therapist I. treated COVID patients as a TNA (temporary nurses' aide) on a dedicated COVID Unit in a nursing home. Therapist I. was part of a team that the parent facility set up to travel among its properties when the destination facility was in a staffing crisis. Therapist I. did not require any form of vaccination to treat these patients but rather was tested twice a week.

93. Therapist I. knows of two colleagues who were "fully vaccinated" yet still contracted COVID-19 and had to be quarantined. These medical facts, along with those recited herein above, inform Therapist I's religious objection to involuntary vaccination as a violation of human dignity.

94. Therapist I., who seeks a religious exemption from COVID vaccination based on the beliefs noted in ¶ 37 (a)-(h), has been advised by his employer, a rehabilitation center, that, because of the Vaccine Mandate, he must receive "at least the first dose" of an abortion-connected vaccine by September 27, 2021.

95. Therapist I. is now facing imminent termination of his employment and damage to his reputation and future employment prospects if he refuses to be vaccinated against his religious belief.

96. Therapist I. is also at risk of action against his certification in EMS as the DOH imposing the Vaccine Mandate also regulates the granting, oversight and renewal of his EMT-B certificate.

97. Therapist I will thus suffer imminent irreparable harm to his occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Doctor J."

98. Plaintiff J., D.O., who is Catholic, is a Doctor of Osteopathy ("Dr. J."), licensed in the State of New York, whose specialty is Obstetrics and Gynecology, for which she is board-certified. She has admitting privileges at a private hospital in the Western District in addition to her private practice.

99. Dr. J. believes she has probably treated dozens of women with COVID, most of whom were asymptomatic, and may have had an asymptomatic case of COVID herself. She works in Labor and Delivery two days per week, training residents, and cares for "unassigned patients" who don't have a doctor. All patients are tested for COVID. Sometimes if the delivery was happening quickly, Dr. J. would have to run into the room without knowing the patient's COVID status, and there was not always time to wear proper personal protection equipment (PPE). She would find out after the fact that the patient was COVID-positive. Dr. J. has had 5 to 8 patients who were admitted specifically due to complications of COVID in pregnancy. She assisted in their treatment even while she herself was pregnant.

100. As an OBGYN, Dr. J. has always practiced in accord with the dictates of her personal religious convictions, including the beliefs enumerated above, and she does not perform any form of abortion or sterilization procedure, nor prescribe any contraceptive that could induce an unintentional abortion.

101. Dr. J. is currently breastfeeding her daughter, is aware of reports of the death of breastfeeding infants following maternal vaccination, and is not aware of any studies to date that

would prove safety in breastfeeding or during pregnancy, which is of particular concern to her as an OB-GYN. Her hospital's own notice of the Vaccination Mandate advises breastfeeding women hesitantly as follows: "Evidence about the safety and effectiveness of COVID-19 vaccination during pregnancy is growing… It's best to talk to your OB-GYN or pediatrician about any questions or concerns you have."

These medical facts, along with those recited herein above, inform Dr. J.'s religious conviction against involuntary vaccination as an invasion of bodily autonomy that is contrary to Catholic Church teaching, especially in the case of COVID vaccination while she is breast-feeding or pregnant, when the welfare of her child is also implicated.

102. Dr. J., who seeks a religious exemption from COVID vaccination that reflects the beliefs set forth in ¶ 37 (a)-(h), has been advised by hospital management that unless she has the "first shot" of COVID vaccine by September 27, she can no longer have admitting privileges at the hospital.

103. Refusal to receive an abortion-connected COVID-19 vaccine will imminently result in the loss of Dr. J.'s admitting privileges, which will make it impossible to conduct her practice.

104. The loss of privileges due to refusal to comply with the Vaccine Mandate would have to be mentioned in her license renewal statements, which could trigger disciplinary proceedings against Dr. J.

105. There is also the threat that the DOH will make COVID-19 vaccination a condition of renewal or threaten license suspension or revocation in order further to coerce Dr. J. to be vaccinated with a vaccine she does not need in her informed medical judgment, does not want, and cannot take in good conscience.

106. The loss of admitting privileges at the hospital with which Dr. J. is affiliated will also render her unemployable anywhere in the State of New York as no other hospital would grant her admitting privileges under the Vaccine Mandate.

107. Dr. J. will suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Nurse J."

108. Plaintiff J., L.P.N. ("Nurse J."), who is Baptist, is a licensed practical nurse, licensed in the State of New York, who provides home nursing care for two private home care agencies doing business in the Eastern District.

109. Nurse J. has cared for COVID patients on an in-home basis, including a patient who had to be hospitalized for several months, on which occasion Nurse J had to be quarantined for two weeks. Nurse J. developed COVID-like symptoms and believes she has had the virus and thus has acquired natural immunity.

