

No.

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IN THE  
**Supreme Court of the United States**

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ANTHONY MARCIANO, INDIVIDUALLY AND ON BEHALF OF ALL  
OTHER INDIVIDUALS SIMILARLY SITUATED,

*Applicant,*

*v.*

ERIC ADAMS, MAYOR OF THE CITY OF NEW YORK, IN HIS OFFICIAL  
CAPACITY; ASHWIN VASAN, COMMISSIONER OF HEALTH AND  
MENTAL HYGIENE, IN HIS OFFICIAL CAPACITY; KEECHANT SEWELL,  
POLICE COMMISSIONER, IN HER OFFICIAL CAPACITY; THE NEW  
YORK CITY BOARD OF HEALTH; AND THE CITY OF NEW YORK,

*Respondents.*

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE UNITED STATES  
SUPREME COURT AND ACTING CIRCUIT JUSTICE FOR THE SECOND CIRCUIT

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**EMERGENCY APPLICATION FOR WRIT OF INJUNCTION**

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## **IDENTITY OF PARTIES**

The Applicant is ANTHONY MARCIANO, appearing on behalf of himself, and all others similarly situated. Applicant was the Plaintiff in the action\proceeding originating in New York State Supreme Court, and Plaintiff upon removal in the United States District Court for the Southern District of New York, and is the current Appellant-Plaintiff in the United States Court of Appeals for the Second Circuit.

Respondents are ERIC ADAMS, in his official capacity as Mayor of the City of New York, ASHWIN VASAN, in his official capacity as Commissioner of the New York City Department of Health and Mental Hygiene, KEECHANT SEWELL, in her official capacity as Commissioner of the New York Police Department, THE NEW YORK CITY BOARD OF HEALTH, and THE CITY OF NEW YORK. Respondents (“City”) were the Defendants in the United States District Court for the Southern District of New York and are the Appellees in the United States Court of Appeals for the Second Circuit.

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**TO THE HONORABLE SONIA SOTOMAYOR,  
ASSOCIATE JUSTICE OF THE SUPREME COURT AND  
ACTING CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:**

Applicant Anthony Marciano, on behalf of himself and all others similarly situated, brings this legal challenge seeking a Stay in this Honorable Court, and to ultimately, strike down an Emergency Use Authorized (EUA) Covid 19, adult- vaccination-mandate being imposed on him, and all New York City municipal workers, as a newly, created condition of employment with the City of New York. The EUA Covid 19 vaccination mandate at issue requires all NYC municipal employees to either submit to a Covid 19 vaccination, or be fired, losing any accrued time, vested pension, health benefits, and sadly, ending many careers.

The EUA Covid 19 mandate went into effect on October 20, 2021, and was supplemented on October 31, 2021, (collectively the “Vaccination Orders”), authorized in an Emergency Executive Order No. 98, signed March 12, 2020, by the former Mayor of New York City, Bill de Blasio. (App. 145 to App. 154). Your Applicant now comes before the Supreme Court, respectfully, seeking a Stay, to restore a State Court Temporary Restraining Order (TRO) that was granted to Appellant on December 14, 2020, but then dissolved in error, upon removal of the case by the City Respondents to the District Court on December 15, 2020, after losing in State Court. (App. 2: 87 to 135; App. 6: 132 - 161).

On October 20, 2020, the challenged Vaccination Orders went into effect, signed by the NYC Commissioner of Health and Mental Hygiene, requiring an EUA Covid 19 vaccination for all NYC City municipal employees, and Certain City contractors. (App. 7 & 8: 145 – 154). Applicant’s claim is that an EUA Covid 19 adult vaccination is prohibited by state and federal law in NYS from being mandated on adults, and, thus, the mandate is violating *inter alia* due process to refuse informed consent, rendering the Vaccination Orders void *ab initio*. Id.

A majority of this Court would likely agree the Mayor of the City of New York has no executive authority that permits him to mandate an EUA Covid 19 vaccination, that is prohibited under existing NYS and federal laws from being imposed on any adult in NYC, employee or otherwise. Nonetheless, the challenged adult-vaccination-mandate requires all NYC municipal workers receive an EUA Covid 19 vaccination, with or without requisite informed consent, and/or with or without a Judicial Order of Quarantine PHL §2120 (3), required by state and federal law, or be fired. *Id.*

Although exemptions for medical and religious reasons were ostensibly permitted, out of an estimated 6000 exemption requests from members of the N.Y.P.D. alone, an estimated 97% have been denied. (*App.* 3: 69). Approximately, 1500 municipal workers have been fired thus far for refusing the EUA Covid 19 vaccination, and thousands more are still waiting for determinations on exemption appeals, to previously denied religious and medical exemptions, that will likely be terminated also. Thousands of other municipal employees and City residents have already acquiesced to the vaccination mandate(s) under duress, and many municipal employees face booster vaccinations to continue working in NYC without informed consent provided. (*App.* 91 – 92).

Applicant now comes before the Supreme Court seeking a Stay, reinstating the dissolved State Court TRO, while his current appeal is pending in the Second Circuit. The Vaccination Orders should be Stayed because, among other reasons, the mandate is violating the due process rights of those adults affected withholding informed consent, and is causing them continuing, and future irreparable harm. Appellant, respectfully, asserts that a majority of this Court would likely agree that an EUA Covid 19 vaccination, adult-mandated is prohibited by state and federal law in NYS, without uncoerced, informed consent. New York Public Health Law, PHL §

206(1)(l); New York Public Health Law, PHL § 613; *see also Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018).

On June 24, 2021, the former Governor of the State of New York, Andrew Cuomo announced the “Covid 19 Emergency” was over in NYS. The Governor’s unprecedented “Emergency Powers,” extended to him on March 7, 2020, in Executive Law 202 by the NYS legislature were fully rescinded on June 24, 2021, in Executive Law 205, and not a minute too soon. This unprecedented delegation of power by the NY Legislature to Governor Cuomo, to create and suspend laws and directives in response to the coronavirus was, in and of itself, an unconstitutional delegation of authority, violating the Separation of Powers Doctrine. (See Appendix 9: 2dc D.E. 100 @ pg. 1, Appellant’s Opening Brief).

In October of 2021, four (4) months after the Covid 19 emergency was declared over by former Governor Cuomo, former Mayor Bill de Blasio spontaneously, granted unto himself similar, extraordinary “Emergency Powers” to impose a series of unprecedented Covid 19 restrictions and mandates (App. 25 to 26, 39, 44), including the now rescinded “Key to NYC”, requiring vaccination passports to enter public buildings in the five boroughs of the City (App. 146), and the municipal employee Vaccination Orders, that are still effect and at issue in this case, that require all municipal employees receive the EUA Covid 19 vaccination(s) or be fired. (App. 146 – 151).

This Court in *National Federation of Independent Business, et al., (NFIB) v. Department of Labor*, et al., No. 21A244 (Jan. 13, 2022), *per curiam*, granted a stay to the Occupational Safety & Health Administration’s (“OSHA”) challenged rule, mandating that employers with at least 100 employees require covered workers receive a COVID–19 vaccine, or submit to weekly PCR testing. The holding in *NFIB* is the legal authority applicable to Applicant’s claims in this

case, challenging the Vaccination Orders, that are imposing an even stricter mandate than the OSHA's rule stayed by this Court earlier this year, that provides no testing option or alternative, and requires all City municipal workers to be either vaccinated with Covid 19 or be terminated for cause. (App. 146 – 155).

This Court's determination in *NFIB*, upholding the Fifth Circuit's stay in *BST Holdings, L.L.C. v. Occupational Safety and Health Admin.*, 17 F. 4th 604, 609 (CA5 2021), has, respectfully, been overlooked here by the Second Circuit in denying Your Applicant nearly identical relief to Stay the Vaccination Orders. Each day more and more municipal workers are being fired for refusing the EUA Covid 19 mandate in a City riddled with crime, and rapidly decaying, in need of more, not less, skilled municipal workers.

The Applicant, and all others similarly situated, are facing termination of employment for refusing informed consent to the Covid 19 employee mandate or have been fired already. Thus far approximately 1500 municipal workers have been fired for refusing the Covid 19 mandate, many others acquiesced under duress. The municipal workers who acquiesced are now facing more and more booster vaccines, even though by all accounts the Covid 19 emergency is over and was declared over in NYS by Governor Cuomo in June of 2021, four (4) months before the adult mandate was imposed in the Mayor's October 20, 2021, Emergency Order. (App. 108 to 109).

The Second Circuit erred in denying the Stay because municipal employees are suffering a continuing, and future, irreparable harm that no money damage award could compensate, and moreover, any damages are speculative at best due immunity, sweeping federal preemption and liability protections for all EUA Covid 19 Countermeasures covering all liability claims. (App. 1 to 2, 57 to 62, 91).

The only currently available Covid 19 vaccination being distributed in the United States is designated as an Emergency Use Authorized (EUA) drug (App. 4, 91-93, 100, 106) and is an unlicensed, vaccination prohibited by state and federal law in NYS from being mandated upon anyone without uncoerced, informed consent. (A-100, 106, 132). Upon information and belief, the *licensed* versions of the Covid 19 vaccinations are just that *licensed* but have no actual products behind them currently being distributed in the United States. This is likely due to a current lack of no-fault, liability protection to the pharmaceutical companies for injuries resulting from a licensed product. In contrast, an EUA Covid 19 vaccination's use implies informed consent, and this eliminates complete liability to the manufacturers as a Covid 19 covered countermeasure. Thus, it is precisely because of the no-fault liability to the manufacturer, current federal and state law prohibit EUA drugs and products from being mandated in NYS. (Appendix 9, 2dc Dkt. # 100 at. Pgs. 13-16, Appellant's Opening Brief).

There is a split in the Circuits on the lawfulness of the EUA Covid 19 vaccination mandates. In *BST Holdings*, the Fifth Circuit addressed the lack of emergency and arbitrariness of the federal OSHA mandates concisely, and preliminary restrained them. On January 26, 2022, OSHA officially withdrew the mandate. Applicant, respectfully, seeks for this Honorable Court to rule the same when it upheld the Fifth Circuit stay in *BST Holdings*. Indeed, to see the comparison between *BST Holdings* and this case, one need only swap out the name "Joe Biden" for "Eric Adams" and substitute "OSHA mandate" for "Vaccination Orders" to readily determine just how arbitrary and capricious Covid 19 mandate really is being applied to municipal workers refusing informed consent.

According to a study done by Harvard Pilgrim Healthcare, Inc., less than 1% of adverse vaccination reactions are reported to the federal Vaccine Adverse Event Reporting System

(VAERS).<sup>1</sup> This is a significant finding because since December 11, 2020, when the first Emergency Use Authorized (EUA) Covid 19 vaccination became available, VAERS has reported as of June 10, 2022: 28,859 Deaths, 53,989 Permanent Disabilities, and 163,121 Hospitalizations attributed to the EUA Covid 19 vaccinations currently being distributed in the United States. The EUA Covid 19 vaccination is designed to target an allegedly, man-made coronavirus, that first was reported by health officials sometime in November of 2019, causing worldwide pandemonium, fear, hysteria and millions of unconfirmed, reported deaths.

A CDC Nationwide blood donor seroprevalence survey estimates that 94.7% of the U.S. population has developed antibodies against SARS-CoV-2 (the virus which causes the disease Covid 19) either from natural infection or vaccination.<sup>2</sup> A 2021 Johns Hopkins Mortality Analysis reported a 98.7% survival rate if infected with Covid 19. This is promising news to all Americans who were terrified by Covid 19, and its global death, destruction and hysteria.<sup>3 4</sup>

### **OPINIONS BELOW**

The decisions in this case in the lower courts are styled either *Marciano v. De Blasio* (for all filings submitted when Mr. Bill de Blasio was the Mayor of the City of New York) or *Marciano v. Adams* (for those filings submitted when Mr. Eric Adams was the Mayor). The Order of the United States Court of Appeals for the Second Circuit, dated August 2, 2022,

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<sup>1</sup> <https://digital.ahrq.gov/sites/default/files/docs/publicationr18hs017045-lazarus-final-report-2011.pdf>

(fewer than 1% of vaccine adverse events are reported. Low reporting rates preclude or slow the identification of “problem” drugs and vaccines that endanger public health). Last retrieved 6 24 22.

<sup>2</sup> Nationwide COVID-19 Infection and Vaccination-Induced Antibody Seroprevalence (Blood donations) <https://covid.cdc.gov/covid-data-tracker/#nationwide-blood-donor-seroprevalence>

<sup>3</sup> <https://coronavirus.jhu.edu/data/mortality> (See Covid-19 Morality rate in the United States). Last retrieved 6 24 22

<sup>4</sup> <https://openvaers.com/covid-data>. Last retrieved 6 24 22.

denying Applicant's request for an injunction pending appeal, is attached hereto as Appendix 1 (the "Second Circuit Order"). The Order of the United States District Court for the Southern District of New York, dated March 8, 2022, dismissing the Applicant's federal and state law claims with prejudice, is attached hereto as Appendix 2. The Order of the United States District Court for the Southern District of New York, Dated December 29, 2021, vacating the Applicant's state court temporary restraining order (the Applicant's "TRO"), is attached hereto as Appendix 3 (the "TRO Order").

The transcript of the District Court's hearing on the City's motion to vacate the State Court TRO, held on December 29, 2021, which includes the District Court's reasons for dissolving the TRO Order, is attached hereto as Appendix 4. The transcript of the District Court's hearing on the City's motion to dismiss the Applicant's complaint, held on February 28, 2022, is attached hereto as Appendix 5. The transcript of the New York State Court's hearing and bench ruling granting the Applicant's motion for a temporary restraining order, held on December 14, 2021, which includes the bench ruling and reasons for granting TRO, is attached hereto as Appendix 6. A copy of the October 20, 2020, Vaccination Order is attached hereto as Appendix 7, and a copy of the October 31, 2020, Supplemental Order ("Vaccination Orders") is attached hereto as Appendix 8. A copy of the docket for this case in the Second Circuit Court of Appeals is attached hereto as Appendix 9.

The docket number in the United States District Court for the Southern District of New York is 21-cv-10752, and the docket number in the United States Court of Appeals for the Second Circuit is 22-570.

## **JURISDICTION**

This Court has jurisdiction over the Emergency Application for a Stay under 28 U.S.C. § 1254 (1), and the All Writs Act, 28 U.S.C. §1651.

## **STATEMENT OF THE CASE**

Currently pending in the Second Circuit is the Applicant's Opening brief seeking to reverse Judgment entered March 15, 2022, (App. 3 to 32) incorporating the Memorandum and Order of the Hon. Jed S. Rakoff dated March 13, 2022, dismissing Applicant's lawsuit with prejudice pursuant to Rule 12 (b)(6), for failure to state a claim. *Id.* Applicant now comes before this Court with a renewed request for an Emergency Stay, denied by the Second Circuit (App. 1 to 2), to reinstate the State Court TRO, which was dissolved in error upon removal to the District Court. (App. 248 - 284). Applicant requested below either review in the Second Circuit of Applicant's claims *de novo* with a preliminary injunction while the Appeal is pending, that stay being denied, or to reinstate the State Court TRO, and *Certify a Question of Law* back to the NYS Court of Appeals, on the state Court's highest ruling in *Garcia vs. NYC Dept. of Health and Mental Hygiene*, and its holding on the preemption of adult vaccination mandates in NYS. PHL §206(1)(l), PHL §613, PHL §2180–§2182. Also see 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III), *Emergency Use Authorizations (EUA)*.

A majority of this Court would likely agree reinstatement of the State Court TRO by this Court in the form of Stay is just and proper because, among other reasons, removal to the District Court, and dissolution of the state Court TRO by Judge Rakoff was an abuse of discretion overlooked in the Second Circuit. (App. 32-34, 71 - 85).



Applicant, Anthony Marciano, is a Detective with the New York City Police Department with a stellar performance record and ten (10) years of dedicated service to the police department and residents of the City of New York. (App. 131). He is by all accounts a hero.<sup>5</sup> Applicant was deemed an essential worker and reported for duty throughout the early stages of the virus when its consequences were uncertain and predicted to be dire. Fortunately, Covid 19 has turned out to be far less lethal than forewarned by the experts leading the US Covid 19 Countermeasure response including Anthony Fauci, M.D., Bill Gates of Microsoft, Klaus Schwab of World Economic Forum (WEF), and other notable pandemic influencers. Today, many effective treatments for the disease are widely available too. By all accounts the emergency is over. (App. 131 to 132).

Applicant is refusing coerced, informed consent to the EUA Covid 19 Countermeasure, adult-vaccination-mandate because, among other reasons, he acquired natural immunity as a front-line worker when he was exposed to Covid 19 in the early stages of the virus—a clear benefit of putting himself in harm’s way in service to the citizens of the City of New York. (App. 49, 79-80, 94, 100, 108, 130). The EUA Covid 19 vaccination has simply too many adverse consequences that Applicant is unwilling to risk, which is his legal, due process right to refuse in NYS (App. 80). See PHL §206(1)(l), PHL §613, PHL §2120(3), 24 RCNY §11.23; PHL §2442, PHL §2180-§2182; 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(I-III) (SDNY ECF No. 35). Also see *Garcia v. N.Y.C. Dep’t of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018).

Applicant is a husband and father of three small children, he cannot and will not assume the health risks associated with an illegal, experimental EUA drug he does not need, and by law

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<sup>5</sup> <https://nypost.com/2022/06/04/eric-adams-praises-nypd-for-arrest-in-killing-of-chinese-food-delivery-man/>

does not have to submit to as part of his job, without informed consent (A131-132). Id. See PHL §2120(3), 24 RCNY §11.23, PHL §2442. Applicant is refusing because an adult mandate is illegal in NYS without informed consent in the absence of a Judicial Order of Quarantine. Id. (App. 100, App. 132). When an experimental drug is being involuntarily imposed on anybody in NYC, the Board of Health must petition the Supreme Court for a Judicial Order of Quarantine, when informed consent is withheld. Id. (App. 100, 133).

PHL §2120(3), affords all municipal workers broad due process protections, such as Notice, an appointment of counsel, and the right to examine evidence in a due process hearing to refuse any drug or treatment, including EUA products. PHL §2120(3) shifts burden of proof to the City to prove there is a compelling government interest to be served, and the vaccination is the “least restrictive” alternative for achieving the public health objective. (App. 79, 100, 107 to 108).

There is a balancing required by the legislature between a compelling government interest versus a fundamental personal right and, where there is a communicable disease health threat, that balance may well shift to the government. *Eichner v. Dillon*, 73 A.D.2d 431, 455 (2d Dep’t 1980). Id. *O’Connor v. Donaldson*, 422 U.S. 563, 975 (the “substantial government interest” cannot be achieved by less drastic means, *i.e.*, the “least restrictive alternative”). *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *City of New York v. Doe*, 205 A.D.2d 469 (1st Dep’t 1994); *City of New York v. Antoinette R.*, 165 Misc. 2d 1014 (Sup. Ct., Queens Co., 1995).

The same procedural due process balancing test for the timing of the holding of a hearing for judicial review must apply as well. Applicant and all other municipal workers refusing the vaccination, for whatever reasons, are being denied due process in that there have

been no due process hearings held as required under the NYS Public Health Law and NYC Health Code. See PHL §2120(3), 24 RCNY §11.23, PHL §2442. (App. 56, 89, 129 to 132).