110. While not a Catholic, Nurse J. shares the common beliefs of the plaintiffs, as enumerated above.

111. On September 6, 2021, Nurse J. sent a letter of protest concerning the Vaccine Mandate to the administration of the agencies for which she works, urging them not to capitulate to the State. But on September 7, 2021, Nurse J. was advised by management that there would be no religious exemptions from vaccination, "much to our disappointment."

112. Nurse J. has requested a religious exemption but does not expect to receive one, given the Vaccine Mandate. On September 9, 2021, Nurse J. was advised by the executive

director of one of the agencies that employ her that no religious exemption is possible due to the Vaccine Mandate and that "my hands are tied."

113. Nurse J. is now facing imminent termination of her employment as of October 7, 2021, the compliance date for entities other than hospitals and nursing homes under the Vaccine Mandate. She will also be unemployable anywhere in the State of New York as no other hospital would hire her under the Vaccine Mandate.

114. Nurse J.'s termination will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against her. There is also the threat that the DOH will make COVID-19 vaccination a condition of her license renewal.

115. Nurse J. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation as a further measure of coercion to take a vaccine that in her informed medical judgment she cannot take in good conscience.

116. Nurse J. will suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Dr. M."

117. Plaintiff M., M.D. ("Dr. M"), who is Catholic, is a medical school graduate in the process of completing her residency at a private hospital in the Western District.

118. On August 19, 2021, during the short time the prior Health Order was in effect, Dr. M. received an email from Human Resources advising that all residents must be vaccinated for COVID-19 and that "Information regarding waivers for medical or religious reasons will be available shortly."

119. On August 25, 2021, however, Dr. M. received an email from administration warning that "disregarding the NYS Vaccination Mandate may affect your ability to continue working and training with your residency or fellowship program." There was no indication of an allowance for religious exemptions.

120. On August 30, 2021, Dr. M. received another email from HR advising that "Late last week, the NYS Public Health & Planning Council and the NYS Commissioner of Health *removed the religious exemption* for the recent state mandate requiring all health professionals get vaccinated for COVID-19." Dr. M. was thus barred from obtaining the religious exemption from COVID vaccination that she seeks, based on the religious beliefs enumerated above.

121. In addition to the medical concerns recited in ¶37 (h), Dr. M. has personally witnessed a medical student having a seizure after receiving the one-shot Johnson & Johnson vaccine. She collapsed to the floor and a rapid response team was summoned because she was unresponsive. She recovered with the assistance of the team. These medical facts inform Dr. M.'s religious conviction against involuntary vaccination.

122. On September 3, 2021, the hospital administration further advised Dr. M. by email that she must receive the "first dose" of a COVID vaccine by September 27 and that "Disregarding the NYS Vaccination Mandate may affect your ability to continue working and training with your residency or fellowship program."

123. Dr. M. has met with her program director to discuss her religious objection to COVID vaccination, but was met only with reiteration of the warning that her residency was at risk if she did not accept vaccination.

124. Dr. M. now faces the imminent loss of her residency and thus the destruction of her entire career as she can never become a fully licensed physician and practice independently without completing a residency.

125. Given the Vaccine Mandate, Dr. M. will be unable to find a residency anywhere in the State of New York due to her conscientious religious abstention from vaccination.

126. Further, termination of her residency for refusal to obey the Vaccine Mandate in violation of her religious belief is likely to have adverse consequences for Dr. M.'s licensure in New York or any other jurisdiction.

127. Dr. M. will suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Nurse N."

128. Plaintiff N., B.S.N, R.N.-C.("Nurse N.), who is Catholic, is a Bachelor's-prepared, medical-surgical certified Registered Nurse, licensed in the State of New York, who works at a hospital in the Northern District.

129. On August 19, 2021, Nurse N., under the prior regime that included the Health Order, received an exemption from COVID vaccination on the basis of anticipated pregnancy and current breastfeeding, and thus did not submit an additional request to her employer for religious exemption, which she would have done, based on the beliefs enumerated above, had her request for exemption related to pregnancy and breastfeeding been denied. Nurse N.'s request for exemption was approved as a "vaccination deferral."

130. On September 1, 2021, however, Nurse N. was notified by hospital administration that the Vaccine Mandate had eliminated all exemptions for religion and pregnancy, that her

exemption was thus revoked, and that she must receive at least one dose of a COVID-19 vaccine by September 21.

131. Nurse N. does not accept the view that recourse to abortion-connected vaccines can be justified as "remote" cooperation in abortion. She rejects any medical cooperation in abortion, "remote" or otherwise.

132. Nurse N. also believes and follows the religious teaching of the Congregation for the Doctrine of the Faith that vaccination is not morally obligatory. Nurse N. does not oppose vaccination generally, and is not an "anti-vaxxer," but does oppose government imposition of any medication or vaccine without informed consent, which she views with sincere religious conviction as a violation of the dignity of the human person.

133. Further, Nurse N. has had COVID-19, from which she recovered. As a medical professional who has read the pertinent medical literature, Nurse N. knows that she has natural immunity that is superior to the vaccine-induced immunity that is already fading, that she is in no need of vaccination by any form of COVID vaccine, and that all available COVID vaccines have known and quite serious side effects, including death.

134. Nurse N. also knows that in her county "fully vaccinated" patients now comprise the majority of COVID cases according to testing results (25 out of 41 cases), which is why "health experts" are now calling for "booster shots," which she fears will be demanded of her under the Vaccine Mandate, which requires that employees "continuously" be "fully vaccinated," however many times the government demands. These medical facts inform Nurse N.'s religious conviction against involuntary vaccination as an invasion of bodily autonomy that is contrary to Church teaching.

135. Plaintiff is now facing imminent loss of her employment, which is essential to the support of her family, on account of her religious abstention from COVID-19 vaccination.

136. Nurse N. will also be unemployable anywhere in the State of New York as no other hospital would hire her due to her conscientious refusal to obey the Vaccine Mandate.

137. Nurse N.'s termination will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against her. There is also the threat that the DOH will make COVID-19 vaccination a condition of her license renewal.

138. Nurse N. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation as a further measure of coercion to take a vaccine that in her informed medical judgment she cannot take in good conscience.

139. Nurse N. will suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Dr. O."

140. Plaintiff O., M.D. ("Dr. O."), who is Catholic, is a board-certified General Surgeon, licensed in the State of New York. He is employed by a private hospital in the Northern District.

141. Dr. O. has treated and seen multiple patients for surgical problems (appendicitis, cholecystitis, soft tissue infections and other problems) who have had COVID.

142. On July 13, 2021, Dr. O. was granted a religious exemption from his hospital under the prior Health Order, which allowed for religious exemptions, but this has been revoked on account of the new Vaccine Mandate announced on August 26, removing the provision for religious exemptions.

143. Dr. O. has thus been advised by his employer that, because of the Vaccine Mandate, he must be "fully vaccinated" with an abortion-connected vaccine by September 21, and that "under the emergency regulations the NYS DOH will not permit exemptions or deferrals for sincerely held religious beliefs…" As the employer further advised: "any colleague who was previously approved for one of the above exemptions/deferrals [including religious exemption] will be required to provide proof of [vaccination]…"

144. Dr. O. now faces imminent loss of his privileges at the hospital where he performs surgery. Without admitting privileges, he would not be able to operate a private surgical practice as he would not have the capacity to admit patients to a hospital if need be.

145. The imminent loss of his staff position and hospital privileges will also render Dr. O. unemployable anywhere in the State of New York as no other hospital would hire him under the Vaccine Mandate, given his religiously motivated refusal to follow it.

146. The imminent loss of Dr. O's staff position and hospital privileges will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against him. There is also the threat that the DOH will make COVID-19 vaccination a condition of his license renewal.

147. Dr. O. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation as a further measure of coercion "continuously" to be inoculated with a vaccine that in his informed medical judgment he cannot take in good conscience.

148. Dr. O. will suffer imminent irreparable harm to his occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Dr. P."

149. Plaintiff P., D.O. ("Dr. P."), who is Catholic, is a third-year obstetrics and gynecology resident at private hospital in the Western District.

150. Midway through her first year of training, the COVID-19 pandemic broke out, and Dr. P. cared for many patients infected with the virus, often with limited or no PPE. No vaccination was needed or required for her to treat patients safely.

151. In March 2020, Dr. P. was assigned to an ICU rotation, standard for a first-year resident, during which she helped care for the sickest patients in the hospital, many suffering from COVID. It was during this time that Dr. P. herself became sick with the virus, from which she recovered before returning to work.

152. As a Catholic, Dr. P. intends to practice medicine in line with the moral teachings of the Church, including the beliefs enumerated in ¶ 37 (a)-(h), which is why she chose her current residency program, in reliance on which she and her husband moved from Texas to Buffalo.

153. As a medical doctor who has recovered from COVID, Dr. P. knows that she has natural immunity, shown by numerous studies to be superior to the vaccine-induced immunity that is already fading; that the COVID vaccines now available do not limit viral transmission, as shown by the rising demand for "booster shots" (including a fourth shot in Israel); and that vaccinating a naturally immune person can do more harm than good by provoking a hyper-immune response.

154. On August 19, 2021, during the short time the prior Health Order was in effect, Dr. P. received an email from Human Resources advising that all residents must be vaccinated for COVID-19 and that "Information regarding waivers for medical or religious reasons will be

available shortly." This email also states that "disregarding the NYS Vaccination Mandate may affect your ability to continue working and training with your residency or fellowship program."

155. On August 30, 2021, Dr. P. received another email from HR advising that "Late last week, the NYS Public Health & Planning Council and the NYS Commissioner of Health *removed the religious exemption* for the recent state mandate requiring all health professionals get vaccinated for COVID-19."