### Procedural History

On December 7, 2022, Applicant commenced this hybrid Article 78/42 U.S.C §1983 action in New York State Supreme Court, from which it was subsequently removed to the Southern District of New York, challenging the Vaccination Orders as invalid facially, preempted by state and federal law, and invalid as applied, as arbitrary and capricious *inter alia* violating the substantive and procedural due process rights of all municipal workers to refuse the EUA Covid 19 vaccination without informed consent. (App. 56, 89, 129-132). The Complaint clearly states “Petitioner brings this hybrid action as an Article 78 proceeding in the nature of prohibition, pursuant to the New York State Civil Practice Law and Rules (“CPLR”) §7803 (2), and as an action for Declaratory Judgment pursuant to CPLR § 3001 and 42 USC §1983” raising both a facial challenge and as applied challenge to the adult mandates.<sup>6</sup> Id. (A-26).<sup>7</sup> The Complaint asserted four claims: (1) “separation of powers” under the New York State Constitution, (2) preemption by state law and federal laws, (3) substantive due process, brought

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<sup>6</sup> The District Court in a footnote 6 to its decision stated: Although stylized as a hybrid complaint and Article 78 petition, nevertheless, because the complaint exclusively sought to challenge the Order on facial grounds, it was an Article 78 petition in name only. See *Corbett v. City of New York*, 816 Fed. App’x 551 (2020) (An Article 78 court “may not rule on [a regulation’s] facial validity” (citing *Hachamovitch v. DeBuono*, 159 F.3d 687, 695 (2d Cir. 1998)). The District Court overlooked Applicant’s claim, is on behalf of himself and all others similarly situated and raised both a facial challenge and as applied challenge to the Vaccination Orders. The Vaccination Orders are facially invalid because they are preempted by the state and federal law, and unconstitutional as applied, because they are arbitrary and capricious violating due process.

<sup>7</sup> As of the date of this Memorandum Opinion, Eric Adams is Mayor of the City of New York and Keechant Sewell is the New York City Police Commissioner. When a government official is sued in an official capacity and subsequently leaves office, the official's successor is automatically substituted. See Fed. R. Civ. P. 25(d).

pursuant to 42 U.S.C. §1983, and (4) procedural due process, brought pursuant to 42 U.S.C. §1983. Id. (App. 8).

The challenged Vaccination Orders require that “Any city employee who has not provided the proof described in Paragraph 2 must be excluded from the premises at which they work beginning on November 1, 2021.” (App. 145 to 154), Paragraph 2 of the Vaccination Order requires “all City employees, except those employees described in Paragraph 5” (¶ 5 refers to “uniformed Department of Corrections (“DOC”) employees”), to submit proof that:

- a. they have been fully vaccinated against COVID-19; or
- b. they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or
- c. they have received the first dose of a two-dose COVID-19 vaccine. (App. 145 – 165).

On December 14, 2021, Applicant successfully obtained a Temporary Restraining Order (TRO) in State Court after a briefing and oral argument was conducted by the Hon. Frank P. Nervo, SCJ. (App. 87 - 135). The following day, on December 15, 2014, after losing in state Court, the City Respondents sought removal to the District Court and to dissolve the State Court TRO. (App. 12 to App. 13, 33 to 34). Applicant opposed removal and sought to sever the state law claims by remanding them back to the State Court on the issue of the legality of an adult mandate in NYS (App. 12). The District Court denied that relief in error. The City Respondents never filed an answer, and the lawsuit was dismissed with prejudice all claims in error. (App. 3 - 28).

Removal was an abuse of discretion because Applicant was still able to amend his state law claims to remove the 42 U.S.C. §1983 claims, as of right, “[b]ecause no answer has yet

been filed, they were entitled to amend as of right. The amendment disposes entirely of their federal claim.” *Spehar v. Fuchs*, 2003 WL 23353308, at \*11 (S.D.N.Y. 2003). 28 U.S.C. § 1367(c)(3) (1994), permits a district court, in its discretion, to decline to exercise supplemental jurisdiction over state law claims if it has dismissed all federal claims. See *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174 (2d Cir. 2020) (amending judgment to reflect that the state law claims were dismissed without prejudice in a quarantine case).

On March 22, 2022, in opposition to removal, Applicant sought to sever the state law issues of Preemption, Separation of Powers and Informed Consent by remanding them to back to State Court with the hard-earned TRO in place, which was denied on December 29, 2021. (App. 33 to 34). Notably, the same issues of state law regarding Preemption and Separation of Powers, raised by Applicant in support of severance and removal, were later determined by Judge Rakoff in his March 8, 2022, Memorandum Order. denying the relief, to be questions of state law “left open” by the Court of Appeals in *Garcia v NYC Dep’t of Mental Health and Hygiene supra* (App. - 19).

A majority of this Court would likely agree that Removal and Dissolution of the State Court TRO was an abuse of discretion because any state law questions deemed “left open” by the District Court by the Court of Appeals were best answered by the Court of Appeals, where this case was headed before removal. *Id.*

Removal was improper because the §1983 claims alleged are not even reached in this case, until the state law issues, already adjudicated by the Court of Appeals in *Garcia* restricting adult mandates were enforced in NYS Supreme Court against the City Respondents, where the case belonged. “A decision of the Court of Appeals on these questions of state law might well resolve all the claims brought by the parties in the case before us, and to do so without requiring any

decision as to the validity of the statute under the United States Constitution.” *Allstate Insurance Co. v. Serio*, 97 Civ. 670 (RCC), 97 Civ. 23 (RCC), at \*1 (S.D.N.Y. May 7, 2003).

Further, “...when all federal claims are eliminated in the early stages of litigation, the balance of factors generally favors declining to exercise pendent jurisdiction...” *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 102–03 (2d Cir. 1998). Generally speaking, “where the federal claims had been dismissed at a relatively early stage and the remaining claims involved issues of state law that [are] unsettled...the exercise of supplemental or pendent jurisdiction [is] an abuse of discretion.” *Valencia ex rel. Franco v. Lee*, 316 F.3d 299, 306 (2d Cir. 2003).

On January 19, 2022, City Respondents then moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim, respectively, opposed by Applicant.(App. 5 - 7). The District Court denied the motion for lack of subject matter jurisdiction but granted the motion to dismiss for failure to state a claim. *Id.* The lawsuit was dismissed with prejudice on March 13, 2022. An Appeal was timely filed in Second Circuit, the Stay request was denied on August 2, 2022. (App. 1 to 2). Applicant now requests relief in this Court, pending the outcome of his Appeal, to Stay the Vaccination Orders that are causing him, and all others similarly situated irreparable harm.

### **REASONS FOR GRANTING THE APPLICATION**

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are “critical and exigent”; (2) the legal rights at issue are “indisputably clear”; and (3) injunctive relief is “necessary or appropriate in aid of the Court’s jurisdiction.” *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S.

1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). The Court also has discretion to issue an injunction “based on all the circumstances of the case,” without its order “be[ing] construed as an expression of the Court’s views on the merits” of the underlying claim. *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014).

A Circuit Justice or the full Court may also grant injunctive relief “[i]f there is a ‘significant possibility’ that the Court would” grant certiorari “and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted.” *Am. Trucking Ass’ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (considering whether there is a “fair prospect” of reversal).

## I. PREEMPTION

### A. The Vaccination Orders Are Void *Ab Initio* Violating The Separation Of Powers And Informed Consent Doctrines

EUA Covid 19 Countermeasure, adult-vaccination-mandates are preempted by state and federal law from being mandated in NYS. The preemption doctrine is most often applied where inferior levels of government have attempted to regulate despite pronouncements on the same subject at a higher governmental level. See, e.g., *New York State Club Assn. v City of New York*, 69 N.Y.2d 211; *Consolidated Edison Co. v Town of Red Hook*, [60 N.Y.2d 99](#); *Monroe-Livingston Sanitary Landfill v Town of Caledonia*, [51 N.Y.2d 679](#)). *see also Boreali v. Axelrod*, 71 N.Y.2d 1, 14-15 (N.Y. 1987).

In *Garcia*, the NYS Court of Appeals identified two (2) provisions of state’s public health law explaining that PHL §206(1)(l) and PHL §613 preempt adult vaccination mandates in

NYS. *Garcia*, 31 N.Y.3d 601, at 619, 620. “A local law will be preempted either where there is a direct conflict with a state statute (conflict preemption) or where the legislature has indicated its intent to occupy the particular field (field preemption).” (App. 48). There were no questions “left open” by the Court of Appeals with respect to adult mandates in NYS that are prohibited by law. (App. 19).

### 1. Conflict Preemption

New York PHL §206(1)(l), *Commissioner: general duties and responsibilities* states, in relevant part:

“establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health...Nothing in this paragraph shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter.” *Garcia* at 840, 841.

NYS PHL §613 (c), *State aid: immunizations*, similarly states, in relevant part:

“The commissioner shall invite and encourage the active assistance and cooperation in such education activities of: the medical societies, organizations of other licensed health personnel, hospitals, corporations subject to article forty-three of the insurance law, trade unions, trade associations, parents and teachers and their associations, organizations of child care resource and referral agencies, the media of mass communication, and such other voluntary groups and organizations of citizens as he or she shall deem appropriate...Nothing in this subdivision shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter.” *Id.*

The City’s defense to preemption is that the Court of Appeals in *Garcia* had permitted Board of Health to mandate a flu vaccination, failing to distinguish the vaccination permitted in *Garcia* was a for a school required FDA licensed, immunization, already authorized by PHL §2164. (App. 20). Upon a plain reading of the decision in *Garcia*, it is clear City Respondents’ defense to preemption has no merit. In *Garcia*, the Court of Appeals permitted NYC’s Board of Health to add a flu shot for toddlers to the school immunization schedule because the school



vaccines were licensed and legislatively authorized in PHL §2164 and §2165, while advising at the same time, that NYS PHL §206(1)(1) and PHL §613 prohibit adult mandates. *Id.*

The *Garcia* Court held:

“The legislature intended to grant NYSDOH authority to oversee and encourage voluntary adult immunization programs, while ensuring that its grant of authority would not be construed as extending to the adoption of mandatory adult immunizations.” *Garcia*, 31 N.Y.3d 601 at 842.

The legislature has not authorized adult mandates in NYS. The Vaccination Orders are violating the Separation of Powers and Informed Consent Doctrines. The Court of Appeals decision in *Garcia*, clearly distinguished school required vaccinations from adult mandates with respect to the Board of Health’s regulatory authority and left no questions of preemption unanswered. *Id.*

## 2. Field Preemption.

On January 1, 2021, the NYS Legislature enacted PHL §2180–§2182, *Novel Coronavirus Covid 19 Legislation*, restricting available Covid 19 Countermeasures in NYS as limited to “contact tracing” only. (App. 47, 93). The Novel legislation reads as follows:

§2180. Definitions. As used in this title the following terms shall have the following meanings:

1. "Contact tracing" means Covid 19 case investigation and identification of case individuals and contact individuals.

In January of 2021, when the NY Legislature enacted §2180-§2182, the law preempted an EUA Covid 19 vaccination as part of the allowable countermeasures because EUA drugs may not be mandated on adults or children under state and federal law. See; PHL §206(1)(1), PHL §613, PHL §2120(3), 24 RCNY §11.23; PHL §2442, PHL §2180-§2182; 21 U.S.C. §360bbb-3(e)(1)(A)(ii)(I-III) (SDNY ECF #35). Also see *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018).

As discussed in *Vatore v. Comm'r of Consumer Affairs of City of New York*, “Where the State has preempted an entire field, a local law regulating the same subject matter is inconsistent with the State's interests if it either (1) prohibits conduct which the State law accepts or at least does not specifically proscribe (see, *New York State Club Assn. v. City of New York*, [69 N.Y.2d 211, 221](#), *affd.* [487 U.S. 1](#), [108 S.Ct. 2225](#), [101 L.Ed.2d 1](#); *Monroe- Livingston Sanitary Landfill v. Town of Caledonia*, [51 N.Y.2d 679, 683](#)), or (2) imposes restrictions beyond those imposed by the State law (see, *Robin v. Incorporated Vil. of Hempstead*, [30 N.Y.2d 347, 350-352](#)).” See *Vatore v. Consumer Affairs*, 83 N.Y.2d 645, 649 (N.Y. 1994). The State’s intention to preempt an entire field need not be specified in a law as “Preemptive intent, however, may be inferred from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme. (See, *Albany Area Bldrs. Assn. v. Town of Guilderland*, [74 N.Y.2d 372, 377](#); *Consolidated Edison Co. v. Town of Red Hook*, [60 N.Y.2d 99, 105](#)).” *Id.*

Where such preemptive intent exists, the locality may not legislate “unless it has received ‘clear and explicit’ authority to the contrary (*Robin v Incorporated Vil. of Hempstead.*, [30 N.Y.2d 347, 350-351](#) (1972); *Matter of Kress Co. v Department of Health of City of N.Y.*, [283 N.Y. 55, 60](#) (1940) (State's Agriculture and Markets Law's regulation of the manufacture and sale of frozen desserts held pre-emptive).” *People v. De Jesus*, 54 N.Y.2d 465, 469 (N.Y. 1981). State laws preempt EUA Covid 19 adult-vaccination- mandates in NYS, and this applies equally to the NYS Commissioner of Health and NYC’s Board of Health and cannot be such that it restricts adult vaccinations mandates without informed consent, but at the same time permits the City by fiat to impose adult vaccinations mandates on municipal employees. (App. 41 to 48, 94, 107, 129 to 132). And “[v]iewed in that light, the agency’s actions were a far cry from the

‘interstitial’ rule making that typifies administrative regulatory activity.” *Boreali v. Axelrod*, 71 N.Y.2d 1, at 13.

### 3. Federal Preemption

In deciding whether federal law preempts state law, a court must (1) assess the comprehensive nature of the federal regulatory scheme; (2) determine if there is a dominant federal interest in the matter to be regulated and if there is a need for national uniformity; and (3) analyze the threat of conflict between state laws and the effective administration of the state program. *Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747, 750 (S.D.N.Y. 1994) (Sweet, J.) and *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). Supremacy clause analysis begins with the “assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Title 21, U.S.C. §360 bbb-3(e)(1)(ii)(I-III), *Food, Drug and Cosmetic Act; Emergency Use Authorizations* (EUA) is a comprehensive, complex, well-developed, regulatory scheme that preempts mandating EUA drugs (USCA ECF #35). In *John Doe #1 v. Rumsfeld*, the Department of Defense (DoD) attempted to mandate an EUA Anthrax vaccine among service members despite its EUA status. A district court halted the mandate citing its lack of legislative authority and application to all persons being “illegal absent informed consent”:

“The Court is persuaded that the right to bodily integrity and the importance of complying with legal requirements, even in the face of requirements that may potentially be inconvenient or burdensome, are among the highest public policy concerns one could articulate...Absent a 32 informed consent or presidential waiver, the United States cannot demand that members of the armed forces also serve as guinea pigs for experimental drugs.” *John Doe #1 v. Rumsfeld*, 297 F.Supp.2d 119 (D.D.C.2003)

*John Doe #1* affirms Applicant’s position that mandates are incompatible with EUA products. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III) (A-1, USCA ECF #35). In addition, the

Vaccination Orders are preempted in NYS under state law. See PHL §206(1)(1), PHL §613, PHL §2180-§2182, also *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 617 (N.Y. 2018). Based on preemption, Applicant, respectfully, seeks a ruling the Vaccination Orders violate the Separation of Powers Doctrine and Informed Consent Doctrines, and the City Respondents, should be temporarily, preliminarily and permanently enjoined as void *ab initio*.  
Id.

B. The Vaccination Orders Are Arbitrary And Capricious

The Vaccination Orders are arbitrary and capricious because they are both underinclusive and overinclusive in that they target certain municipal employees while excusing just about everyone else from the “emergency” mandate.<sup>8</sup> (App. 84). The limitation of the Vaccination Orders to City employees undermines the claim that vaccinations are necessary emergency measures. For one thing, City employees are the people most easily punished for failing to comply. For another, the alleged “public health emergency” can apparently be overlooked when there is “a staff shortage at Department of Corrections (“DOC”) facilities” who are excused from the adult mandate due to a worker shortage, and for famous movie stars and ball players. (App.149).

The Vaccination Orders are clearly arbitrary and capricious because a basketball player or theatre performer recently excused from the vaccination by the Mayor, is no less or no greater a risk than a police officer, member of the fire department, EMS worker, sanitation worker, or teacher doing their job in service to the City of New York required to be vaccinated or be

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<sup>8</sup> <https://www.nytimes.com/2022/06/23/nyregion/nyc-vaccine-mandate-adams.html>

terminated.<sup>9</sup> The Vaccination Orders are arbitrary and capricious because they are including some individuals while arbitrarily excluding others, without a rational basis.

The Fifth Circuit recently reaffirmed a Stay, barring OSHA from enforcing the November 5, 2021, Emergency Temporary Standard (the “Mandate”) requiring employees of covered employers to undergo Covid 19 vaccination or take weekly Covid 19 tests and wear a mask. See *BST Holdings, L.L.C. v. OSHA*, 17 F.4<sup>th</sup> 604, No. 21-60845, 2021 U.S. App. LEXIS 33698 (5th Cir. Nov. 12, 2021). Under-inclusiveness is one of the reasons underpinning the Fifth Circuit’s Stay in *BST Holdings* of the OSHA Mandate, because “...this kind of thinking belies the premise that any of this is truly an emergency. Indeed, under-inclusiveness of this sort is often regarded as a telltale sign that the government's interest in enacting a liberty-restraining pronouncement is not in fact ‘compelling’...The underinclusive nature of the Mandate implies that the Mandate's true purpose is not to enhance workplace safety, but instead to ramp up vaccine uptake by any means necessary.” See *BST Holdings, L.L.C.*, 17 F4th 604, at \*20. The goal “to ramp up vaccine uptake by any means necessary” is not merely an inference. Mayor de Blasio stated as much in media appearances around the mandate. (App. 67)

The Vaccination Orders are arbitrary and capricious violating due process. Under applicable Public Health Laws and NYC Health Code, any person subject to an involuntary, unlicensed drug (EUA vaccine) is entitled to refuse an unauthorized medical intervention and is entitled to a due process hearing under PHL §2120 (3), and 24 RCNY §11.23, when informed consent is withheld. The failure to provide any municipal employee with a due process hearing is

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<sup>9</sup> <https://www.cbsnews.com/newyork/news/mayor-adams-fired-nyc-workers-can-get-their-jobs-back-if-they-get-vaccinated/>

arbitrary and capricious, and thus, the Vaccination Orders should be struck down as causing irreparable harm to all NYC employees affected by the mandate.

Further, the Covid 19 “emergency” is over. (App. 131). Covid 19 is now another “on-going” health concern. *Id.* New York City is no longer experiencing the widespread crisis that marked the spring of 2020, attributed mostly to controversy over a spike in nursing home deaths. According to Respondent’s own expert Dr. Jay Varma’s honest assessment of Covid 19 is an “ongoing public health concern”, and *not* a “widespread crisis”. Dr. Varma’s findings do not support the a “state of emergency” declaration, as claimed by the Mayor and the Health Commissioner, in justification of the exercise of their emergency powers in direct violation of the New York Public Health Law and Food, Drug and Cosmetic Act restrictions on coerced informed consent. (App. 106 to 107). See *BST Holdings, L.L.C. v. OSHA*, No. 21-60845, Slip Op. at \*19 (5th Cir. Nov. 12, 2021); *Nat’l Fed’n of Indep. Bus. (NFIB) v. Dep’t of Labor*, No. 21A244 (Jan. 13, 2022).