156. On September 7, Dr. P. was directed to meet with the OB/GYN department chair, who attempted to pressure her into being vaccinated with the suggestion that, as she had been advised on August 19, "disregarding the NYS Vaccination Mandate may affect your ability to continue working and training with your residency or fellowship program."

157. Dr. P. now faces the imminent loss of her residency and thus destruction of her entire career as she can never become a fully licensed physician and practice independently without completing a residency.

158. Given the Vaccine Mandate, Dr. P. will be unable to find a residency anywhere in the State of New York due to her conscientious religious abstention from vaccination.

159. Further, termination of her residency for refusal to obey the Vaccine Mandate in violation of her religious belief is likely to have adverse consequences for her full licensure in New York or any other jurisdiction.

160. Dr. P. will suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Technologist P."

161. Plaintiff P. ("Technologist P."), who is Catholic, is a Nuclear Medicine Technologist, licensed in the State of New York, who is employed by a private health organization in the Eastern District.

162. On or about August 18, 2021, with the prior Health Order in effect, Technologist P. was advised by her employer that she must be vaccinated with a COVID vaccine unless she obtained a religious exemption, for which she applied on August 26, 2021, with extensive explanation and documentation of her sincere religious belief.

163. After the Vaccine Mandate eliminated religious exemptions on August 26, however, Technologist P. was advised by her employer by email on September 1, 2021, that her pending request for religious exemption had been rejected because "on August 26, 2021, the DOH announced that religious exemptions are not permitted under the State mandate. *It is for this reason* that we are unable to grant your request for a religious exemption."

164. Technologist P.'s employer warned in said email that she must receive at least her "first shot" of one of the abortion-connected vaccines by September 27, 2020 and that "If you choose to not receive your first shot between now and September 27, 2021, you will be non-compliant with the NYS mandate and your continued employment will be at risk."

165. Technologist P. has been further advised by her manager that, as of September 27, if she fails to be vaccinated against her religious belief, her security badge will be deactivated, she will not be able to access her place of employment and will essentially be regarded as a trespasser.

166. In addition to the medical facts recited in ¶ 37 (h), Technologist P. knows of a co-worker who collapsed after vaccination from a severe allergic reaction, requiring the calling of a

code and the administration of Benadryl and steroids for a month, and who returned to work visibly miserable, covered in a rash, itchy, jittery, and shaking. Technologist P. has also observed that 50 percent of her colleagues who contract COVID and are out sick have been "fully vaccinated," and that there is a regular flow of "fully vaccinated" patients being admitted to her hospital.

167. In addition to the medical concerns recited herein above, Technologist P. is breastfeeding, and there are limited data on the safety of COVID vaccines for the breastfeeding child, with reports of infant death following vaccination of the breastfeeding mother. These medical facts inform Technologist P.'s religious conviction against involuntary vaccination as an invasion of bodily autonomy contrary to Church teaching.

168. Technologist P. now faces imminent loss of her employment, as well as loss of her certification in disciplinary proceedings, if she refuses, as she must, any of the available COVID vaccines.

169. Any discharge from employment on account Technologist's P's conscientious and religiously motivated refusal to take any of the available abortion-connected vaccines would have to be reported upon renewal of Technologist P's certification.

170. Plaintiff Technologist P. will thus suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Dr. S."

171. Plaintiff S., D.D.S. ("Dr. S."), who is Catholic, is a board-certified Oral and Maxillofacial surgeon who, in addition to his private practice, is an attending physician with admitting privileges at a hospital in the Northern District.

172. Dr. S. and his partners have treated numerous patients who were sick with COVID without need of vaccination, and Dr. S. thus contracted COVID, from which he recovered. Patients with COVID were not turned away but received dental treatment that was urgently needed.

173. On August 17, 2021, under the then-applicable DOH vaccination requirement, which included the prior Health Order as of August 18, Dr. S. received a religious exemption from COVID-19 vaccination. The exemption was based on his religious convictions as a Catholic, including the beliefs enumerated above.

174. On September 1, however, Dr. S.'s religious exemption was revoked due to the issuance of the Vaccine Mandate, and he was notified by hospital administration that if he fails to provide proof of vaccination by September 21, 2021, his hospital privileges will be suspended.

175. As a licensed physician who has recovered from COVID, Dr. S. knows that he has natural immunity, shown by studies he has reviewed to be superior to the vaccine-induced immunity that is already fading. *See* Exhibit E.

176. The imminent loss of admitting privileges at the hospital with which Dr. S is affiliated will make it impossible to conduct his practice, as he cannot conduct oral and maxillofacial surgery without the ability to admit patients to a hospital if the need arises.

177. The imminent loss of privileges will also render Dr. S. unemployable anywhere in the State of New York as no other hospital would grant him privileges under the Vaccine Mandate.

178. The imminent loss of privileges will have to be reported at the time of license renewal and may well trigger disciplinary proceedings against Dr. S. There is also the threat that the DOH will make COVID-19 vaccination a condition of license renewal.