This Court’s determination in *NFIB*, upholding the Fifth Circuit in *BST Holdings* is binding on the Second Circuit. In *BST Holdings*, the Fifth Circuit addressed the lack of emergency and arbitrariness of the federal OSHA mandates concisely and struck them down. Indeed, to see the striking similarities between *BST Holdings* and this case, one need only swap out the name “Joe Biden” for “Eric Adams” and substitute “OSHA mandate” for “Vaccination Orders” to readily determine just how arbitrary and capricious the mandate being applied to handful of municipal workers refusing an illegal, adult vaccination mandate really is. (App. 41 to 48, 94, 107, 129 to 132).

The Fifth Circuit stated in *BST Holdings*:

“On the dubious assumption that the Mandate *does* pass constitutional muster—which we need not decide today—it is nonetheless fatally flawed on its own terms. Indeed,

the Mandate's strained prescriptions combine to make it the rare government pronouncement that is both overinclusive (applying to employers and employees in virtually all industries and workplaces in America, with little attempt to account for the obvious differences between the risks facing, say, a security guard on a lonely night shift, and a meatpacker working shoulder to shoulder in a cramped warehouse) *and* underinclusive (purporting to save employees with 99 or more coworkers from a "grave danger" in the workplace, while making no attempt to shield employees with 98 or fewer coworkers from the very same threat). The Mandate's stated impetus—a purported "emergency" that the entire globe has now endured for nearly two years, and which OSHA itself spent nearly two *months* responding to—is unavailing as well. And its promulgation grossly exceeds OSHA's statutory authority.”

See *BST Holdings v. Occupational Safety & Health Admin.*, 17 F.4th 604, 611-12 (5th Cir. 2021). *Id.*

#### 1. School vs. Adult Mandates

The District Court, respectfully, *erred* overlooking that EUA Covid 19 vaccinations cannot be mandated in NYS because the EUA versions are unlicensed drugs, and more important, there is no adult vaccination mandate allowable in the NYS’ legislation, in contrast to the legislation authorizing school required vaccination schedule found in PHL §2164 and §2165, *student immunizations*. (SPA – 21). See *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 619 (N.Y. 2018). This key difference between the school required vaccinations in PHL §2164 and §2165, allowable by state statute, in contrast to an adult mandate preempted by state statute, PHL §206(1)(l) and PHL §613, were clearly articulated by the Court of Appeals in *Garcia*, and were overlooked by the District Court deeming these questions of state law were “left open” in *Garcia*. *Id.*

The District Court in dismissing the case chose instead to rely upon December 2020 Second Department Appellate Division decision in *C.F. v New York City Dept. of Health & Mental Hygiene*, 191 AD3d 52 (NY App. Div. 2020), interpreting *C.F.* as extending legislative authority to the Board of Health to impose an adult, unlicensed EUA Covid-19 vaccination,

without informed consent, on municipal workers being terminated for refusing. (App. 42-43). *V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010) (a federal court “is bound to apply the law as interpreted by a state’s intermediate appellate courts unless there is persuasive evidence that the state’s highest court would reach a different conclusion”). *Id.*

A majority of this Court would likely agree the Second Circuit *erred* in denying the Stay because Court of Appeals holding in *Garcia* is “persuasive evidence that the state’s highest court would reach a different conclusion.” *Bone v. CNA Fin. Corp.*, 20 CV 6073 (VB), at \*8 (S.D.N.Y. Sep. 22, 2021). The Court of Appeals in *Garcia* not only distinguished school required vaccinations from adult mandates, but also has previously, clearly, rejected similar holdings to the *C.F.* case, sharply curtailing the Board of Health’s perceived “unique” legislative authority, striking down cigarette bans and soda cup size regulations when it deemed NYC’s Board of Health to be delving too far into fundamental, legislative decision making reserved for the legislature, violating the Separation of Powers Doctrine. (App. 94). See *Boreali v. Axelrod*, 71 N.Y.2d 1, 12, 523 N.Y.S.2d 464, 470, 517 N.E.2d 1350, 1355 (1987) (“It is an ‘oft-recited principle’ in New York ‘that the legislative branch of government cannot cede its fundamental policy-making responsibility to an administrative agency.’” *Id.* at 9, and see, *Matter of N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, 2014 NY Slip Op 4804, ¶ 4, 23 N.Y.3d 681, 694, 992 N.Y.S.2d 480, 486, 16 N.E.3d 538, 544; (“Respondents, however, contend that the Board of Health is a unique body that has inherent legislative authority. We disagree.”).

If *C.F.* had been appealed to the Court of Appeals, it likely would have been reversed under the authority of *Garcia*, *Boreali* and *NY Hispanic Chambers of Commerce*, *supra*. Clearly, if the state’s highest Court has previously determined the Board of Health lacks legislative



authority to ban cigarette smoking, and dictate the size of a soda cup, the Court of Appeals would not permit the imposition of an unprecedented, adult vaccination mandate by fiat, for an experimental EUA Covid-19 vaccination, preempted under state and federal law from being mandated on adults without uncoerced, informed consent. (App. 46, 101).

In *C.F.*, the Second Department upheld the Board of Health’s authority to impose an FDA licensed, adult measles vaccine in 2019, for a few weeks that quickly expired, thus, mooted the case. (App. 18, 42 – 43). A majority of this Court would likely agree the Second Department, in *C.F.*, erred in that case when imposing a measles vaccine (that was FDA Approved)<sup>10</sup> on adults prohibited by *Garcia*. The nuisance ordinance upheld in *C.F.* had been issued by the Board of Health during a measles “inbreak” in Brooklyn where, it is believed, that certain religious observants were spreading measles to avoid vaccinations that violated their sincerely held religious beliefs contrary to the practice of vaccinating and affected approximately eight (8) adults. *Id.*

A majority of this Court would also likely agree a plain reading of *Garcia* shows the NYS Court of Appeals left no question open as to the distinction between school required vaccinations allowable in PHL §2164 and §2165, and adult mandates preempted by state law PHL §206(1)(1) and PHL §613 being imposed in the Vaccination Orders. The District Court in relying on *C.F.* over *Garcia*’s clear holding, is reversible error, and the Second Circuit’s denial of the Stay an abuse of discretion. (App. 19)

A majority of this Court would likely agree, as it did in *NFIB*, the City Respondents’ have no inherent legislative authority to engage in fundamental, medical policy decision reserved

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<sup>10</sup> The vaccine known as MMR or MMRV. The trivalent MMR contains measles, mumps and rubeola. The quadrivalent MMRV contains measles, mumps, rubeola and chicken pox.

for the legislature. Per the NYS Court of Appeals, “In *Boreali* we held that, under the separation of powers doctrine, the Public Health Council went beyond its lawfully delegated authority when it promulgated comprehensive regulations governing tobacco smoking in areas open to the public. We determined that the Council had usurped the role of the Legislature when, rather than employing its public health expertise in making technical determinations to implement legislative policies, the Council engaged in a balancing of political, social, and economic factors and drew up a ‘code embodying its own assessment of what public policy ought to be.’” *Consolidated Edison Co. of New York, Inc. v. Department of Environmental Conservation*, 71 N.Y.2d 186, 191-92 (N.Y. 1988).

The Mayor has no authority to enact an unprecedented, EUA Covid 19 adult, vaccination mandate on municipal employees in NYC that is preempted by state and federal law from being mandated on anyone. “The Court of Appeals concluded the ‘agency stretched that statute [the legislative grant of authority] beyond its constitutionally valid reach when it uses the statute as a basis for embodying its own assessment of what public policy ought to be’ *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (N.Y. 1987)” *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, 2013 N.Y. Slip Op. 30609, 11 (N.Y. Sup. Ct. 2013).

Even if this Court was somehow persuaded City Respondents have some authority to mandate a vaccine on adults (FDA licensed) than their actions would still be nonetheless *ultra vires*, and well beyond the scope of any regulatory authority because, among other reasons, fortunately, there is no longer a Covid 19 emergency in NYS. The Hon. Lizette Colon, J.S.C., Richmond County Supreme Court, observed, regarding Respondent Mayor’s Emergency Executive Order 225, “The current pandemic status, despite its worldwide impact, does not seem to meet the first element necessary to declare a state of emergency under the quoted language of

New York City's code ('an act of violence or a flagrant and substantial defiance of or resistance of a lawful exercise of public authority...')." *Indep. Rest. Owners Ass'n Rescue (I.R.O.A.R.) v. De Blasio*, No. 2021-32948, 5 (N.Y. Sup. Ct. 2021). (App. 145-155).

The Vaccination Orders as written do not support the City' claim that the required Vaccination of City employees is a necessary response to a "public health emergency." *Id.* The "WHEREAS" clauses state "City employees and City contractors provide services to all New Yorkers that are critical to the health, safety, and well-being of City residents, and the City should take reasonable measures to reduce the transmission of Covid 19 when providing such services". The determination by the Health Commissioner, a mayoral appointee, as to what measures are "reasonable" does not justify violating state law, and municipal worker's constitutional and civil rights to refuse. These are rights protected by state and federal law. *Id.*

The "WHEREAS" clauses, citing the Center for Disease Control and Prevention ("CDC"), also state "the [CDC] reports that new variants of Covid 19, identified as "variants of concern" have emerged in the United States." *Id.* (EXHIBIT 1). The City Respondents' concerns simply do not justify the disregard of municipal workers due process rights to the statutory protections preempting EUA Covid 19 Countermeasure requiring informed consent, nor do their concerns permit the City to contravene duly enacted legislation of the New York Senate and Assembly prohibiting adult vaccination mandates. See PHL §206 (1)(l) and PHL §613.

The Court of Appeals left no question open in *Garcia* as to preemption of adult mandates when permitting the Board of Health to add a flu shot for toddlers to the already, statutorily authorized school schedule in PHL §2164, §2165. *Id.* There is no corresponding adult vaccination schedule in NYS for the Board of Health to append an EUA Covid 19 adult mandate

to by fiat. See *Garcia, Boreali* and *N.Y. Statewide Coal. of Hispanic Chambers of Commerce. Id.* “The point is simply this: if there is any new reason to doubt an earlier federal court's decision as to state law, the state's highest court should be given the opportunity to weigh in.” *Tapia v BLCH 3rd Ave. LLC*, 906 F3d 58, 65 (2d Cir 2018). (App. 40 – 41).

A majority of this Court would likely agree if there was a statutorily, authorized adult schedule in NYS, the Respondent Board of Health could have simply added the Covid 19 vaccination to the adult schedule, in the same way the Board of Health added the flu shot for toddlers to the school schedule in 2018. See *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 604-05 (N.Y. 2018). Since there is no adult schedule to add to in NYS, the Mayor conjured up the Emergency Executive Order 98, and the Board of Health manufactured the unprecedented Vaccination Orders, violating state and federal law, and Applicant’s substantive and procedural rights of due process to withhold uncoerced informed consent to mandate. (App. 145 – 155).

## 2. Police Power

In 1905, the Supreme Court in *Jacobson v. Massachusetts*, a landmark, vaccine-refusal case, upheld a smallpox vaccination mandate for the adult population based on a criminal statute imposing a \$5 dollar fine as a valid exercise of *police power*. 197 U.S. 11 (1905). The unlicensed, EUA Covid 19 Countermeasure vaccination mandate, at issue here, is dramatically different from the sole (discontinued) smallpox vaccine of more than a century ago, and of questionable necessity, proportionality, and harm avoidance particularly in the absence of true emergency. *Jacobson* requires that a compulsory vaccination be made possible only in highly circumscribed situations: when there is “an emergency,” “imminent danger,” when “an epidemic of disease...threatens the safety of [society’s] members” and when the epidemic

“imperil[s] an entire population.” *Id.* at 29, 27, 29, 31. The *Jacobson* Court did not recognize or condone unlimited authority to mandate every vaccine, EUA or otherwise, that exists today. In 1905, Henning Jacobson was never at risk of being forcibly vaccinated without consent. Today, in NYS, EUA Covid 19 countermeasure vaccinations cannot be mandated on adults without uncoerced informed consent by law.

The Court stated in *Jacobson* that a public health initiative to control disease is constitutionally permissible only if the powers exercised conform with principles of fairness and necessity, i.e., comply with the statutes. Under *Jacobson’s* legacy, the legitimacy of the licensed vaccination may not go “beyond what was reasonably required for the safety of the public.” *Jacobson*, 197 U.S. 11, at 28. There must exist a reasonable relationship between the legislation and the achievement of a public health objective. *Id.* at 26.

Justice Harlan writing for the majority stated in circumstances where the “regulations [are] so arbitrary and oppressive in particular cases...justify the interference of the courts to prevent wrong and oppression.” *Jacobson*, 197 U.S. 11, at 38-39. The mandating of unlicensed vaccinations on municipal workers must conform with the state and federal laws that extend far beyond *Jacobson’s* constitutional minimums, and cannot be “a plain, palpable invasion of rights.” *Id.* at 31. (A-237).

This case squarely addresses the type of overreach against which the *Jacobson* Court expressly forbid as an exercise of *police power*. *Id.* To force front line, essential workers, who have suffered so much already, to play Russian Roulette and risk injury from an unlicensed, illegal EUA Covid 19 Countermeasure vaccination, without the possibility of a damage claim for any loss other than physical injury or death, would be “cruel and inhuman to the last degree,” especially when its punishing front line municipal workers and no one else. The challenged

actions of the City Respondents fail every aspect of the *Jacobson*'s fairness and reasonable test violating municipal workers substantive and procedural due process rights to refuse uncoerced, informed consent. The Vaccination Orders should be struck down as void *ab initio* and unconstitutional. Id.

The federal restrictions on mandating EUA drugs, and the NY legislature's guarantee of due process protections in PHL §206(1), §613 and PHL §2120 (3) go far beyond what the Supreme Court, and this Court have declared as the minimum with respect to the constitutional rights of refusers to avoid an otherwise legal vaccination mandate. See *We the Patriots U.S., Inc. v. Conn. Office of Early Childhood Dev.*, CIVIL 3:21cv597 (JBA), at \*25 (D. Conn. Jan. 11, 2022).

**C. The Vaccination Orders Violate Procedural And Substantive Due Process.**

1. Due Process

Applicant's due process rights are not predicated solely upon a Fourteenth Amendment due process right to refuse an otherwise lawful vaccination mandate for that relief would be no different than the relief *Jacobson* sought in 1905. (SPA-22). "This argument is foreclosed by the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905)." *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015). Here, today in NYS, an adult mandate for an EUA Covid 19 Countermeasure, unlicensed vaccine, is covered under complex federal regulations, and statutory restrictions that require either uncoerced informed consent or a Judicial Order of Quarantine for any unwanted unlicensed, drug or device, not otherwise authorized by law.

A majority of this Court would likely agree the due process rights are not derived directly from the Constitution itself, but rather from the state and federal statutes that protect municipal workers' rights to refuse informed consent. See *Matter of K.L.*, 1 N.Y.3d 362, 372 (N.Y. 2004); *Rivers v. Katz*, 67 N.Y.2d 485, 496-98 (N.Y. 1986). Viewing the adult mandate the Applicant is facing solely through the lens of *Jacobson*, as the District Court's decision seems to do, is both incomplete and insufficient to protect the constitutional rights to refuse informed consent protected by the state and federal statute. (SPA-22). The state and federal law and regulations go far beyond *Jacobson's* due process minimums.

“The Supreme Court and the Second Circuit both have held 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.” *Id.* at 293 (citing *Jacobson*, [197 U.S. at 25-31, 37](#); *Phillips*, [775 F.3d at 542-43](#).) In light of the Second Circuit's recent reliance on *Jacobson*, Plaintiffs' contention at oral argument that it is outdated and nonbinding lacks force here. *Id.* at 293 n.35, 294 (“*Jacobson* remains binding precedent.”).

*We the Patriots U.S., Inc. v. Conn. Office of Early Childhood Dev.*,  
CIVIL 3:21cv597 (JBA), at \*25 (D. Conn. Jan. 11, 2022).

A majority of this Court would likely agree this case is not about *police power* to mandate a legislatively authorized vaccination as erroneously determined below. The Vaccination Orders should be Stayed because they are violating state and federal statutes, causing irreparable harm to all municipal workers affected being denied due process in refusing informed consent.

- a. PHL §2120, *Control of Communicable Diseases; (3), Judicial Order of Quarantine.* (A-25).

PHL §2120(3), states:

“The magistrate after due notice and a hearing, if satisfied that the complaint of the health officer is well founded and that the afflicted person is a source of danger to others, may commit the said person to any hospital or institution established for the care of persons suffering from any such communicable disease or maintaining a room, ward or wards for such persons.”

In making the determination whether mandatory treatment is constitutional, courts apply the same substantive and procedural due process standards as they would for any serious deprivation of liberty, *i.e.*, the same standards applicable to isolation and quarantine. See *Matter of Sampson*, 29 N.Y.2d 900 (N.Y. 1972). These include a finding that the threat to the community is supported by “clear and convincing evidence,” and that mandatory treatment is the “least restrictive alternative.” See *O’Connor v. Donaldson*, 422 U.S. 563, 975 (the “substantial government interest” cannot be achieved by less drastic means, *i.e.*, the “least restrictive alternative”).

It would be difficult for City Respondents, if not impossible, to show by clear and convincing evidence how a municipal employee with acquired natural immunity, asymptomatic, would meet the burden of proof required under PHL§2120 (3) to obtain a Judicial Order of Quarantine, satisfying the broad due process protections afforded to municipal employees refusing the EUA mandate, which by law, cannot be mandated.

It is highly unlikely the Board of Health could meet its burden of proof under PHL §2120, by clear and convincing evidence showing how a person, asymptomatic, with natural immunity is a health risk, or demonstrating how an EUA Covid 19 vaccination is the “least restrictive” alternative for achieving the public health goal. The City Respondents would have to disclose their evidence of vaccine safety and efficacy in a Court of Law, for scrutiny and



inspection by Applicant’s experts and the Court—something the government has never been called upon to do before in any Court proceeding, with respect to any Covid 19 Countermeasures. This is significant because vaccinations are an area of science “bereft of complete and direct proof of how vaccines affect the human body.” *Althen v. Sec’y of HHS*, 418 F.3d 1274, 1280 (Fed. Cir. 2005).

Typically, when a licensed, legislatively authorized vaccination mandate is challenged, say for example, a school required immunizations in PHL §2164, §2165, the government is entitled to a "high degree of judicial deference," and it is a petitioner’s "heavy burden" to demonstrate that health department’s actions are "unreasonable and unsupported by any evidence," *Home of The Franciscan Sisters v. Novello*; 7 NY3d 538, 544 (2006); quoting *Consolation Nursing Home, Inc. v Comm'r of New York State Dep't of Health*, 85 NY2d 326, 331 (1951). PHL §2120 (3), shifts the burden of proof to the City Respondents, a burden they cannot meet.