179. Dr. S. is now also under the threat of disciplinary proceedings by the DOH, including license suspension or revocation as a further measure of coercion to take a vaccine that in his informed medical judgment he cannot take in good conscience.

180. Dr. S. will suffer imminent irreparable harm to his occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Nurse S."

181. Plaintiff S., R.N. ("Nurse S."), who is Catholic, is a registered nurse employed by a hospital in the Northern District.

182. Nurse S. has treated a patient who had recovered from COVID but still decided to be vaccinated. After receiving the second dose of the vaccine, this patient needed high-flow oxygen to survive and was not able to get out of bed or even turn over without exacerbation of her condition.

183. On August 15, 2021, before the Vaccine Mandate removed religious exemptions, Nurse S. applied for a religious exemption from the employing hospital, based on the beliefs enumerated above. Nurse S.'s request for religious exemption advised in particular that she could not take any of the available COVID-19 vaccines because of their connection to aborted fetal cell lines, citing the analysis of each vaccine by the Charlotte Lozier Institute. Nurse S. advised that "is my Catholic duty to refuse the injection."

184. In addition to the medical concerns recited herein above, Nurse S. intends to have children, and she is aware that there is a lack of data on the effect of the available COVID vaccines on pregnancy and post-partum development of children, given that the vaccines have

been available for less than year. These medical facts inform Nurse S.'s religious conviction against involuntary vaccination.

185. On September 1, 2021, Nurse S. was advised by the hospital administration that due the Vaccine Mandate, as of August 26, 2021 the State will not permit exemptions for sincerely held religious beliefs, that "we are required to comply with state law" and that every member of the staff must have at least one dose of a two-dose COVID vaccine, or a single dose vaccine by September 21, 2021.

186. Nurse S., who is just beginning her nursing career, now faces imminent termination of her employment and will be unemployable as a nurse anywhere in New York State due to the Vaccine Mandate, as well as possible license suspension or disciplinary proceedings due to termination for "insubordination."

187. Nurse S. will thus suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

Plaintiff "Physician Liaison X."

188. Plaintiff X. ("Physician Liaison X"), who is Catholic, is a physician liaison manager for a major cancer center in the Southern District. Her job has been 100% remote for the past 18 months.

189. Last month, Physician Liaison X.'s employer began mandating COVID vaccinations for all employees, but with religious and medical exemptions allowed under the prior Health Order. That policy changed on September 1, 2021, when her employer announced by email that the Vaccine Mandate had eliminated all religious exemptions, that the employer could no longer grant religious exemptions, and that any religious exemptions granted would be

revoked. Physician Liaison X. is thus barred from obtaining the religious exemption she seeks, based on the religious beliefs enumerated above, which she holds in common with the other plaintiffs.

190. Physician Liaison X. now faces imminent loss of her employment and severe damage to her professional reputation and future employment in the extremely competitive sector of the medical executive class.

191. Physician Liaison X. will thus suffer imminent irreparable harm to her occupation, reputation, and professional standing in the absence of injunctive relief barring enforcement of the Vaccine Mandate.

COUNT I

VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRSTAMENDMENT TO THE UNITED STATES CONSTITUTION. (42 U.S.C. § 1983)

192. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-191 above as if fully set forth herein.

193. The Free Exercise Clause of the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, prohibits the State from abridging Plaintiffs'rights to free exercise of religion.

194. Plaintiffs have sincerely held religious beliefs that compel them to refuse vaccination with abortion-connected vaccines.

195. Plaintiffs reallege the discussion of their sincerely held religious beliefs as set forth in all the preceding paragraphs.

196. The Vaccine Mandate, on its face and as applied, targets Plaintiffs' sincerely held religious beliefs by requiring the revocation of revoking religious exemptions previously

granted by their employers or by prohibiting them from seeking and receiving exemption and accommodation for their sincerely held religious beliefs from their employers, with the employers citing the Vaccine Mandate as the grounds for refusing even to consider exemption requests.

197. The Vaccine Mandate, on its face and as applied, impermissibly burdens Plaintiffs' sincerely held religious beliefs, compels them to abandon their beliefs or violate them under coercion, and forces Plaintiffs to choose between their religious convictions and the State's patently unconstitutional value judgment that their religious beliefs are of no account and cannot be considered by employers.

198. The Vaccine Mandate strips Plaintiffs, adult medical professionals, of the right to religious exemption secured by state statute even for 17-year-old college students, who can obtain an exemption by merely submitting "a written and signed statement from the student (parent or guardian of students less than 18 years of age) that he/she objects to immunization due to his/her religious beliefs." *See* Public Health Law § 2165, Immunization Requirements for Students, https://tinyurl.com/4byd8s56.

199. The Vaccine Mandate even eliminates the protection for religion and the allowance of religious exemptions under the prior Health Order, which was revised to exclude religious accommodation on or about August 26, 2021, only days ago.