- b. NYC Health Code, 24 RCNY §11.23, (k) *Removal and Detention of Cases, Contacts and Carriers Who Are or May Be a Danger to Public Health, Other Orders. (A-37)*

24 RCNY §11.23 (k) states:

“(k) In addition to the removal or detention orders referred to in subdivision (a) of this section, and without affecting or limiting any other authority that the Commissioner may otherwise have, the Commissioner may, in his or her discretion, issue and seek enforcement of any other orders that he or she determines are necessary or appropriate to prevent dissemination or transmission of contagious diseases or other illnesses that may pose a threat to the public health including, but not limited to, orders requiring any person or persons who are not in the custody of the Department to be excluded; to remain isolated or quarantined at home or at a premises of such person's choice that is acceptable to the Department and under such conditions and for such period as will prevent transmission of the contagious disease or other illness; to require the testing or medical examination of persons who may have been exposed to or infected by a contagious disease or who may have been exposed to or contaminated with dangerous amounts of radioactive materials or toxic chemicals; to require an individual who has been exposed to or infected by a contagious disease to complete an appropriate, prescribed course of

treatment, *preventive medication or vaccination*, including directly observed therapy to treat the disease and follow infection control provisions for the disease; or to require an individual who has been contaminated with dangerous amounts of radioactive materials or toxic chemicals such that said individual may present a danger to others, to undergo decontamination procedures deemed necessary by the Department. Such person or persons shall, upon request, be afforded an opportunity to be heard, but the provisions of subdivisions (a) through (j) of this section shall not otherwise apply.”

NYC’s own Health Code requires a Court Order be obtained by the Board of Health from a magistrate to impose any mandatory drug involuntarily within the City of New York, affording the same due process protections as the state law PHL §2120 (3), *Judicial Order of Quarantine*. 24 RCNY §11.23.

c. NYS PHL §§2440 - 2446, *Protection of Human Subjects*; PHL§2442, *Informed Consent* (A-23)

NYS PHL §2442. *Informed consent*, states:

“No human research may be conducted in this state in the absence of the voluntary informed consent subscribed to in writing by the human subject. If the human subject be a minor, such consent shall be subscribed to in writing by the minor's parent or legal guardian. If the human subject be otherwise legally unable to render consent, such consent shall be subscribed to in writing by such other person as may be legally empowered to act on behalf of the human subject. No such voluntary informed consent shall include any language through which the human subject waives, or appears to waive, any of his legal rights, including any release of any individual, institution or agency, or any agents thereof, from liability for negligence.” (A-23).

PHL §2442 applies because the EUA Covid 19 vaccinations are unlicensed, and thus are considered “experimental” and their use is restricted unless uncoerced, informed consent is obtained in writing under state law. The right of informed consent to refuse unwanted, unlicensed drugs, are not only deeply rooted in myriad ethical, philosophical, and legal foundations of this nation, but are the pivotal principles articulated by the Nuremberg Declaration and form the basis for internationally recognized fundamental human rights protections. See, e.g., TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG

MILITARY TRIBUNAL COUNCIL LAW No. 10, at 181-82 (1997), also see *In Re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 816–18 (S.D. Ohio 1995)

2. Level of Scrutiny

While many things have changed in the world since *Jacobson's* case was decided it still remains the supreme law on *police power* in the United States. The Supreme Court held that mandatory vaccination was within the State's police power. *Zucht v. King*, 260 U.S. 174, 176 (1922) (“*Jacobson* ... settled that it is within the police power of a state to provide for compulsory vaccination.”). *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015).

Yet, undeniably, with the advent of the electron microscope and advances in medicine, a great deal has changed over the course of the last century, not least the way the Supreme Court views personal autonomy, the right to informed consent and the right to medical decision-making. In *Jacobson*, the Supreme Court's standard of review was only rational basis. *Jacobson's* fine was \$5, and the Supreme Court applied a rational basis standard upholding the Massachusetts ordinance. This case is different. It requires intermediate scrutiny, if not strict scrutiny because it involves statutory interpretations that exclude adult vaccination mandates in NYS, protecting municipal worker's fundamental liberty interests. It is undisputed once vaccinated the person cannot be unvaccinated. The EUA Covid 19 adult mandate is imposing on fundamental liberty interests protected and inherent in the statutes. *City of Cleburne Texas v. Cleburne Living Center*, 473 U.S. 432 (1985). To view New York's vaccination mandates solely through the lens of the *police power*, as the District Court seems to do, without considering Applicants' liberty interests protected by statute, is to look at only one side of a two-faced coin.

A majority of this Court would likely agree the District Court misapprehended Applicants' §1983 claims because the procedural and due process violations alleged are not

derived directly from the 14<sup>th</sup> Amendment in and of itself. The due process rights are inherent in state and federal laws protecting municipal workers' First, Fifth, Ninth and Fourteenth Amendment constitutional rights to refuse informed consent.

The state and federal laws preempting adult mandates without informed consent protect a citizen's religious beliefs contrary to the practice of vaccinating, property interests and rights in their jobs, rights of bodily integrity to refuse an experimental EUA drug, and to protect the procedural and due process rights afforded to municipal workers in the judicial process being sidestepped by avoiding a Judicial Order of Quarantine required by PHL §2120 (3). While it is understood the legislature could likely mandate an adult Covid 19 vaccination that was licensed in NYS, the fact is when the opportunity was available to the legislature, the 2021 Novel Coronavirus Covid 19 legislation preempted all countermeasures to "contact tracing." See PHL §2180-§2182 Moreover, the vaccination is unlicensed by the FDA and requires informed consent.

Thus, when a state legislature does make legislative determinations excluding adult mandates and preempting EUA Covid 19 vaccination countermeasures, the statutes must be applied lawfully and equally to everyone. *Id.* For example, "[t]he United States Constitution mandates that, if New York wishes to allow a religiously based exclusion from its otherwise compulsory program of immunization... it may not limit this exception from the program to members of specific religious groups but must offer the exemption to all persons who sincerely hold religious beliefs that prohibit the inoculation... See *Sherr v. Northport-East Northport U. Free*, 672 F. Supp. 81, 98 (E.D.N.Y. 1987).<sup>11</sup> The same holds true here. If the applicable state

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<sup>11</sup> NYS §2165 (9) provides for religious exemptions to adults attending school. NYS repealed §2164(9) for school children k – 12<sup>th</sup> grade in June of 2019.

and federal laws preempt unlicensed, EUA Covid 19 vaccination, countermeasure, adult-mandates, then those same laws must protect equally and fairly all adults, including all NYC municipal employees refusing informed consent.

Since the 1960's, the Supreme Court has established clear precedents under the Fourteenth Amendment due process clause requiring states to prove that their interference in medical autonomy is "necessary, and not merely rationally related to, the accomplishment of a permissible state policy." *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964)). In the 1990's, the Supreme Court set limits on state interference with medical autonomy in three landmark cases: *Cruzan v. Dir., Mo. Dept't of Health*, 497 U.S. 261 (1990), *Washington v. Harper*, 494 U.S. 210 (1990) and *Washington v. Glucksberg*, 521 U.S. 702 (1997). Considering these precedents, the reasoning supporting bodily integrity and medical decision making locates a constitutionally protected, fundamental liberty interest in refusing unwanted, experimental medical treatment, not authorized by law in NYS, without informed consent or a Judicial Order of Quarantine.

*Cruzan* found that the "freedom from unwanted medical attention is unquestionably among those principles 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'". *Cruzan* at 305 (quoting *Snyder v. Mass.*, 291 U.S. 97, 105 (1934)). The Supreme Court has upheld two distinct and contradictory lines of cases that pertain to state vaccination mandates – one focused on collective health and the limits of individual rights, and the other focused on the fundamental rights to liberty and bodily integrity. See B. Jessie Hill, *The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines*, 86 *Tex. L. Rev.* 277 (2007). Because both lines of cases pertain to Applicant's challenges, it is

critical that this Court inquire the Vaccination Orders meet the requirements of intermediate or strict scrutiny.

*Jacobson* requires for courts to assess the constitutionality of vaccination mandates; courts may not defer blindly to state authorities. *Jacobson* at 29 -35. The Second Circuit has previously stated that New York’s vaccination program is “well within the State’s *police power* and thus its constitutionality is too well established to require discussion.” *Caviezel v. Great Neck Pub. Sch.*, 500 F.App’x 16 (2d Cir. 2012), citing *McCartney v. Austin*, 31 A.D.2d 370 (3d Dep’t 1969). This assertion does not address EUA adult vaccination mandates without informed consent, and the due process requirements of the statutes that still apply to *police power* even in a perceived emergency. *Jacobson*, 197 U.S. 11, at 29, 27, 29, 31. “[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Agudath Isr. v. Cuomo*, 983 F.3d 620, 635-36 (2d Cir. 2020)

*Jacobson* hardly offers states *carte blanche* it goes further still. It requires that if vaccination mandates are arbitrary and unreasonable, then courts must “interfere for the protection” of those affected. *Id.* at 28. *Jacobson* foresaw that there might be vaccination mandates that are so arbitrary the Supreme Court considered it “the duty of the courts to so adjudge.” *Id.* at 31. In short, *Jacobson* does not permit executive or regulatory agencies to impose whatever mandates they like; it requires that courts assess the constitutionality of the mandates individually, as the Supreme Court did for the sole mandate in *Jacobson*. The burden of proof is on the City. See PHL §2120 (3).

The sweeping assertion in *Caviezel* that the constitutionality of vaccination mandates is “too well established to require discussion” has a profound and tragic legacy. *Id.* It was precisely this judicial outlook that led the Supreme Court in 1927 to affirm the constitutionality of

Virginia’s compulsory eugenic sterilization law in *Buck v. Bell*. 274 U.S. 200 (1927). Oliver Wendell Holmes, writing for the majority, stated “the principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.” *Id.* at 207. This misguided, eugenic decision led directly to the compulsory sterilization of tens of thousands of poor, minority and working-class Americans being between the 1920’s and mid-1970’s. Today, forced sterilization is considered a war crime, yet the Supreme Court sustained its constitutionality through its overbroad interpretation of *Jacobson*. Rome Statute of the International Criminal Court Art. 8(2)(b)(ii) (1998). Surely courts should avoid this tragedy today and apply *Jacobson*’s fairness and reasonable test, and rule on the statutory due process violations with intermediate, if not heightened scrutiny.

## **II. The Equities Weigh In Favor Of Injunctive Relief**

Applicants seeking an “injunction while an appeal is pending” before this Court, must satisfy the traditional standard for injunctive relief: (1) likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) balance of the hardship tips in the Applicants’ favor; and (4) the public interest would not be disserved by the issuance of an injunction. *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015).

### **A. Likelihood of Success**

Applicant is likely to prevail as a matter of law. The Vaccination Orders are void *ab initio* in that they violate the Separation of Powers and Informed Consent Doctrines, which preempt adult vaccination mandates in NYS. The Vaccination Orders violate Applicant’s due process rights to the statutory protections of the state and federal laws that protect municipal worker’s due process rights to refuse informed consent. The Vaccination Orders are arbitrary

and capricious because they are both overinclusive and underinclusive, and moreover, the emergency is over. *BST Holdings, L.L.C. v. OSHA*, 17 F.4<sup>th</sup> 604, at \*19 (5th Cir. 2021); *Nat'l Fed'n of Indep. Bus. (NFIB) v. Dep't of Labor*, No. 21A244 (Jan. 13, 2022).

“It is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends” *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v DOMHH*, 23 N.Y.3d at 696-97. The NY legislature can and has spoken and in January of 2021, chose not to mandate a Covid 19 vaccination while approving measures to conduct contact tracing. See PHL §2180-2182, (1-3).

#### B. Irreparable Harm

Your Applicant is seeking a Stay pending a *de novo* review of the dismissal of his lawsuit in the Second Circuit, and to reverse the District Court's Judgment granting removal from state Court, and dissolving the State Court TRO, as an abuse of discretion. Applicant sought an Emergency Stay\Preliminary Injunction in the Second Circuit that was denied causing the Applicant, and all others similarly situated, irreparable harm, depriving City employees of their due process rights to refuse an EUA Covid 19 adult vaccination or be terminated from employment. “The deprivation of constitutional rights, such as due process, causes irreparable harm. *Covino v. Petrissa*, 967 F.2d 73 at 77, (2d Cir. 1992); see *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984).” *Bray v. the City of New York*, 04 Civ. 8255 (WHP), at \*15 (S.D.N.Y. Sep. 30, 2005).

In dissolving the State Court TRO, the District Court found there was no irreparable harm to the Applicant because he was still working pending a review of his religious exemption to excuse him from the employee mandate. The District Court discounted the fact that although the



Applicant was still working, his religious exemption was likely going to be denied, and was denied as expected.

On about March 1, 2022, Applicant filed an appeal of the denial of his religious exemption, which is still pending with the Law Department, and will likely be denied along with nearly every other exemption request and appeal, given that the City has denied 99% of all religious and medical exemptions for municipal workers to the EUA Covid 19 vaccination thus far.

The Second Circuit in denying the Stay overlooked the Vaccination Orders are void *ab initio* violating the due process rights of thousands of other municipal employees, similarly, situated to Detective Marciano, who have already been terminated or are facing imminent termination causing them irreparable harm. In *Elrod v Burns*, U.S. Supreme Court noted in upholding the granting injunctive relief, “[a]t the time a preliminary injunction was sought in the District Court, one of the respondents was only threatened with discharge.” 427 U.S. 347 (1976).

The District Court reasoned that any harm endured by Applicant could be remedied by a *Monell* claim as a source for monetary damages. (A-275). See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). The District Court overlooked the sweeping no-fault liability protections giving City complete immunity from suit with respect to any claims for losses arising out of any Covid 19 covered countermeasure. The PREP Act provides for no damages awards, outside of the illusory Countermeasure Injury Compensation Program (CICP), entitlement program, which only rarely will cover medical costs not covered by the vaccinee’s health insurance, if at all. *Parker v. St. Lawrence Cnty. Pub. Health Dep’t*, 102 A.D.3d 140 (N.Y. App. Div. 2012).

The District Court stated during oral argument, “In *Monell*, which, for the benefit of the record, a 1978 decision of the U.S. Supreme Court, the Supreme Court held, as a matter of constitutional law, that if a state agent acting in their official capacity violated the federal Constitution, an action for damages would lie. I don't see how that can be possibly affected by what you are referring to...” (A- 275). Any *Monel* claim filed by Applicant would be dismissed pursuant to 12(b)(6) and 12(b)(1) as fast as it was filed under the no-fault, no-liability protections of the PREP Act preempting all damages for Covid 19 EUA Countermeasures.

Under the PREP Act, the waiver of liability for any Countermeasure use is premised upon implied informed consent to the submit to the EUA Countermeasure voluntarily. (A-276 to A-277). The Second Circuit has defined irreparable harm “as certain and imminent harm for which a monetary award does not adequately compensate.” *Wisdom Imp. Sales Co., LLC v. Labatt Brewing Co., Ltd.*, 339 F.3d 101, 113 (2d Cir. 2003) (citations omitted); *see also Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995) (stating that “[i]rreparable harm is an injury that is not remote or speculative but actual and imminent, and ‘for which a monetary award cannot be adequate compensation’”(quoting *Jackson Dairy*, 596 F.2d at 72)). *Doe v. Rensselaer Polytechnic Inst.*, 1:18-CV-1374 (FJS/CFH), at \*4 (N.D.N.Y. Jan. 11, 2019).

Applicant is refusing informed consent and has no legal remedy. Applicant is facing either loss of his job or receiving a dangerous and illegally mandated EUA Covid 19 Countermeasure vaccine under duress, which he does not need, nor want, because among other things, in NYS, adult mandates are illegal as a matter of state law, and he has natural immunity. See PHL §206(1)(l), PHL §613, also see *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018).

More importantly, this endless abuse of power by the City’s Respondents is likely to continue and repeat with more mandates, more emergencies, more drugs, more vaccines, more medical devices, and other bold, unprecedented restrictions and mandates, in a sea of executive and regulatory abuses by an overactive NYC Board of Health. “The separation of powers doctrine of the State Constitution establishes the boundaries between actions of the legislature and an administrative agency. Because the constitution vests legislative power in the legislature, administrative agencies may only effect policy mandated by statute and cannot exercise sweeping power to create whatever rule they deem necessary. In other words, ‘[as] an arm of the executive branch of government, an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations’”. *Rent Stabilization Assn. of N.Y. City v. Higgins*, 83 N.Y.2d 156, 169, (1993), *cert. denied* 512 U.S. 1213 (1993), citing *Boreali*, 71 N.Y.2d at 9.

A majority of this Court would likely agree that to avoid continuing irreparable harm, the State Court TRO should be reinstated, the City Respondents should be preliminarily enjoined, and the Vaccination Orders, ultimately, struck down in the Second Circuit upon conclusion of the Appeal process.

### **Balance of the Equities & Public Interest**

The balance of the equity’s tips in Applicant’s favor and requires this Court to find “that the harm to the plaintiff without the injunction will be greater than the harm to the defendant if the injunction is granted. *Nassau Roofing & Sheet Metal Co. v Facilities Devp’t Corp.*, 70 A.D.2d 1021 (3d Dept. 1979). Where there is “no evidence to suggest [Respondent] will be harmed in the interim” and the first two prongs of the standard have been satisfied, a preliminary injunction is properly granted. *Park Briar Assoc. v Park Briar Owners, Inc.*, 182 A.D.2d 685,

687 (2d Dept. 1992). The *status quo* to be preserved here is period before the vaccine orders went into effect in October of 2021, not after. It is well-settled that there is no public interest in preserving an unconstitutional governmental order. *See, e.g., Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013).

### **CONCLUSION**

For the reasons stated above, Detective Marciano respectfully requests for this Honorable Court to reinstate the State Court Stay, pending the outcome of Applicant's Appeal in the Second Circuit.

Dated: August 22, 2022.

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# **APPENDICES**

**APPENDIX 1**  
**(Ct. App. Dkt. No. 118)**

S.D.N.Y.-N.Y.C.  
21-cv-10752  
Rakoff, J.

# 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 2<sup>nd</sup> day of August, two thousand twenty-two.

Present:

Jose A. Cabranes,  
Joseph F. Bianco,  
*Circuit Judges.\**

Anthony Marciano, individually and on behalf of all other individuals similarly situated,

*Plaintiff-Appellant,*

v.

22-570

Eric Adams, Mayor of the City of New York, in his official capacity, et al.,

*Defendants-Appellees.*

Appellant moves for an injunction or stay pending appeal, and for certification of an issue to the New York State Court of Appeals. Upon due consideration, it is hereby ORDERED that the motion for an injunction or stay is DENIED because Appellant has failed to meet the requisite standards. *See U.S. Sec. & Exch. Comm'n v. Citigroup Global Mkts. Inc.*, 673 F.3d 158, 162-63 (2d Cir. 2012); *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994). It is further ORDERED that the motion for certification is DENIED because the New York Court of Appeals has addressed the state law issue identified by Appellant and Appellant has not otherwise demonstrated that certification is warranted. *Osterweil v. Bartlett*, 706 F.3d 139, 142 (2d Cir. 2013).

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

\* Judge Alison J. Nathan has recused herself from consideration of this motion. Pursuant to Second Circuit Internal Operating Procedure E(b), the matter is being decided by the two remaining members of the panel.

**APPENDIX 2**  
**(Ct. App. Dkt. No. 2)**



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ANTHONY MARCIANO,

Plaintiff,

-against-

BILL DE BLASIO, MAYOR OF THE CITY  
OF NEW YORK, in his official  
capacity, DAVE A. CHOCKSHI,  
COMMISSIONER OF HEALTH AND MENTAL  
HYGIENE, in his official capacity,  
DERMOT SHEA, POLICE COMMISSIONER,  
in his official capacity, THE NEW  
YORK CITY BOARD OF HEALTH, and THE  
CITY OF NEW YORK,

Defendants.

21-cv-10752 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

In the two years since the first confirmed COVID-19 case in New York City was reported on March 1, 2020, the virus has inflicted death and disruption upon the City on a scale unparalleled in recent memory.<sup>1</sup> Seeking to control and mitigate the virus's impact, the New York City Board of Health has put into place various measures. Among these measures was an order, first issued by the Commissioner of the City's Department of Health and

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<sup>1</sup> According to the most recent data, at least 39,903 individuals have died of COVID-19 in New York City. See "Trends and Totals," NYC Health, <https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page> (last accessed March 7, 2022).

Mental Hygiene on October 20, 2021, requiring all City employees and certain contractors to be vaccinated against COVID-19.

Plaintiff Anthony Marciano, a detective with the New York City Police Department ("NYPD"), commenced this action in New York State Supreme Court, from which it was subsequently removed to this Court, challenging the Commissioner's October 20, 2021 order as facially invalid under state law and as violating his federal constitutional right to substantive and procedural due process. Listed as defendants in this action were Bill de Blasio, in his (former) official capacity as Mayor of the City of New York, Dave A Chokshi, in his official capacity as Commissioner of Health and Mental Hygiene, Dermot Shea, in his (former) official capacity as Police Commissioner, the New York City Board of Health, and the City of New York.<sup>2</sup>

Defendants have now moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing and failure to state a claim, respectively. See ECF No.

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<sup>2</sup> As of the date of this Memorandum Opinion, Eric Adams is Mayor of the City of New York and Keechant Sewell is the New York City Police Commissioner. When a government official is sued in an official capacity and subsequently leaves office, the official's successor is automatically substituted. See Fed. R. Civ. P. 25(d). Were this case to continue beyond the motions disposed of here, it would be appropriate to substitute-in the successors of the named government officials. Marciano's complaint also misspells Commissioner Chokshi's name as "Dave A. Chockshi," which it would similarly be appropriate to correct were the case to move forward.

27. For the reasons set forth below, the motion to dismiss for lack of subject matter jurisdiction is denied, the motion to dismiss for failure to state a claim is granted, and the complaint is dismissed with prejudice.

### **BACKGROUND**

#### **A. Factual Background**

The New York City Board of Health (the "Board") is part of the City's Department of Health and Mental Hygiene (the "Department") and consists of the Commissioner of that Department, the Chairperson of the Department's Mental Hygiene Advisory Board, and nine other members, appointed by the Mayor. See New York City Charter ("Charter") § 553.

On March 25, 2020, David Chokshi, the Department's Commissioner, declared a public health emergency within New York City to address the threat posed by COVID-19 to the health and welfare of City residents. See ECF 28-1 ("Order") at 2. That order remains in effect. Id. The Commissioner's declaration followed Mayor De Blasio's issuance of Emergency Executive Order No. 98, which similarly declared a state of emergency in the City to address the threat posed by the pandemic to the City residents – and that executive order also remains in effect. Id. A week after Commissioner Chokshi's declaration, the first wave of the pandemic hit its peak within the City, with approximately 1,850 daily hospitalizations reported on March 30, 2020. ECF 1-1 ¶ 66.

In late 2020, the first COVID-19 vaccine – developed by Pfizer and BioNTech – was granted emergency use authorization by the Food and Drug Administration (“FDA”). See ECF 1-1 (“Complaint”) ¶ 126. Subsequently, on August 23, 2021, the FDA granted full approval to the Pfizer-BioNTech vaccine for individuals 16 years of age and older.<sup>3</sup> In a press release announcing the vaccine’s approval, the FDA stated that the vaccine had proven “91% effective in preventing COVID-19 disease” in clinical trials.<sup>4</sup> The following week, Mayor de Blasio issued Executive Order No. 78, requiring that, beginning September 13, 2021, City employees and covered City contractors either be vaccinated against COVID-19 or be tested for COVID-19 on a weekly basis. See Order at 3.

Pursuant to his prior declaration of a public health emergency, Commissioner Chokshi, on October 20, 2021, issued an order (the “Department’s Order” or the “Order”) requiring COVID-19 vaccinations for City employees and certain City contractors. See id. In setting out the justification for the Order, Commissioner Chokshi noted, among other things, that, that the U.S. Centers for Disease Control and Prevention (“CDC”) “has stated that vaccination is an effective tool to prevent the spread of

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<sup>3</sup> See “FDA Approves First COVID-19 Vaccine” (Aug. 23, 2021), <https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine> (see Complaint ¶ 126 n.9).

<sup>4</sup> Id.

COVID-19 and the development of new variants, and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated.” Id. at 2. He also noted that, according to one study, “the Department’s vaccination campaign was estimated to have prevented about 250,000 COVID-19 cases, 44,000 hospitalizations, and 8,300 deaths from COVID-19 infection since the start of vaccination through July 1, 2021,” and that “the number of prevented cases, hospitalizations, and death has risen since then.” Id. The Board ratified the Department’s Order by a unanimous vote on November 1, 2021. ECF No. 28-2 at 22.

The Order set a deadline of 5:00 p.m. on October 29, 2021 by which time City employees “must provide proof to the agency or office where they work that either (1) they have been fully vaccinated against COVID-19; or (2) they have received a single dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or (3) they have received the first dose of a two-dose COVID-19 vaccine.” See id. at 5. Further, under the Order, any City employee who has not provided the above-described proof must be excluded from their assigned work location beginning on November 1, 2021. See id. at 4. The Order specifically states that it shall not “be construed to prohibit any reasonable accommodations otherwise required by law.” Id. at 6.

After the Order was issued, the City published a set of Frequently Asked Questions ("FAQs") to clarify the application of the vaccine mandate.<sup>5</sup> The FAQs state that, "[b]eginning November 1, [2021,] City staff who are not in compliance with the vaccine mandate and have not applied for a reasonable accommodation will be placed on Leave Without Pay" ("LWOP"). Id. The FAQs further explain that an employee may be immediately "removed from LWOP" and restored to payroll if he or she arrives at work with proof of one dose of a vaccine; however, "[e]mployees who refuse to comply will be terminated in accordance with procedures required by the Civil Service Law or applicable collective bargaining agreement." Id.

Subsequently, the NYPD issued an Administrative Bulletin advising members of the police force of the Order and its requirements. See ECF No. 20-3. Then, on November 10, 2021, Police Commissioner Shea issued Operations Order 49, which incorporated the requirements of both Mayor de Blasio's August 31, 2021 Executive Order and the Department's Order, including the requirement that NYPD employees who are not in compliance with

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<sup>5</sup> "FAQ on New York City Employees Vaccine Mandate," <https://www1.nyc.gov/assets/dcas/downloads/pdf/guidelines/faq-vaccine-mandate.pdf> (last accessed February 22, 2022). The Court may take judicial notice of these state agency-promulgated guidelines in deciding the motion to dismiss. See T.P. ex rel. Patterson v. Elmsford Union Free Sch. Dist., 2012 WL 860367, at \*4 n.1 (S.D.N.Y. Feb. 27, 2012).

these order would be placed on LWOP. See ECF No. 20-4. The order also sets out a process by which NYPD employees may seek a reasonable accommodation to be exempted from the Department's Order and provides that any member of the service with a pending application may continue to report to duty so long as he or she undergoes weekly COVID-19 testing. Id. at 2.

Plaintiff Anthony Marciano is a detective with the NYPD. See Complaint ¶ 44; ECF 31-1 ¶ 1. Marciano has served as a member of the City's police force through the pandemic, including after contracting and recovering from COVID-19 in March of 2020. See Complaint ¶ 91. Following the issuance of Police Commissioner Shea's order, Plaintiff Marciano applied for an accommodation exempting him from the Department's Order, citing religious objections. See ECF 8-1 at 24. In accordance with the NYPD's procedures, he was not put on LWOP pending a decision on his accommodation request. See ECF 8-1 at 24. On February 8, 2022, Marciano was notified that his accommodation request was denied, and he was given seven days to appeal the decision before it was put into effect. ECF No. 30-6. Marciano timely proceeded with such an appeal on February 11, 2021, and, as a result, he remains on active duty pending a final decision regarding his accommodation request. ECF No. 32 at 2.

B. Procedural Background

On December 6, 2021, Marciano commenced this action in New York State Supreme Court by filing a complaint<sup>6</sup> on behalf of himself and “others similarly situated” against the defendants challenging the vaccine mandate imposed by the Department’s Order and seeking a temporary restraining order (“TRO”) preventing the implementation of the mandate as well as a declaration that the Order is void. Complaint at 2. The complaint asserts four claims: (1) “separation of powers” under the New York State Constitution, id. ¶¶ 235-40; (2) preemption by state law, ¶¶ 241-44; (3) substantive due process, brought pursuant to 42 U.S.C. § 1983, id. ¶¶ 245-49; and (4) procedural due process, brought pursuant to 42 U.S.C. § 1983, id. ¶¶ 250-53.

On December 14, 2021, both parties appeared before the Honorable Justice Nervo of the New York State Supreme Court for oral argument concerning Marciano’s TRO application. At the conclusion of oral argument, Justice Nervo issued an oral decision from the bench granting the TRO. See ECF No. 20-5 at 48. The next day, on December 15, 2021, defendants timely removed the

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<sup>6</sup> Although stylized as a hybrid complaint and Article 78 petition, nevertheless, because the complaint exclusively sought to challenge the Order on facial grounds, it was an Article 78 petition in name only. See Corbett v. City of New York, 816 Fed. App’x 551 (2020) (An Article 78 court “may not rule on [a regulation’s] facial validity” (citing Hachamovitch v. DeBuono, 159 F.3d 687, 695 (2d Cir. 1998))).



action to this Court pursuant to 28 U.S.C. §§ 1441 and 1443 based on Marciano's federal claims, viz., his third and fourth claims alleging substantive and procedural due process violations, respectively. See ECF No. 5. Subsequently, on December 23, 2021, Marciano filed an emergency motion seeking that his state law claims be severed and remanded to the state court. ECF No. 17. On December 27, 2021, defendants filed a motion to vacate the TRO issued by the New York State Supreme Court. ECF No. 18.

On December 29, 2021, the parties appeared remotely before this Court for oral argument on Marciano's motion to remand the state law claims to the state court and defendants' motion to vacate the TRO. First, the Court denied Marciano's motion to sever and remand his state law claims. ECF No. 24 at 16. Next, noting that Marciano's reasonable accommodation request was still pending and, as a result, he was continuing to be paid his salary and work in his position, the Court granted defendants' motion, vacating the TRO, although without prejudice to plaintiff bringing a renewed application for a TRO if his circumstances changed. ECF No. 24 at 28. The Court then set a briefing schedule with respect to defendants' motion to dismiss Marciano's complaint.<sup>7</sup>

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<sup>7</sup> Subsequently, on January 13, 2022, Justice Nervo issued a Decision and Order in which he concluded that, notwithstanding defendants' removal of the matter to this Court, the state court retained jurisdiction – at least insofar as a federal court had not yet granted the motion to remove – and denied Marciano's complaint on the merits. See ECF 28-8. Because this order was

On February 8, Marciano filed a renewed TRO motion, citing the City's denial of his request for reasonable accommodation. ECF No. 30-1. Oral argument on defendants' motion to dismiss and Marciano's renewed TRO motion was held before this Court on February 28, 2022. At the hearing, the Court denied Marciano's renewed TRO motion, citing, among other reasons, that Marciano remains on active duty while his appeal of the denial of his accommodation request is pending. See Transcript of February 28, 2022 Hearing.

#### **LEGAL STANDARD**

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must provide grounds upon which his claim rests through "factual allegations sufficient 'to raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).<sup>8</sup> To do so, the complaint must allege "enough facts to state a claim to relief that is plausible on its face." Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010) (quoting Twombly, 550 U.S. at 570). "A claim has facial

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issued after defendants' notice of removal was filed, it is void and without effect. See N.Y. State Nat'l Org. for Women v. Terry, 697 F. Supp. 1324, 1330 n.5 (S.D.N.Y. 1988) (citing United States ex rel. Echevarria v. Silberglitt, 441 F.2d 225, 227 (2d Cir. 1971)).

<sup>8</sup> Unless otherwise indicated, in quoting cases all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In applying this standard, the Court accepts as true all well-pled factual allegations but does not credit “mere conclusory statements” or “[t]hreadbare recitals of the elements of a cause of action.” Id.

In deciding a motion pursuant to Rule 12(b)(6), “the Court may consider documents that are referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in the plaintiff’s possession or that the plaintiff knew of when bringing suit, or matters of which judicial notice may be taken.” Jovani Fashion, Ltd. v. Cinderella Divine, Inc., 808 F. Supp. 2d 542, 545 (S.D.N.Y. 2011) (citing Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir.2002)), aff’d, 500 F. App’x 42 (2d Cir. 2012). In resolving a challenge to standing under Rule 12(b)(1), “the Court may consider extrinsic evidence proffered by the parties in addition to facts alleged in the pleadings.” Bekker v. Neuberger Berman Grp. LLC, 2018 WL 4636841, at \*3 (S.D.N.Y. Sept. 27, 2018).

#### **DISCUSSION**

Defendants move to dismiss Marciano’s complaint both for failure to state a claim, pursuant to Rule 12(b)(6), and for lack of standing, pursuant to Rule 12(b)(1). Because defendants’

challenge to standing implicates whether the Court has the subject matter jurisdiction necessary to consider the merits of the action, see Rhulen Agency, Inc. v. Ala. Ins. Guar. Ass'n, 896 F.2d 674, 678 (2d Cir.1990), the Court first addresses Marciano's standing to pursue this action.

I. Standing

To satisfy the "irreducible constitutional minimum of standing . . . the plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). Defendants' arguments concern the first of these three elements – injury in fact. An injury in fact is "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." Id. at 339. Because Marciano has not yet actually been put on LWOP or terminated pending the resolution of his appeal of the denial of his request for accommodation, defendants argue that he faces at most a hypothetical harm, insufficient to give rise to standing. The Court disagrees.

Satisfying the injury-in-fact requirement is "a low threshold which helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." John v. Whole Foods Mkt. Grp., Inc., 858 F.3d 732, 736 (2d Cir. 2017). Accordingly, a threatened

injury in the future is sufficient to satisfy standing so long as the injury is “certainly impending[] or there is a substantial risk that the harm will occur.” Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014). Although it is true that Marciano’s departmental appeal is still pending and, as a result, he has neither been placed on LWOP or terminated, defendants have not offered any reason to conclude that an ultimate denial of his accommodation request is anything but very likely. Indeed, the evidence submitted by Marciano, including an internal guidance document for reviewing accommodation requests and a sworn affidavit from the executive director of the NYPD’s Equal Employment Opportunity Division, see ECF Nos. 31-15, 31-25, strongly suggests that his accommodation request – based on purported objections to fetal cell derivative research – will ultimately be denied.

Accordingly, the Court denies the motion to dismiss for lack of standing and proceed to the merits.<sup>9</sup>

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<sup>9</sup> The Court’s determination that Marciano has standing to proceed with this suit is not inconsistent with its prior holding that Marciano failed to establish a sufficiently immediate harm to justify a TRO. “[E]stablishing that there is a substantial threat of irreparable injury on a motion for preliminary injunction is a much taller task than showing injury-in-fact to survive a motion to dismiss.” Gbalazeh v. City of Dallas, 394 F. Supp. 3d 666, 672 (N.D. Tex. 2019); see also Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1022 (9th Cir. 2016) (“A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief.”). While the allegations and

## II. Ultra Vires

Marciano's first cause of action seeks a declaration that the Department's Order is facially invalid as an ultra vires act under the New York State Constitution. However, as recent case law has made clear, the Commissioner and the Board's authority to issue the sort of vaccination requirement at issue here is firmly established.

In particular, the Board's authority to mandate vaccinations was confirmed by the Court of Appeals of New York in its decision in Garcia v. New York City Department of Health & Mental Hygiene, 31 N.Y.3d 601 (2018). As the court explained in that case, the New York City Charter, as enacted by the state legislature, "empowers the Department with 'jurisdiction to regulate all matters affecting health in the city of New York and to perform all those functions and operations performed by the city that relate to the health of the people of the city,'" including in matters relating to the "control of communicable and chronic

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limited evidence proffered by the parties in connection to the 12(b)(1) motion to dismiss suggest a sufficiently likely injury so as to ensure Marciano has a "personal stake in the outcome of the controversy," Whole Foods, 853 F.3d at 767, that Marciano's pay continues for the time being has provided the Court sufficient opportunity to reach a decision on the merits before any harm is actually suffered, obviating the need for a TRO, see Citibank N.A. v. Citytrust, 756 F.2d 273, 275 (2d Cir. 1985) ("[T]he single most important prerequisite for the issuance of a preliminary injunction is a demonstration that, if not granted, the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.").

disease and conditions hazardous to life and health.” Id. at 610 (quoting Charter § 556).

Consistent with this broad grant of jurisdiction, Section 17-109 of the New York City Administrative Code “delegates to the Department – and by extension, the Board – the power ‘to collect and preserve pure vaccine lymph or virus, produce diphtheria antitoxin and other vaccines and antitoxins, and add necessary additional provisions to the health code in order to most effectively prevent the spread of communicable diseases’” and “to take measures . . . for general and gratuitous vaccinations.” Id. at 610-11 (quoting New York City Admin. Code § 17-109(a), (b)). Concluding that these provisions constituted a “legislative delegation of authority” sufficient to enable the Board “to adopt vaccination measures,” the Court of Appeals upheld the Board’s rule mandating influenza vaccines for children attending city-regulated childcare or school-based programs. Id. at 611.

In reaching this conclusion, the Court of Appeals acknowledged that “the flu vaccine rules necessarily impinge upon personal choice to some degree,” but explained that “the rules challenged here do not relate merely to a personal choice about an individual’s own health but, rather, seek to ensure increased public safety and health for the citizenry by reducing the prevalence and spread of a contagious infectious disease.” Id. at 612. Accordingly, there was a “very direct connection between the

flu vaccine rules and the preservation of health and safety,” placing the vaccine measures in question clearly within the Board’s purview. Id. at 612.

The same can be said about Board’s requirement that City employees and contractors be vaccinated against COVID-19. As Commissioner Chokshi explained in promulgating the Order, “a system of vaccination for individuals providing City services and working in City offices will potentially save lives, protect public health, and promote public safety,” both because vaccination protects the City employees and contractors themselves from serious illness and death and because it reduces the risk that those employees and contractors will transmit the disease to those members of the public they serve. ECF 28-1 at 2. Indeed, it is not hard to see how that rationale applies with full force to the city’s police department, Marciano included: The NYPD’s officers regularly interact with the public, whom they have sworn to protect, often in emergency situations where close contact is unavoidable. It is incumbent on the City to take steps that mitigate the health risks such interactions with the police pose to its residents, thus reinforcing the public trust on which effective policing relies.