200. The Vaccine Mandate, on its face and as applied, places Plaintiffs in an irresolvable conflict between compliance with the mandate and their sincerely held religious beliefs.

201. The Vaccine Mandate, on its face and as applied, puts substantial pressure on Plaintiffs to violate their sincerely held religious beliefs or face loss of their occupations, professional standing, licenses, reputations, and ability to support their families.

202. The Vaccine Mandate, on its face and as applied, is neither neutral nor generally applicable as it grants the possibility of medical exemptions for reasons of secular "health" but bars religious exemptions according to the State's unconstitutional value judgment that physical health is less important than spiritual health.

203. The Vaccine Mandate, on its face and as applied, thus targets Plaintiffs' religious beliefs for disparate and discriminatory treatment.

204. The Vaccine Mandate, on its face and as applied, creates a system of individualized exemptions for preferred exemption requests based on physical health, while discriminating against requests for exemption and accommodation based on sincerely held religious beliefs.

205. The Vaccine Mandate, on its face and as applied, is a religious gerrymander that, only days after promulgation of the Health Order allowing religious exemptions, excluded sincerely held religious beliefs from any form of accommodation while permitting state-favored medical exemptions.

206. There is no legitimate, rational, or compelling interest in the Vaccine Mandate's exclusion of exemptions and accommodations for sincerely held religious beliefs, especially given the following facts: (a) those exempted for reasons of "health" are no less susceptible of contracting and spreading COVID (the prevention of which is the very reason for the Vaccine Mandate) than those who would be exempted for reasons of religion (b) that the available COVID-19 vaccines are clearly failing to prevent transmission or infection, so that "booster shots" are now being promoted; (c) even the vaccinated must continue to wear masks as if they were not vaccinated because they can still be infected *or infect others*; (d) that naturally immune persons who have recovered from COVID have superior immunity and do not need

vaccination; (e) that vaccinating naturally immune people may harm them by causing a hyperimmune response; and (f) that vaccinated persons are being admitted to the hospital along with unvaccinated persons.

207. The Vaccine Mandate is not the least restrictive means of achieving an otherwise permissible government interest, which could be achieved by the same protective measures (masking, testing, quarantining, etc.) already being required of the vaccinated and the unvaccinated alike (including those exempted for health reasons).

208. The Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship to Plaintiffs from violation of their sincerely held religious beliefs and the occupational, professional, social and economic consequences pleaded above.

209. Plaintiffs have no adequate remedy at law to prevent the continuing violation of their constitutional liberties and sincerely held religious beliefs.

COUNT II

VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTIONBY (42 U.S.C. ¶ 1983))

210. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-209 as if fully set forth herein.

211. The Supremacy Clause provides:

> **This Constitution, and the Laws of the United States** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land**; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Lawsof any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 22 (emphasis added).

212. The Vaccine Mandate, both facially and as applied, compels employers of health care workers in the State of New York to disregard Title VII's protection against employment discrimination on account of religion, forbidding any accommodation of religious belief whatsoever and even requiring the revocation of previously granted religious exemptions from COVID vaccination.

213. The Vaccine Mandate thus requires actions that federal law forbids, which renders the Vaccine Mandate null and void. *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 486 (2013).

214. All of Plaintiffs' employers have 15 or more employees and are subject to the requirements of Title VII.

215. By attempting to preclude application of Title VII in the State of New York in the case of COVID vaccination, the Vaccine Mandate patently violates the Supremacy Clause.

216. In particular, the Vaccine Mandate purports to negate Title VII's requirement that employers provide reasonable accommodations to individuals with sincerely held religious beliefs, and even flatly prohibits religious exemption or accommodation requests, as the employers noted above have indicated.

217. By purporting to place themselves and their mandate outside the protections of both Title VII and the First Amendment, Defendants have violated the basic constitutional principle that "federal law is as much the law of the several States as are the laws passed by their legislatures." *Haywood v. Drown*, 556 U.S. 729, 734 (2009) (emphasis added).

218. The Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship to Plaintiffs from violation of

their sincerely held religious beliefs and the occupational, professional, social and economic consequences pleaded above.

219. Plaintiffs have no adequate remedy at law for the continuing deprivation of their statutory rights under Title VII as secured by the Supremacy Clause.

COUNT III

VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION (42 U.S.C. § 1983)

220. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1-209 above as if fully set forth herein.

221. The Fourteenth Amendment to the United States Constitution guarantees Plaintiffs' right to equal protection under the law.

222. The Vaccine Mandate, on its face and as applied, is an unconstitutional abridgment of Plaintiffs' right to equal protection, is not neutral, and specifically targets Plaintiffs' sincerely held religious beliefs for discriminatory and unequal treatment as compared with the medical exemptions favored by the State's impermissible, anti-religious value judgment.

223. The Vaccine Mandate, on its face and as applied, is an unconstitutional abridgement of Plaintiffs' right to equal protection because it permits the State to treat Plaintiffs differently from similarly situated healthcare workers solely on the basis of Plaintiffs' sincerely held religious beliefs.