In Garcia, the Court of Appeals explained that the Board’s authority to require vaccination was further supported by “the Board’s long history of mandating immunizations for children



attending City-regulated child care programs beyond those required by the [state] legislature” – a history beginning no later than 1866, when the Board, in a predecessor form, mandated smallpox vaccinations for minors. 31 N.Y.3d at 613-14. Notably, the Board’s deep history of such actions similarly supports its authority to impose vaccination as a condition of employment for those in service of the City. As the Court of Appeals recognized when upholding the constitutionality of the Board’s predecessor over a century and a half ago, the City’s health officials have long been endowed with immense control “over persons and property, so far as the public health was concerned,” including the authority “to regulate, abate or remove all trades or manufactures that might be by them deemed injurious to the public health.” Metropolitan Bd. of Health v. Heister, 37 N.Y. 661, 670 (1868); see also John Fabian Witt, American Contagions: Epidemics and the Law from Smallpox to COVID-19 24-26 (2020) (discussing the Metropolitan Board of Health). Regulation of those the City employs or with whom it contracts to work within its limits through the imposition of a vaccine requirement would certainly seem to fall within that broad mandate. Cf. Viemeister v. White, 179 N.Y. 235, 240 (1904) (noting that vaccination against smallpox is a requirement to serve “in nearly all the armies and navies of the world”).

In any case, although the decision in Garcia only explicitly addressed mandated vaccinations for children, the Appellate

Division recently extended that prior holding to adult vaccinations in C.F. v. New York City Department of Health & Mental Hygiene, 191 A.D.3d 52, 64-65 (N.Y. App. Div. 2d Dep't 2020). In its decision issued on December 23, 2020, approximately nine months into the COVID-19 pandemic, the court upheld the Board's adoption of a mandatory vaccination requirement – applicable to all persons “older than six months of age who lived or worked within four specified zip codes” – arising out of a severe measles outbreak in Williamsburg, Brooklyn. Id. at 57, 69. The court's decision also upheld the Commissioner's authority to promulgate such a vaccination order pursuant to Section 3.01(d) of the New York City Health Code, which provides, in relevant part, that upon the declaration of a public health emergency, the Department's Commissioner may . . . issue necessary orders and take such actions as may be necessary for the health or the safety of the City and its residents,” provided that any such orders “shall be effective only until the next meeting of the Board,” where “the Board may continue or rescind” those orders. See C.F., 191 A.D.3d at 57-58, 67.

In its opinion in C.F., the Appellate Division made clear that it understood itself to be deciding “whether the Board of Health, as a means of controlling a contagion that has already spread, may mandate the vaccination of all persons who live or work, and children who attend school, within the affected area.”

Id. at 62. In so doing, the court explained that it was “very much aware of the COVID-19 pandemic[,] which has caused so much death, severe illness, and economic dislocation in our state and nation,” as well as “the concerns expressed as to the willingness of the public to accept the vaccine voluntarily,” potentially necessitating “the public health authorities to mandate the administration of a vaccine.” Id. The court, in other words, presciently anticipated a case not unlike the present one challenging the authority of the Commissioner and the Board to require vaccination for COVID-19 and laid down a rule plainly deciding the issue in favor of sustaining such an order. Thus, to the extent the Court of Appeals, in Garcia, left open any question as to the Commissioner’s authority to issue a vaccine requirement applicable to adults to address a public health emergency, no ambiguity persists following the decision in C.F. See V.S. v. Muhammad, 595 F.3d 426, 432 (2d Cir. 2010) (a federal court “is bound to apply the law as interpreted by a state’s intermediate appellate courts unless there is persuasive evidence that the state’s highest court would reach a different conclusion”).

Nevertheless, Marciano seeks to distinguish the decision in C.F. from the present case, pointing to various differences between the Department’s Order pertaining to COVID-19 and the measles-related order at issue in C.F., including that the Board’s measles order provided an exception for people who could demonstrate they

"already had immunity to the disease," an exception the Order at issue here lacks. 191 A.D.3d at 58. But, as the Court of Appeals explained in Garcia, it is not for the courts to "determin[e] whether a regulatory agency adopted the most desirable method or type of regulation." 31 N.Y.3d at 616. Rather, once a court has concluded that "the agency has been empowered to regulate the matter in question, the separation of powers analysis goes no farther in reviewing the agency's methods." Id. (citing Boreali v. Axelrod, 71 N.Y.2d 1 (1987)).

Accordingly, having concluded that the authority to require vaccination for City employees and contractors falls clearly within the Board's regulatory purview, The Court grants defendants' motion to dismiss count one of the complaint, which seeks a declaration that the Order is ultra vires under the New York State Constitution.

### III. Preemption

Marciano's second cause of action asserts that the Department's Order is invalid as preempted by state law. Specifically, he argues that the Order is preempted by New York's Public Health Law, which he characterizes as "explicitly limit[ing] the commissioner's authority to require vaccination to . . . 'children' and 'post-secondary students.'" ECF No. 31 at 25. In support of this position, Marciano points to Section 206(1)(1) of the law, which states, in relevant part, that

"[n]othing in this paragraph shall authorize mandatory immunizations of adults or children, except as provided in [Public Health Law §§ 2164 and 2165, mandating vaccination of children]." But, as the Court of Appeals explained in Garcia, these statutory provisions are directed to the powers and duties of the Commissioner of the New York State Department of Health and in no way limit the New York City Department or its Commissioner from issuing separate and independent vaccine requirements. See Garcia, 31 N.Y.3d at 620. Indeed, in C.F., the Appellate Division explicitly rejected the argument that the state Public Health Law preempted the City Commissioner's authority to issue a vaccine mandate applicable to adults. See C.F., 191 A.D.3d at 67.<sup>10</sup> Accordingly, the Order is not preempted by state law, and Marciano's second cause of action is dismissed.

#### IV. Substantive Due Process

Marciano's third cause of action alleges that the Department's Order violates his "right to bodily integrity," constituting a denial of substantive due process in violation of the Fourteenth Amendment. ECF No. 31 at 33. Such a substantive

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<sup>10</sup> Marciano also suggests that New York State Department of Labor will likely adopt a rule mandating a mask and test requirement that will preempt the Department's Order. But this Court knows of no authority allowing a federal court to invalidate a duly issued order on such speculative grounds, and Marciano offers none.

due process claim, however, is foreclosed by the U.S. Supreme Court's decision in Jacobson v. Massachusetts, 197 U.S. 11 (1905).

At issue in that case was a regulation, promulgated in the midst of an epidemic by the board of health of the city of Cambridge, Massachusetts pursuant to a state statute, mandating that all inhabitants of the city of Cambridge be vaccinated against smallpox or face criminal penalty in the form of a fine. Id. at 12. The plaintiff argued that the statute violated his "inherent right" to "care for his own body and health in such a way as to him seems best." Id. at 26. But the Court rejected that argument, explaining that "[t]he possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." Id. Accordingly, the Court upheld the vaccine requirement, concluding that a court must not invalidate a law or regulation "enacted to protect the public health" so long as it has "real or substantial relation [to public health]" and is not "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." Id. at 31.

Although decided over a century ago, Jacobson remains good law. As the Second Circuit recently stated in declining to enjoin a COVID-19 vaccination requirement similar to the one at issue here, "[b]oth [the Second Circuit] 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.” We The Patriots USA, Inc. v. Hochul, 17 F.4th 266, 293 (2d Cir. 2021) (citing Jacobson, 197 U.S. at 25-31 and Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015)). As such, a requirement that City employees and contractors receive a vaccine approved by the FDA, implemented in the throes of a pandemic to help stem the unremitting waves of illness within the City, does not facially violate any right to substantive due process.

In the face of this precedent, Marciano concedes that it is within the power of the state to enact a compulsory vaccination law like the one at issue here. Nevertheless, he argues that while Jacobson upholds a state’s authority to require vaccination, it does not similarly authorize Commissioner Chokshi, “a municipal health commissioner” who is not “accountable to the people,” to exercise such power. ECF No. 31 at 34. But this assertion has no basis in the law. Indeed, in Jacobson itself the vaccine mandate upheld by the U.S. Supreme Court had been issued by local health authorities – not the state legislature. See 197 U.S. at 12-13.

More broadly, a state’s delegation of its police power to an administrator is not subject to review as a matter of federal constitutional law. See Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 255 (1957) (“[T]his Court has held that the concept of

separation of powers embodied in the United States Constitution is not mandatory in state governments.”). Accordingly, courts in this Circuit have uniformly recognized the validity of vaccine requirements imposed by the City and the Board when challenged on substantive due process grounds. See Maniscalco v. New York City Dep’t of Educ., 2021 WL 4344267, at \*3 (E.D.N.Y. Sept. 23, 2021) (denying motion to preliminary enjoin COVID-19 vaccination requirement for New York City Department of Education employees for failure to show likelihood of success on the merits), aff’d, 2021 WL 4814767 (2d Cir. Oct. 15, 2021); Abadi v. City of New York, 2022 WL 347632, at \*2 (S.D.N.Y. Feb. 4, 2022) (denying motion to preliminary enjoin requirement that all City employees and covered contractors either be vaccinated or take weekly test for COVID-19 for failure to show likelihood of success on the merits). For these reasons, the Court dismisses Marciano’s third cause of action.

#### V. Procedural Due Process

Marciano fourth cause of action asserts a procedural due process claim based on the threatened loss of pay and employment he faces for failure to meet the Order’s vaccine requirement. “A procedural due process claim requires the plaintiff to establish (1) possession by the plaintiff of a protected liberty or property interest, and (2) deprivation of that interest without



constitutionally adequate process.” Tooly v. Schwaller, 919 F.3d 165, 173 (2d Cir. 2019).

As a public employee subject to discharge only for cause, Marciano has a constitutionally protected interest in his continued employment. See O’Connor v. Pierson, 426 F.3d 187, 196 (2d Cir. 2005); see also O’Neill v. City of Auburn, 23 F.3d 685, 688 (2d Cir. 1994) (“[The New York Civil Service Law] gives covered employees a property interest in their employment, so that they may not be terminated without notice and hearing.”); Capul v. City of New York, 2020 WL 2748274, at \*2 (S.D.N.Y. May 27, 2020) (holding that the New York Civil Service Law covers NYPD employees), aff’d, 832 F. App’x 766 (2d Cir. 2021). Accordingly, the question of whether Marciano’s constitutional rights have been violated depends on what process he has or will be provided in connection with his threatened relegation to LWOP and termination and whether that process is constitutionally adequate.

Marciano argues that his procedural due process rights were violated because the NYPD has failed to adhere to the disciplinary procedures set forth in section 14-115 of the New York City Administrative Code and the NYPD Patrol Guide in enforcing the vaccine requirement. As an initial matter, it does not appear that Marciano is entitled to these protections as a matter of state or city law. Marciano has failed to satisfy a condition of his employment, that is, that he be vaccinated against COVID-19, and

“the termination of a public employee based on the employee’s failure to satisfy a qualification of employment unrelated to job performance, misconduct, or competency does not implicate the [Administrative Code’s or the Patrol Guide’s] disciplinary procedures.” Garland v. New York City Fire Dep’t, 2021 WL 5771687, at \*5 (E.D.N.Y. Dec. 6, 2021); see also Broecker v. New York City Dep’t of Educ., 2022 WL 426113, at \*9 (E.D.N.Y. Feb. 11, 2022) (“Recent case law from this Circuit and in the State of New York supports a finding that vaccination is a lawful condition of employment.”)

More importantly, Marciano’s arguments are beside the point. The question for the Court is not whether state procedural law was correctly followed or applied, but rather whether the process provided satisfies constitutional requirements. And to determine whether process is adequate, the Court looks to “[f]ederal constitutional standards rather than state statutes.” Robison v. Via, 821 F.2d 913, 923 (2d Cir. 1987); see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (“[O]nce it is determined that the Due Process Clause applies, the question remains what process is due . . . . The answer to that question is not to be found in the [state] statute.”); Russell v. Coughlin, 910 F.2d 75, 78 n.1 (2d Cir. 1990) (“[T]he fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action . . . .

does not settle what protection the federal due process clause requires.”).

In order to satisfy the constitutional minimum, the predeprivation proceedings “need not be elaborate.” O’Connor, 426 F.3d at 198 (quoting Loudermill, 470 U.S. at 545). “[T]he Constitution mandates only that such a process include, at a minimum, notice and opportunity to respond.” Id. As defendants argue, Marciano received multiple forms of notice regarding the Department’s Order more than a month before the deadline to comply or to seek an accommodation, including through an Administrative Bulletin sent to members of the police force and through an order issued by Police Commissioner Shea. See ECF Nos. 20-3, 20-4. Further, as reflected in Commissioner Shea’s order, Marciano was given the opportunity to be heard as to the application of the Order against him by seeking an accommodation through the appropriate channels. See ECF No. 20-4 at 2.

Marciano fails to articulate how this process falls below the constitutional floor; and, given the case law making clear that “informal procedures,” as opposed to a “formal hearing,” are sufficient prior to an employee’s termination, see Ezekwo v. N.Y.C. Health & Hosps. Corp., 940 F.2d 775, 786 (2d Cir. 1991), it appears that he was afforded constitutionally adequate process. Accordingly, Marciano’s fourth cause of action is dismissed.

**CONCLUSION**

For the foregoing reasons, defendants' Motion to Dismiss the complaint with prejudice is hereby granted. The Clerk of the Court is instructed to close documents numbered 27 and 30 on the docket of this case.

SO ORDERED.

Dated: New York, NY  
March **X**\_, 2022

  
JED S. RAKOFF, U.S.D.J.

**APPENDIX 3**  
**(Dist. Ct. Dkt. No. 23)**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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-----x
ANTHONY MARCIANO,           :
                             :
    Plaintiffs,             :
                             :
        -v-                 :
                             :
BILL DE BLASIO, et al.,    :
                             :
    Defendants.           :
                             :
-----x

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21-cv-10752 (JSR)

ORDER

JED S. RAKOFF, U.S.D.J.

For the reasons stated from the bench, see Transcript of December 29, 2021 Hearing, plaintiff’s motion to remand on the grounds that removal was improper or, in the alternative, to sever and remand his state law claims to the New York State Supreme Court as a matter of this Court’s discretion, ECF No. 12, is denied, and defendants’ motion to vacate the temporary restraining order (“TRO”) issued prior to removal, ECF No. 18, is granted but without prejudice to a renewed TRO motion if circumstances change.


The briefing schedule on defendants’ motion to dismiss is as follows: Defendants’ moving papers, with the opening brief limited to no more than 30 pages, are due by January 19, 2022. Plaintiff’s answering brief, which is limited to no more than 30 pages, is due by February 9, 2022. Defendants’ reply brief, which is limited to no more than 10 pages, is due by February 16, 2022. Oral argument on the motion to dismiss will be held on February 28, 2022 at 3:30

p.m. The hearing will be held in Courtroom 14B of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York 10007. Discovery and all other proceedings in this case are stayed pending the resolution of the motion to dismiss.

Plaintiff has until 10 days following the filing of defendants' motion to dismiss to amend the complaint.

SO ORDERED.

Dated: New York, NY  
December 29, 2021

  
\_\_\_\_\_  
JED S. RAKOFF, U.S.D.J.

**APPENDIX 4**  
**(Dist. Ct. Dkt. No. 24)**



1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 ANTHONY MARCIANO, individually  
4 and on behalf of all other  
5 individuals similarly  
6 situated,

Plaintiffs,

v.

21 CV 10752 (JSR)

7 BILL de BLASIO, Mayor of the  
8 City of New York, in his  
9 official capacity, *et al.*,

Defendants.

Hearing  
(via Telephone)

-----x

New York, N.Y.  
December 29, 2021  
10:00 a.m.

13 Before:

14 HON. JED S. RAKOFF,

District Judge

16 APPEARANCES

17 PATRICIA FINN  
18 Attorney for Plaintiff

19 GEORGIA M. PESTANA  
20 Corporation Counsel for the City of New York  
21 Attorney for Defendants

22 BY: IVAN A. MENDEZ, JR.  
23 EUGENIA FOWLKES  
24  
25

1 (Case called)

2 MS. FINN: Good morning, your Honor, Patricia Finn for  
3 plaintiff Detective Marciano.

4 THE COURT: Good morning.

5 MS. FINN: Good morning.

6 MR. MENDEZ: Good morning, your Honor. Ivan Mendez  
7 from the office of the Corporation Counsel for the defendants.

8 THE COURT: Good morning.

9 As you know, there are two emergency motions pending  
10 before the Court.

11 I should note for the record that this case was  
12 originally assigned to Judge Nathan, but she claims to be  
13 preoccupied with something called the Maxwell trial, which you  
14 may conceivably have heard of, and so she asked that the case  
15 be reassigned for all purposes and it was reassigned to me.

16 The two motions are: First, to sever the state law  
17 claims and remand them to state court and, second, to dissolve  
18 the TRO.

19 I think, logically, we should start with the sever and  
20 remand motion, which is the plaintiff's motion. Let me hear  
21 first from plaintiff's counsel. Then from defendants' counsel.

22 MS. FINN: Thank you, your Honor.

23 Your Honor, the defendants' motion to dissolve the TRO  
24 and to remove the case to your court was not only defective,  
25 it's improper. I'll explain why. I had mentioned in my

1 papers --

2 THE COURT: Let me ask you one question. It was  
3 timely, right? They had 30 days.

4 MS. FINN: Right. But it did not include some very  
5 key documents that I think the rules require. Now, you may  
6 consider --

7 THE COURT: The hearing transcript should have been  
8 annexed, but you, very kindly, cured this defect by filing the  
9 transcript with the Court, and I've read it and am fully  
10 familiar with it. So I think that objection is no longer  
11 meaningful.

12 MS. FINN: Your Honor, there were other documents that  
13 were omitted.

14 For one, defense counsel Fowlkes' December 13, 2021,  
15 46-page opposition to her application for a temporary  
16 restraining order that was E-filed in state court was not  
17 included. The affidavit of Michael Melikofsky E-filed in state  
18 court in opposition was also not included. A copy of a  
19 reasonable accommodation E-filed by the defendant -- I'm sorry.  
20 It was a department of health reasonable accommodation form  
21 that was filed in the lower court was not provided to the Court  
22 and then there was the transcript.

23 I think that, you know, this kind of dovetails with  
24 the argument that this really is -- it should have stayed in  
25 the state court. If they were going to remove it, they should

1 have removed it before they briefed, they opposed, they  
2 appeared, and this argument that the TRO was not on notice is  
3 completely incorrect. They were noticed, they opposed, and  
4 they appeared.

5 THE COURT: My question is this. What I think you're  
6 basically saying is that having 30 days, they, in your view,  
7 waited around to see how they were doing on the TRO and when it  
8 didn't come out the way they liked, they removed, a variation  
9 on forum shopping. That, of course, goes on all the time. It  
10 may be that strategic choices of that sort are not wholly  
11 commendable, but they are part and parcel of normal litigation  
12 strategy. So even on your view of the underlying facts, I  
13 don't see how they weren't still within their rights to remove.

14 MS. FINN: If that's your opinion, your Honor, I'll  
15 move on to why it's improper.

16 The reason it's improper is that they failed to  
17 substantively address the nature of the federal claims or  
18 explain why the state court cannot adjudicate them. The  
19 substance of this claim is a state law violation. The  
20 defendants are trying to lop Detective Marciano into a basket  
21 with numerous amounts of other cases in state and in federal  
22 court.