224. The Vaccine Mandate, on its face and as applied, singles out Plaintiffs for selective treatment based upon their sincerely held religious objections to the COVID-19 vaccines.

225. The Vaccine Mandate, on its face and as applied, was clearly designed to slam shut what Defendants undoubtedly viewed as a large potential "escape hatch" from their planned regime of brute coercion to be vaccinated under penalty of personal and professional destruction, which regime has no precedent in the history of the United States. This is shown by the Vaccine Mandate's abrupt excision of religious protection and religious accommodation from the prior Health Order, issued only days before. The intent is clearly to leave religious believers with no choice but to violate their religious beliefs to keep their jobs and avoid professional destruction and financial hardship.

226. The Vaccine Mandate, on its face and as applied, creates a system of classes and categories that improperly accommodates exemptions for the class of healthcare workers concerned with bodily health while denying exemption to the class of health care workers concerned with spiritual health above bodily health, including all the Plaintiffs herein.

227. The Vaccine Mandate, reversing the State's policy of only days before, arbitrarily and capriciously attempts to deny Plaintiffs and others similarly situated the protection for religion and the requirement of religious accommodation under both the Human Rights Law of the State of New York and the Human Rights Law of the City of New York, as well as the parallel the protections of Title VII, while leaving untouched protections under the same statutes for other protected classes, including by allowing exemptions for reasons of "health" but not religion.

228. The Vaccine Mandate arbitrarily and capriciously denies to adult medical workers with expert knowledge of vaccination and its risks the same religious exemption from vaccination available to any college student under Public Health Law § 2615, as pleaded above.

229. By purporting to negate statutorily required religious accommodations from consideration in the State of New York, Defendants, via the Vaccine Mandate, have singled out for disparate treatment the specific class of healthcare employees whose motive for seeking exemption from vaccination is religious rather than medical.

230. Further, Nurse J, Nurse N, Dr. P, and Dr. S have all previously had COVID or COVID-like symptoms and, on information and belief, have natural immunity at a level no less than, and likely far more than, the immunity purportedly offered by available COVID vaccines. (See Exhibit E.)

231. There is no rational, legitimate, or compelling interest in the Vaccine Mandate's application of different standards to different, similarly situated groups in the field of healthcare.

232. The Vaccine Mandate, on its face and as applied, discriminates between religion and nonreligion by allowing nonreligious exemptions to the Vaccine Mandate while prohibiting religious exemptions.

233. The Vaccine Mandate, on its face and as applied, is a "status-based enactment divorced from any factual context" and "a classification of persons undertaken for its own sake," which "the Equal Protection Clause does not permit." *Romer v. Evans*, 517 U.S. 620, 635 (1996). The Vaccine Mandate, on its face and as applied, "identifies persons by a single trait [religious beliefs] and then denies them protections across the board." *Id.*at 633.

234. The Vaccine Mandate, on its face and as applied, by allowing medical exemptions while denying religious exemptions, is a "disqualification of a class of persons from the right to seek specific protection [for their religious beliefs]." *Id.*

235. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek [an exemption from the COVID-19 Vaccine Mandate] is itself a

denial of equal protection of the laws in the most literal sense." *Id.* The Vaccine Mandate, on its face and as applied, is such a measure.

236. The Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship to Plaintiffs from violation of their sincerely held religious beliefs and the occupational, professional, social and economic consequences pleaded above.

237. Plaintiffs have no adequate remedy at law for the continuing deprivation of their rights under the Equal Protection Clause.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for relief as follows as to all Counts:

(A). A statewide temporary restraining order and/or preliminary injunction, followed by a permanent injunction, restraining and enjoining the Defendants, their officers, agents, employees, attorneys and successors in office, and all other persons in active concert or participation with them, from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with the Vaccine Mandate such that:

(1) The Vaccine Mandate is suspended in operation to the extent that the Department of Health is barred from enforcing any requirement that employers deny religious exemptions from COVID-19 vaccination or that they revoke any exemptions employers already granted before the Vaccine Mandate superseded the prior Health Order to exclude religious exemptions, including the exemptions already granted to certain of the Plaintiffs herein;

(2) The Department of Health is barred from interfering in any way with the granting of religious exemptions from COVID-19 vaccination going forward, or with the operation of exemptions already granted under the prior Health Order;

(3) The Department of Health is barred from taking any action, disciplinary or otherwise, against the licensure, certification, residency, admitting privileges or other professional status or qualification of any of the Plaintiffs on account of their seeking or having obtained a religious exemption from mandatory COVID-19 vaccination.