23 For example, one of the exhibits provided, I think,  
24 yesterday, it's docket entry 20-6, Exhibit F, that is a  
25 decision on an order on motion in the state court. And I

1 believe the defendants are trying to lump our case in with all  
2 these other cases.

3 And I think, if you carefully look at what Judge Perry  
4 did in Supreme Court, it's fairly clear. These cases are  
5 completely different. This case is not about religious  
6 accommodation. It is not a First Amendment right to refuse.  
7 It is not a collective bargaining argument. It's none of those  
8 things. If you look at the decision --

9 THE COURT: Your complaint, of course, says that the  
10 defendant, among other things, violated federal law by denying  
11 your client both substantive and procedural due process. From  
12 the very outset you asserted that there were both federal and  
13 state issues here.

14 MS. FINN: Indeed there are. But the predominant  
15 claim is a state court claim. You don't reach the federal  
16 constitutional claims until the state court issue is resolved.  
17 And in all these other cases that the defendants are trying to  
18 claim Detective Marciano is akin to, there is a presumption in  
19 those cases that the vaccination mandates were lawful.

20 Plaintiff is asking the Court to take a step back  
21 further. The plaintiff is asking the Court to determine  
22 whether or not the city has the authority to mandate anything.

23 Let me just go back to due process. Indeed there is a  
24 due process and substantive due process claim, but they are not  
25 a claims of a right to refuse the vaccine. The claims are,

1 their substantive and procedural due process rights are  
2 violated by a dereliction of the statutory protections. It's a  
3 due process right to the statutory protections in the state  
4 law, namely, Public Health Law 206(1)(1) that specifically  
5 excludes adult vaccine mandates in this state.

6 The defendants go on and then they attempt to contort  
7 *Garcia, Garcia v. Department of Health and Mental Hygiene*,  
8 which I think, your Honor, is the pivotal case here. The  
9 reason defendants are trying to move into federal court and lop  
10 our case in with all the other ones is because they don't want  
11 to address *Garcia*. In their papers that they filed yesterday  
12 the defendants indicated that the Court of Appeals had not  
13 ruled on the authority of DOHMH to mandate vaccines during an  
14 emergency. That is actually incorrect.

15 The fact is, that case, *Garcia*, had -- I mean, it was  
16 like a boxing match. It started in the state court and the  
17 state court agreed with plaintiff that 2164, Public Health Law  
18 2164, prohibited the city from adding a flu shot. The case was  
19 appealed to the First Department. The First Department upheld  
20 that but on different grounds. The First Department held that  
21 it was not necessarily a separation-of-powers claim but,  
22 rather, the city was *ultra vires*.

23 It finally got to the Court of Appeals, and the Court  
24 of Appeals reversed and determined that the Department of  
25 Health and Mental Hygiene could indeed mandate a

1 school-required vaccine for children. That's not disputed. We  
2 understand that.

3 But where the problem is or the rubber meets the road  
4 here is that the case in *Garcia*, the Court of Appeals was very  
5 clear that it applied to childhood school-related vaccines and  
6 went on to state that the legislature in New York State has  
7 prohibited adult vaccine mandates.

8 THE COURT: Forgive me for interrupting. What about  
9 the case of *CF v. New York City Department of Health and Mental*  
10 *Hygiene*, which seemed to approve the vaccination for a  
11 different disease, but vaccination for adults.

12 MS. FINN: Your Honor, that was a very interesting  
13 case and Judge Scheinkman, of course, he is well known for his  
14 bulletproof decisions. I don't really take issue with any of  
15 those findings other than the case was mooted before it really  
16 had a chance to go further. That case involved a nuisance that  
17 was declared by the Department of Health and Mental Hygiene  
18 regarding a measles inbreak. At the time there were -- we were  
19 in a measles crisis. That is what preceded COVID.

20 In Rockland County and in Brooklyn there are large  
21 observant Jewish communities. In many of these communities, in  
22 order to avoid having to vaccinate in New York State, you can  
23 provide a positive immunity or what's known as a titer test.  
24 If you show a positive titer to measles, you do not have to get  
25 an MR vaccine.

1           What I believe was going on in those communities, and  
2 this is very common and it was common before the advent of  
3 vaccines, if one kid got chicken pox, the mom would expose all  
4 the kids to get it over with, to get the natural immunity. My  
5 understanding of what happened is that these people in  
6 Brooklyn, the community in Brooklyn, were actually  
7 intentionally spreading the measles --

8           THE COURT: Excuse me. Someone seems to be typing or  
9 something in the background and haven't muted themselves. I  
10 heard every word you said, but I ask whoever that person is to  
11 make sure they are muted.

12           Go ahead.

13           MS. FINN: What was going on in Brooklyn was and in  
14 Rockland, there was somewhat of an intentional spreading of the  
15 measles. The Department of Health and Mental Hygiene, which  
16 has the authority to control children's school-related  
17 vaccines, issued a nuisance order. And I would submit that it  
18 was properly voted on, etc., and Judge Scheinkman upheld that.

19           The fact is, there were adults encompassed in that  
20 mandate, but the nuisance order expired and the case was not  
21 appealed. I believe, had it gone to the Court of Appeals, the  
22 Court would have reversed, like it did in *Garcia*, and would  
23 have held that Public Health Law 206(1)(1) prohibits adult  
24 mandates. So that was kind of a unique case. It had sort of  
25 expired on its own before it really had a chance and I know if



1 I had --

2 THE COURT: I'm sorry. I understood your point.

3 Anything else you wanted to say on this motion before  
4 I hear from the city?

5 MS. FINN: Your Honor, the procedural and substantive  
6 due process claims do not even -- they are not even reached  
7 until there is a determination as to whether or not Public  
8 Health Law 206(1)(1) prohibits adult vaccine mandates. This is  
9 a very simple case. And the defendants have a tendency to try  
10 to suck these plaintiffs up into a vacuum with discovery and  
11 this, that, and the other thing. There is no need. This is a  
12 question of law. Either the legislature allows adult mandates  
13 or they don't. And I think I sufficiently distinguished *CF*.

14 I would also add, the Second Department ruled at the  
15 same time, in a Rockland measles challenge, that the measles  
16 outbreak, or the claimed outbreak or inbreak, did not rise to  
17 the level of an epidemic defined under the Executive Law 20.A,  
18 which is also something that we would like a ruling on.

19 I'm not suggesting COVID is not a problem. I  
20 understand it is. But our experts -- we have the same experts  
21 as the defendant. We are relying on CDC data. And CDC data  
22 says there is a 99 percent survival rate if you are infected  
23 with COVID or one of its variants. The Supreme Court in  
24 *Jacobson v. Massachusetts*, which articulated its state police  
25 power to mandate a vaccine, there had to be an emergency.

1 There had to be an epidemic. It had to imperil society.

2 THE COURT: Wait. Hold on. I'm sorry. These are  
3 important arguments, but I think they go to the second motion,  
4 to the TRO.

5 The issue on the first motion, the one that I'm asking  
6 be addressed now, is whether I should sever the two state  
7 claims and send them back for the reasons you previously  
8 articulated, or keep them together. Whether or not the CDC has  
9 given you ammunition for seeking a TRO is a separate question.

10 So let me take the liberty of interrupting and asking  
11 the city to respond, and then we will come back to you in a  
12 minute.

13 MS. FINN: Your Honor, I'm sorry. I didn't mean to go  
14 down the path with *Jacobson* there. But if I could just make  
15 the point regarding the constitutional claims. Ten seconds.

16 THE COURT: Yes.

17 MS. FINN: The fact is, the due process and the  
18 substantive due process arguments are not involving a right to  
19 refuse a vaccine, a right of bodily autonomy. There is no  
20 presumption here that the mandates are lawful.

21 And all the other cases that were brought had  
22 presumed -- even if you look at Judge Perry's decision, she  
23 says that plaintiffs concede the mandate is lawful. We do not  
24 concede that. So this due process challenge is to the  
25 Fourteenth Amendment right to the statutory protections the

1 public health law affords my client. He is an adult and he  
2 does not want to vaccinate. Thank you.

3 THE COURT: Thank you very much.

4 Let me hear from the city.

5 MS. FOWLKES: Good morning, your Honor. My name is  
6 Eugene Fowlkes. My colleague, Mr. Mendez, is addressing the  
7 defendants' motion to dissolving the TRO, and I'm addressing  
8 our response to plaintiff's motion to sever.

9 Now, we believe that we have addressed everything in  
10 our papers which were filed yesterday evening. To the extent  
11 that the Court has any specific questions, I would be happy to  
12 attempt to answer them.

13 THE COURT: I do. Lucky you.

14 Implicitly, I think, plaintiff concedes that if *CF v.*  
15 *New York City Department of Health and Mental Hygiene*, a  
16 decision of the Second Department in 2020, were the law of New  
17 York that she would have a weaker case for remand because the  
18 issue has already been, in effect, decided adversely to her.  
19 But she says that case was not appealed and that *Garcia*, in her  
20 view, casts doubt on that decision. What is your view of that?

21 MS. FOWLKES: Your Honor, both *CF* and *Garcia* make  
22 clear that the board of health has the authority to mandate  
23 adult vaccinations. In *CF* specifically, the Court specifically  
24 upheld the board of health's authority to mandate specifically  
25 adult vaccinations.

1           With respect to *Garcia v. the New York City Department*  
2 *of Health and Mental Hygiene*, there the Court was addressing  
3 the challenger's arguments with respect to holding that the  
4 legislature did not have authority. They rejected that. The  
5 Court stated that the legislature clearly delegated authority  
6 and specifically that it did not violate the separation of  
7 *Harris* doctrine to adopt these vaccination measures.

8           Specifically, on *CF* it's important to note that the  
9 petitioners there filed an Article 78 alleging that the mandate  
10 was arbitrary and capricious and nothing more, which is  
11 different from what was filed here by plaintiff.

12           Initially, when he filed in state court, he filed a  
13 hybrid Article 78 and complaint action alleging, as we have  
14 stated, substantive and procedural due process rights and, as  
15 counsel has specified just now, that this is based on the  
16 Fourteenth Amendment. It's irrelevant specifically for the  
17 motion to sever. Looking into the merits of *CF* and *Garcia* are  
18 premature. The case here clearly discusses constitutional  
19 violations.

20           And with respect to the preemption and  
21 separation-of-powers arguments, they are merely amounting to  
22 statutory interpretation issues, which this Court is able to  
23 handle, especially given the claims and how they are  
24 intertwined with the substantive and procedural due process  
25 claims.

1 THE COURT: That was the main question I had for you.  
2 Anything else, though, that you wanted to respond to?

3 MS. FOWLKES: No, your Honor. That will be all.  
4 Thank you.

5 THE COURT: Back to plaintiff's counsel. Anything  
6 further you wanted to say?

7 MS. FINN: Yes, your Honor. It's been held in the  
8 Second Circuit and the Southern District that you can sever the  
9 law claims and remand to the state court --

10 THE COURT: I totally agree. I have that power. I am  
11 not required to do it. It's a question of discretion.

12 MS. FINN: That's right. But where the claims raised  
13 are novel and complex issues of state law or where the state  
14 claims predominate, which is the case here, that is the real  
15 body of the case.

16 We have a real conflict here with *Garcia*. The  
17 defendants claim that the Court of Appeals authorized DOHMH to  
18 authorize an adult vaccine, and that is not what *Garcia* said  
19 and that is not what the legislature intended.

20 I would add that in December of 2020, the legislature  
21 enacted a novel coronavirus legislation. And it's worth  
22 pointing out they delegated no authority to any regulatory or  
23 administrative agency to do anything other than contact  
24 tracing. Traditionally, a mandatory vaccine, which admittedly  
25 involves rights of bodily autonomy, is within the authority of

1 the legislature of the State of New York. *Boreali v. Axelrod*  
2 was very, very clear. It stated that the legislature cannot  
3 cede fundamental medical decision making to anyone other than  
4 the legislature. The City of New York was struck down on the  
5 size of the soda cap ban under *Boreali*. They were struck down  
6 on smoking ban regulations.

7 Now, you can put a cigarette out. You can avoid a  
8 Coca-Cola in a 25-ounce cup. But once you're vaccinated,  
9 that's it. There is no way to unring the bell. My client has  
10 demonstrated he has natural immunity, and there is a wealth of  
11 evidence to show that people with natural immunity who are  
12 revaccinated can in fact experience a hyperimmune reaction, and  
13 they do die.

14 I recently settled a case for a child who had the  
15 exact reaction to a countermeasure vaccine, which is my final  
16 point, your Honor, on irreparable harm. They are claiming that  
17 my client's loss of health insurance, loss of his stature, loss  
18 of his position, loss of his pay, is something that can be  
19 compensable in a later action. That's completely not true.

20 THE COURT: Again, I'm sorry. These are important  
21 arguments, but I think they go much more to the TRO question of  
22 irreparable harm and so forth. So I do want to get to that,  
23 but I want to, for now, deal with the severance issue.

24 Let me once again take the liberty of interrupting.  
25 I'm impressed with the arguments, the skill with which you are

1 making those arguments, but I do want to keep the two motions  
2 separate.

3 I think I'm ready to rule on the first motion. I am  
4 going to deny the motion. Once again, I think plaintiff's  
5 counsel has raised some interesting points.

6 I start with the obvious proposition that all these  
7 claims ultimately arise from the same factual situation, and  
8 there is obvious judicial economy in not having two separate  
9 lawsuits arising from the same basic facts. Furthermore, in my  
10 court we move with considerable expedition, and we would be  
11 able to resolve all these matters in prompt fashion.

12 But if the plaintiff's arguments really raised novel  
13 or complex issues that substantially predominated over the  
14 federal claims, that would give me pause. I take a longer view  
15 of that and I think it's not really the case. Ever since  
16 vaccinations or, as they used to be called, immunizations came  
17 into play more than a hundred years ago, these kinds of issues  
18 involving the authority of New York City's Board of Health, as  
19 well as the state, to require immunization in certain  
20 circumstances has been the subject of litigation. Most of the  
21 litigation has resolved itself in favor of the city and the  
22 state.

23 A case that was not mentioned by the parties, and no  
24 reason they should, but, in my view, is really the seminal  
25 case, is the Metropolitan Board of Health v. Heister, which is

1 37 N.Y. 661. It's a decision by the highest court of the State  
2 of New York in 1868. That just shows you how early these kinds  
3 of issues got decided. That case very strongly supported the  
4 authority of the New York Board of Health to issue the kind of  
5 mandates they have issued here. I'm not deciding today whether  
6 that is dispositive. I am just saying these issues are not  
7 nearly as novel as I think plaintiff believes.

8 I also think that this is further supported both by  
9 the *CF* case that I mentioned, which I think plaintiff's counsel  
10 agrees would be very devastating to her position. And so far  
11 as *Garcia* is concerned, I read it the way the city reads it  
12 and, therefore, not supportive of plaintiff's position.

13 In the end, exercising my discretion, I am going to  
14 keep the entire case and deny the motion to sever and remand.

15 Let's turn to the city's motion to vacate the TRO and  
16 here the city is the moving party. So let me hear first from  
17 the city.

18 I am not hearing anything, which makes me think  
19 someone is on mute.

20 MS. FOWLKES: Your Honor, this is Ms. Fowlkes. Mr.  
21 Mendez may be having trouble unmuting himself. Just one second  
22 while I confirm.

23 THE COURT: That's a serious problem for any lawyer.

24 MS. FOWLKES: Your Honor, it appears that the clerk  
25 may have muted Mr. Mendez.



1 THE LAW CLERK: If that's the case, if he just hangs  
2 up from the conference and then calls back, we will have him  
3 back.

4 THE COURT: While we are waiting, just a quick  
5 question that doesn't have to do with these motions, but just  
6 really out of curiosity a question for Ms. Finn.

7 My understanding is your client separately has filed a  
8 request for reasonable accommodation. What is that based on?

9 MS. FINN: His religious beliefs, your Honor.

10 THE COURT: What religion is he?

11 MS. FINN: He is Catholic.

12 MR. MENDEZ: I am back, your Honor.

13 THE COURT: Just finishing what I was saying. Hasn't  
14 the Pope strongly encouraged people to have the vaccine?

15 MS. FINN: Yes, he has. But the courts have been  
16 very, very clear, including the Supreme Court. I think you can  
17 look at, if I pronounce it right, *Lukumi v. Babalu*, you have  
18 *Yoder v. Wisconsin*, you have *Seiger*. In those cases the  
19 Supreme Court held -- actually, in the Eastern District, Judge  
20 Wexler in *Sherr and Levy v. Northport*, there were multiple  
21 determinations that one does not have to be a member of a  
22 particular religious or organization in order to obtain a  
23 religious exemption to a vaccine. In fact, it has been  
24 determined that it is a personal interpretation of one's faith.

25 THE COURT: That's very helpful. It's not before me,

1 so I don't want to get -- I was just curious. But it's not an  
2 issue before me. In the present posture it's before the state  
3 authorities, the city authorities.

4 Now that we have counsel, let's turn to the motion to  
5 vacate the TRO. Let me hear from the city.

6 MR. MENDEZ: Good morning, your Honor. I am back.

7 The first thing I want to do is just briefly clarify  
8 an error in our papers, your Honor.

9 In point 1 of our papers I indicated that the TRO,  
10 pursuant to the *Carrabus* case and Rule 65(d) of the Federal  
11 Rules of Civil Procedure, would expire yesterday. Upon a  
12 closer reading of *Carrabus*, the TRO would actually expire  
13 today, which is 14 days from when the case was removed to  
14 federal district court.

15 I want to start briefly. I think the Court  
16 understands the holding in *Garcia*, so I am not going to dwell  
17 on *Garcia* unless the Court has specific questions about that.

18 THE COURT: My question, and this will be more for  
19 plaintiff's counsel than for you, but I had trouble seeing  
20 where there was, at this stage, irreparable harm because the  
21 plaintiff is still being paid. He has his pending motion for a  
22 reasonable accommodation on religious grounds.

23 So it seems to me, while there might be a stage later  
24 on, if that accommodation request is denied, that there might  
25 be a basis for saying that there is irreparable harm. I don't

1 really see it now. And that's even aside from the fact that we  
2 are only talking about money. Because plaintiff's counsel is  
3 saying, yes. But this is not like a big company or a  
4 multimillionaire. This guy needs his pay. But as of now, as I  
5 understand it, he is getting his pay, correct?

6 MR. MENDEZ: Yes, your Honor.

7 THE COURT: Now, what about the argument that  
8 plaintiff's counsel makes that, OK, but if the mandate were  
9 upheld and if the reasonable accommodation were denied, then he  
10 would suffer irreparable harm because he is not in a financial  
11 position to go without pay. What about that?

12 MR. MENDEZ: So the first thing I'll say, your Honor,  
13 is that that's what counsel had said and that was the  
14 assumption that the state Supreme Court made. But there is  
15 nothing on the record suggesting that plaintiff will suffer  
16 financial harm. We can only go by what's on the record.

17 THE COURT: Excuse me. Hold on. Someone, again, is  
18 not muting themselves. Whoever is talking need to mute  
19 themselves.

20 Go ahead.

21 MR. MENDEZ: We can only go by what's in the record.  
22 I'm not saying that somebody losing their paycheck isn't a bad  
23 thing. It can lead to some bad things as well, your Honor.  
24 But we can only go by what's on the record.