(B). A declaratory judgment declaring that the Vaccine Mandate, both on its face and as applied by Defendants, is unconstitutional, unlawful, and unenforceable in that:

(1) the Vaccine Mandate violates the Free Exercise Clause of the First Amendment by depriving Plaintiffs and others similarly situated of the free exercise of religion under a measure that is neither neutral nor generally applicable but rather favors secular over religious reasons for exemption from COVID-19 vaccination and specifically targets for elimination the religious exemptions provided only days earlier under the superseded Health Order;

(2) the Vaccine Mandate violates the Supremacy Clause by purporting to strip Plaintiff and others similarly situated of statutory and constitutional protections for religion and religious accommodation under federal law;

(3) the Vaccine Mandate violates the Equal Protection Clause of the Fourteenth Amendment by purporting to strip Plaintiffs and others similarly situated of state and federal statutory protection from discrimination in the matter of vaccination solely because of the religious grounds on which Plaintiffs seek protection.

(C). An award of reasonable costs and expenses of this action, including a reasonable attorney's fee, in accordance with 42 U.S.C. § 1988; and

(D). Such other and further relief as the Court deems equitable and just under the circumstances.

Dated: September 13, 2021

Respectfully submitted,

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VERIFICATION

I, Dr. A, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on September 9TH 2021

Dr. A

VERIFICATION

I, Dr. C, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9-9-2021

VERIFICATION

I, Dr. F, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9-9-2021

Dr F

VERIFICATION

I, [redacted] am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/7/2021

[redacted]

Dr. G.

VERIFICATION

I, Dr. J, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/11/21

Dr. J.

VERIFICATION

I, Dr. M, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct. based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness. I would and could do so competently. I declare under penalties of perjury, under the laws of the United States. that the foregoing statements are true and correct.

Executed on 9/12/2021

Dr. M.

VERIFICATION

I, [redacted], am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/9/2021

[redacted]

Dr. O

VERIFICATION

I, Dr. P, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on September 10, 2021

Dr. P

VERIFICATION

I, Dr. S, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/9/21

S

Dr. S

VERIFICATION

I, Nurse A, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/11/21

Nurse A.

VERIFICATION

I, [redacted], am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/9/21 [redacted]

Nurse D

- **VERIFICATION**

I, Nurse J, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/9/2021

Nurse J

VERIFICATION

I, Nurse N, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on Sept 11, 2021

Nurse N

VERIFICATION

I, Nurse S, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/10/21

Nurse S

VERIFICATION

I, Physician Liaison X, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/12/21

Physician Liaison X

VERIFICATION

I, Technologist P., am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 9/9/2021

Technologist P.
Technologist P.

VERIFICATION

I, Therapist I, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed on 10 SEPTEMBER 2021

Therapist I

Therapist I

EXHIBIT 11

Thomas More SOCIETY

A national public interest law firm defending life, family and religious liberty.

September 17, 2021

By ECF
Honorable David N. Hurd
United States District Judge
Alexander Pirnie Federal Bldg. and U.S. Courthouse
10 Broad Street Utica, New York 13501

Re: Dr. A., et al., v. Hochul, et al., 21-CV-1009 (DNH)(ML)

Dear Judge Hurd:

Plaintiffs strongly oppose the Defendants' application to schedule oral argument on Plaintiffs' motion for a preliminary injunction on Friday, September 24, 2021, instead of Wednesday, September 28, 2021, as provided in the Court's Order granting the TRO. The reasons for our opposition are as follows:

1. The Defendants' written opposition is due on Wednesday, September 22 at 5 p.m. Given that plaintiffs' counsel would have to travel to Utica on September 23, they would have less than one business day—literally only a few hours—to review, research and digest that response and prepare to rebut it at oral argument.

2. Plaintiffs' counsel are involved in other litigated matters that are very pressing next week, including co-counsel McHale's TRO application in another state, as well as assisting the clients in this matter respecting religious exemptions which, due to the TRO, are now being granted (multiple plaintiffs) or reconsidered (multiple other plaintiffs).

3. We were dismayed to learn that the Defendants have relied on this Court's TRO in arguing *against* expedited proceedings in the Second Circuit in *We the Patriots USA, Inc. v. Hochul*, No, 21-2179, an appeal from denial of a TRO against the Vaccine Mandate in the Eastern District, at the same time they argue in *favor* of expediting proceedings this case even more than they have already been expedited. (See attached letter from Assistant Solicitor Grube to the Clerk of the Second Circuit.)

4. The Defendants argue for the September 24th date on the grounds that "Defendants may fully present their positions to the Court in advance of September 27, 2021, the effective date of the challenged regulation." But the effective date of the challenged regulation is August 26, 2021, whereas the deadline for compliance is September 27. In any case, this is no reason to schedule argument on the 24th versus the 28th of September.

In sum, Plaintiffs would be severely prejudiced by the Defendants' proposed impossible time constraint, which appears to serve no other purpose than unfairly to advantage the Defendants. We urge the Court to deny the State's request.

Respectfully submitted,

s/Michael G. McHale
Michael G. McHale, Esq.
(N.D.N.Y. Bar No. 701887)
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c: All counsel of record (via ECF)