25 Point 1 is, there is nothing on the record suggesting,

1 as the Supreme Court stated, that the plaintiff is going to be  
2 homeless, for example, as a result of not receiving his  
3 paycheck. And the type of harm that plaintiff is alleging  
4 here, literally every court that has passed upon this has  
5 concluded that pecuniary harm, it's settled. It is not  
6 sufficiently irreparable within the context of an application  
7 for a TRO or a preliminary injunction. I preface that by  
8 saying that I'm not insensitive to the potential hardships that  
9 that could impose on someone, but the law is what the law is.  
10 The law is that way in the State of New York and it is that way  
11 in the United States, in the courts of the United States.

12 THE COURT: Let me turn to plaintiff's counsel.

13 Again, although, as you know, to warrant a TRO you  
14 have to make various showings. The one that I'm really  
15 focusing on and I would ask you to focus on is irreparable  
16 harm. Am I right that at the moment the plaintiff is being  
17 paid?

18 MS. FINN: Yes. He is waiting for a determination on  
19 his accommodation.

20 I would point out that the defendants indicated they  
21 have already denied 6,000 of them. I don't know what that  
22 decision will be.

23 THE COURT: I guess what strikes me is, we don't know  
24 how that decision is going to come out. If it comes out  
25 adversely to you, then I would think you would have a basis for

1 coming back to this court and saying, OK, now we have  
2 irreparable harm. Although the city points out, I think  
3 correctly, that the vast majority of cases have said that where  
4 there are damages available that deprivation of this sort is  
5 not irreparable harm, I'm open to considering that that may not  
6 be ultimately how the case should be viewed in the case of an  
7 everyday working person because I can see -- and I'm not making  
8 any determination now, but I can see an argument that it's very  
9 different for an everyday working-class person to lose his pay.

10 We would need, as the city points out, to know a lot  
11 more. We would need to know what the plaintiff's savings were.  
12 We would need to know whether he had available loans, whether  
13 he had available family support. All of those would have to be  
14 the subject of evidentiary submissions. But I'm not prepared  
15 to totally foreclose the possibility that there could be an  
16 unusual case where economic harm would nevertheless be  
17 irreparable harm.

18 But here we are not there. He is getting his pay.  
19 Until he is no longer getting his pay, why should I consider  
20 that a TRO is warranted?

21 MS. FINN: Your Honor, the due process and substantive  
22 due process claims are a right to the statutory protections of  
23 the Fourteenth Amendment. The Fourteenth Amendment right to  
24 the statutory protections of Public Health Law 206(1)(1) that  
25 prohibits adult mandates. Constitutional violations are

1 routinely recognized as triggering irreparable harm unless they  
 2 are promptly remedied. This has been going on for months and  
 3 it's not getting better. It's getting worse.

4           Moreover, the fact is that my client is responsible  
 5 for his family and he is very, very afraid. And to suggest  
 6 that he would be able to get damages at a later time, which  
 7 these other courts have held, has two problems. One, in those  
 8 cases the presumption was the mandate was lawful. We do not  
 9 concede it's lawful. In fact, we rely on *Garcia* and we rely on  
 10 the novel coronavirus legislation. This is an illegal mandate.  
 11 The mayor, the police commissioner, even the health department  
 12 do not have the authority to mandate. All these efforts are  
 13 considered COVID-19 countermeasures.

14           They are preempted under the PREP Act. I think there  
 15 is another act. But if you look at a case called *Parker v. St.*  
 16 *Lawrence* in the Third Department in New York State, in that  
 17 case the mother had declined consent to have her child  
 18 vaccinated. When the kid got to school, the school nurse went  
 19 ahead and vaccinated. She turned around and sued for battery.  
 20 The Third Department held that liability protections for  
 21 countermeasures taken by certain covered persons in response to  
 22 a declaration of public health by the secretary are provided  
 23 for by the PREP Act, and it provides that covered persons shall  
 24 be immune from suit and liability under federal and state law  
 25 for all claims for loss.

1           So to suggest that he can get another job or he can  
2 sue the city, it's never going to happen. The city has such  
3 broad immunity. If I was defending the city, I would argue no  
4 standing because the PREP Act is a liability protection for a  
5 pandemic countermeasure, and this is a pandemic countermeasure,  
6 so he is out of luck. The threat of losing one's job, not to  
7 mention all the other plaintiffs similarly situated.

8           Maybe we could talk a little bit, if your Honor wants,  
9 about this argument that we are trying to skirt a putative  
10 class. And the Second Circuit in the *Kane* case talks about how  
11 defendants raised an applied constitutional challenge to the  
12 mandate that the teachers were facing. The Second Circuit in  
13 that case allowed for a stay to address the 15 plaintiffs on  
14 the applied constitutional challenge, but did not allow the  
15 same for the in fact challenge.

16           And the reason is for precisely this point I'm trying  
17 to make. You have to independently show that you have  
18 particular damage if you are alleging the constitutional  
19 violation in the denial of the religious exemption. That's not  
20 what's happening here.

21           If Detective Marciano is successful in convincing your  
22 Honor that the state legislature has prohibited an adult  
23 vaccine mandate to avoid piecemeal litigation, then everybody  
24 else affected by this same mandate would be covered, and that  
25 is not uncommon. It's actually quite common when it comes to

1 vaccine cases.

2           Again, I direct the Court to *Sherr and Levy v.*  
3 *Northport* and Judge Wexler's 1983 decision. Judge Wexler  
4 decided, he took a look at the Public Health Law 2164 and the  
5 requirement that somebody be a member of a religious  
6 organization in order to get a religious exemption to attend  
7 school. Judge Wexler took that case and he struck down 2164 or  
8 at least that part that required membership in a religion that  
9 had bona fide tenets contrary to vaccinating, which gets to  
10 your point about the Pope.

11           Judge Wexler said, and this has been adopted in all 50  
12 states, that you do not have to be a member of a religious  
13 organization; that you have to have a personal religious  
14 belief, your interpretation. You could be in a synagogue and  
15 sitting next to somebody who is reading the torah and comes to  
16 a completely different conclusion about your body, about  
17 vaccines. It's the same in a church.

18           THE COURT: I don't know enough about the Catholic  
19 religion, but I would say there is no person in the Jewish  
20 religion who corresponds to being a Pope. So I am not sure the  
21 analogy is totally apt, but I understand your point.

22           MS. FINN: Thank you, your Honor.

23           I would say that many rabbis throughout this state  
24 have come down on both sides of this issue.

25           So, again, it goes to the wisdom of Judge Wexler in



1 *Sherr and Levy* where he said it doesn't matter what your  
2 established orthodox religion thinks. It's what you think.  
3 It's how you interpret this scripture. It's your relationship  
4 with Jesus Christ.

5 What Judge Wexler did there is what I'm concerning you  
6 to do, please, is to look at how Judge Wexler found it  
7 incumbent upon him to address the statute, to avoid piecemeal  
8 litigation.

9 Currently, there are many police officers that are  
10 refusing the vaccines and not getting paid. They are  
11 ineligible for unemployment. And the threat of termination,  
12 based on a substantive and procedural due process violation in  
13 the denial of the statutory protections of Public Health Law  
14 206(1)(1), is sufficient to establish irreparable harm. He  
15 can't sue. Even if you determine in the end that plaintiff was  
16 right, he can't turn around and sue the city. And if the law  
17 department doesn't know that, they should.

18 THE COURT: I'm sorry. At least so far as the federal  
19 claims are concerned, you can bring an action for damages  
20 against state authorities acting in their official capacity.  
21 That's the famous *Monell* case that has been law of the United  
22 States now for several decades. I think, at least so far as  
23 the federal claims are concerned, that you are not correct. I  
24 see these cases every day.

25 MS. FINN: Your Honor, dare I disagree, but I would

1 submit to you that this is not the case. The PREP Act is a  
2 broad liability protection and it covers, among other things --  
3 let me see. There is one exception and that is for death or  
4 serious injury. Otherwise, a COVID-19 countermeasure is  
5 no-fault liability. There is no way that the plaintiff in this  
6 case would be able to sue. The immunity provisions apply to  
7 any claim for loss that has a causal relationship with the  
8 administration of the covered countermeasure.

9 I have dealt with these cases for a long time, and  
10 defendants rarely understand the preemption of the PREP Act,  
11 and I think it goes to the heart of irreparable harm. You have  
12 a constitutional violation.

13 THE COURT: Maybe I'm still not understanding your  
14 point. In *Monell*, which, for the benefit of the record, is  
15 *Monell v. Department of Social Services of the City of New*  
16 *York*, 436 U.S. 658, a 1978 decision of the U.S. Supreme Court,  
17 the Supreme Court held, as a matter of constitutional law, that  
18 if a state agent acting in their official capacity violated the  
19 federal Constitution, an action for damages would lie. I don't  
20 see how that can be possibly affected by what you are referring  
21 to.

22 MS. FINN: Your Honor, I don't presume to know the  
23 breadth that you know of the law, but I am quite sure that  
24 liability protections for pandemic countermeasures taken by the  
25 mayor are preempted from a liability suit under federal and

1 state law. And the fact that maybe nobody has raised it is  
2 possibly because this area of jurisprudence is so bizarre and  
3 it's evolving so rapidly.

4 And I would submit that a lot of the cases that were  
5 filed, with all due respect, they were ill-conceived. Even the  
6 unions. They are arguing that this is a non-- that the term  
7 for the vaccine was not part of the collective bargaining.  
8 It's seen deeper than that.

9 The fact is, you can't collectively bargain for a term  
10 that is fundamentally illegal that violates the statute. You  
11 don't even get to collective bargaining. You don't even get to  
12 religious accommodation.

13 This is purely a question of state law. You've  
14 already ruled on that, and I appreciate that. But it's whether  
15 or not you can permit an adult mandate in New York State. The  
16 answer is no. If we prevail, my client is precluded, under the  
17 PREP Act, from bringing a cause of action against his employer,  
18 a *Monell* with standing.

19 THE COURT: Let me hear from the city on that last  
20 point.

21 MR. MENDEZ: Though I am not familiar with the PREP  
22 Act, your Honor, I do still remember from Professor Cheryl  
23 Hannah's first-year common law class that Congress can't,  
24 through legislation, abridge a right guaranteed by the  
25 Constitution.

1           The Supreme Court has said that a private litigant can  
2           sue a state pursuant to that *Monell* decision to seek money  
3           damages for redress for a constitutional violation. I don't  
4           see how the PREP Act changes that.

5           We have nothing further to add that hasn't been  
6           included in the papers, and we will rest on our papers, unless  
7           the Court has further questions.

8           THE COURT: No. Thank you very much.

9           Again, I'm prepared to rule. I am going to vacate the  
10          TRO, though without prejudice to its being reraised on terms  
11          I'll get to in a moment.

12          In my mind, this is a fairly simple issue because, in  
13          fact, the plaintiff is being paid his salary and has not  
14          suffered any financial harm. Nothing has changed in the status  
15          quo other than the threat of possible action. And the threat  
16          of possible action can sometimes be a basis for a TRO.

17          And I take plaintiff's point that this may be  
18          particularly true when it's an alleged constitutional  
19          violation, although I think the argument that it is an  
20          alleged -- it a constitutional violation may not be the  
21          strongest of plaintiff's arguments.

22          But here he has a pending request for a reasonable  
23          accommodation. And while there are cases that go both ways on  
24          that issue, it would be, I think, premature to impose a TRO  
25          barring the city from going forward with a mandate until, at an

1 absolute minimum, we know that his request for reasonable  
2 accommodation has been denied. If it is denied, then on the  
3 question of irreparable harm we'd have to get into some of the  
4 issues that have been raised, and that would probably require a  
5 prompt evidentiary hearing.

6 I don't reach at this point the other requirement for  
7 a TRO, namely, a likelihood of success on the merits. But I do  
8 agree with plaintiff's counsel that most of the issues in this  
9 case appear to be issues of law rather than fact.

10 My understanding is that Magistrate Moses granted the  
11 city until February 15, the time to move or answer. Magistrate  
12 Moses, of course, is one of the great magistrate judges of our  
13 court, but I'm a much more impatient person.

14 I assume that the city is going to move to dismiss and  
15 that all the pure issues of law that both sides have spent a  
16 lot of time already discussing in connection with the pending  
17 emergency motions will be raised there.

18 So I'd like to ask the city whether they can get in  
19 their motion to dismiss much sooner than February 15.

20 MR. MENDEZ: We can, your Honor. Would three weeks  
21 from today be satisfactory to the Court?

22 THE COURT: Yes. Today is the 29th. That would be  
23 Wednesday, January 19.

24 How long does plaintiff's counsel want to respond?

25 MS. FINN: Thirty days is the usual, right, Judge?

1 THE COURT: Not in my court it isn't. Plus, don't you  
2 have every reason to want to move this promptly?

3 MS. FINN: I do, your Honor. We will respond -- I'm a  
4 solo. I don't have all the resources --

5 THE COURT: But you've already impressed me with the  
6 realty of your knowledge. Plus, this is right up your alley,  
7 right?

8 MS. FINN: Yes, sir, it sure is.

9 THE COURT: Why don't I give you the same three weeks  
10 I gave them. How about that?

11 MS. FINN: I will move as quickly as I can.

12 THE COURT: When I set a deadline, it's a deadline in  
13 my court.

14 MS. FINN: Yes, sir.

15 THE COURT: Three weeks from -- let me ask my law  
16 clerk, who has got a 2022 calendar.

17 THE DEPUTY CLERK: Judge, three weeks from the 19th is  
18 February 9. That's a Wednesday also.

19 THE COURT: February 9.

20 How long does the city want to put in reply papers?  
21 My suggestion is a week or a week, but take your choice.

22 MR. MENDEZ: We will take the Court's suggestion.

23 THE COURT: Very good.

24 Linda, that is --

25 THE DEPUTY CLERK: February 16.

1 THE COURT: We will have oral argument a week from  
2 then.

3 THE DEPUTY CLERK: You're at Berkeley.

4 THE COURT: I'm at Berkeley.

5 MR. MENDEZ: Your Honor, could I ask for the city to  
6 have 30 pages in the moving brief?

7 THE COURT: Yes. Let me finish the schedule. Then  
8 I'm happy to talk about length of papers.

9 MR. MENDEZ: Thank you.

10 THE COURT: Linda, when am I back from Berkeley?

11 THE DEPUTY CLERK: You're back on Monday, the 28th, at  
12 which time we are picking a jury.

13 THE COURT: Let's do it at 3:30 on the 28th.

14 THE DEPUTY CLERK: I'm just pulling up the balance of  
15 that day. You already have a sentencing at that time, and you  
16 have to leave at 5:45. That's not bad. But the sentencing is  
17 on at 4:30. You could do it at 3:30. Sorry.

18 THE COURT: If necessary, we can move the sentencing.  
19 I think this is important and we move it forward. 3:30 then on  
20 February 28. Very good.

21 In terms of length of papers, I have no problem with  
22 30 pages for the city in their moving papers, 30 pages for the  
23 plaintiff in her responding papers. But I think reply papers  
24 need to be limited to 10 pages.

25 In terms of everything else, I am going to stay all

1 discovery and all further proceedings in this case because I  
2 think the motion to dismiss has a fair chance of resolving this  
3 case one way or the other.

4 Is there anything else we need to take up today?

5 MS. FINN: Your Honor, if I may, I know it is  
6 premature to reargue. But the Supreme Court has got a rocket  
7 docket going on right now with January 7 scheduled to hear  
8 challenges brought by, I think it's 25 states with regard to  
9 the OSHA mandate. I would say there is a clear analogue here  
10 with what the mayor has done. The Fifth Circuit ruled the  
11 actions of the president exceeded his power. The Sixth Court  
12 disagreed. Now the Supreme Court is going to rule on that.

13 Is there any way that you would possibly consider  
14 extending the TRO to at least the 7th? Because I need to meet  
15 with my client, and there are other police officers that are  
16 out of work.

17 THE COURT: They are not before me. I appreciate what  
18 you are saying. As I said, my vacating of the TRO is without  
19 prejudice. So if either something arising from the Supreme  
20 Court or something arising from other people that they want to  
21 join this lawsuit, or whatever changes the situation, of  
22 course, then you can come back to me.

23 Let me mention in that regard, both sides should  
24 familiarize themselves with my individual rules. I don't allow  
25 parties to submit anything in writing to the Court before first



1 jointly calling the Court. The reason I do that is, I can move  
2 things much more quickly. If either side has an application at  
3 any time, get a hold of your adversary, call my chambers.  
4 Usually, if I'm not on the bench, I will give you a ruling  
5 right then and there. One of my clerks described this as a  
6 dial-a-judge system, but hopefully it's a little more formal.  
7 In any event, if I'm on the bench when you call, I'll get back  
8 to you before the end of the day with a ruling.

9 I am not going to extend the TRO now. But I leave the  
10 door open for you to come back to me if circumstances change.

11 MS. FINN: Yes, sir. Thank you.

12 THE COURT: Anything else anyone needs to raise?

13 MR. MENDEZ: Your Honor, I would just ask that if it  
14 is plaintiff's intention to amend her complaint to either add  
15 claims or parties that she provide a date certain or that the  
16 Court set a date certain by which she is to do so. We don't  
17 want to run into a situation where the amended complaint or an  
18 amended complaint is being filed the day before or the day our  
19 motion papers are due. I think it would just provide more  
20 clarity to the parties moving forward if we have a date  
21 certain.

22 THE COURT: I think that's reasonable. But I also  
23 think, in fairness to the plaintiff, that should await her  
24 receipt of your moving papers. I would say, if she is going to  
25 amend, she has to do so within 10 days after receiving your

1 moving papers, and then we can adjust. If we have to adjust  
2 schedule, we will on that basis.

3 I assume that works for plaintiff's counsel as well?

4 MS. FINN: Your Honor, am I precluded from amending  
5 prior to that, if I can?

6 THE COURT: No. You can amend tomorrow, if you would  
7 like. But my suggestion is, since you're as hard working as  
8 you are, that you wanted to take a couple of days off before  
9 you turned to amending. In any event, you are not precluded  
10 from amending sooner than that. You just can't amend after  
11 that.

12 MS. FINN: Judge, one more thing, if I can.

13 THE COURT: Yes.

14 MS. FINN: With respect to the putative class argument  
15 raised by defendants, if I am to amend and include an  
16 individual that is -- or -- there has been 6,000 city employees  
17 or NYPD employees denied religious accommodations. They are  
18 out of work. Most of them are not vaccinated. My firm can't  
19 handle 6,000 plaintiffs.

20 THE COURT: If you want to amend with a proposed class  
21 action, of course.

22 MS. FINN: No, I don't.

23 THE COURT: You don't. If you just want to join one  
24 person, that's OK too, but you can't have it both ways.

25 In your original complaint, if I remember correctly,

1 you said something about, and others similarly situated.  
2 That's a nonstarter as far as federal procedure is concerned.  
3 If you want to go the class-action route, fine. You can amend.  
4 And if you want to just add one or two people who you think  
5 will make it a stronger case for your legal arguments, that's  
6 fine too. But you can't have it both ways.

7 MS. FINN: Understood, and thank you.

8 THE COURT: Anything else?

9 MS. FINN: No, sir, for plaintiffs.

10 MR. MENDEZ: No, your Honor.

11 THE COURT: Very good. I appreciate all your good  
12 arguments, and I look forward to the continuation of this case.

13 I will issue a short order today just summarizing my  
14 rulings And then maybe a longer opinion. I'll have to think  
15 about that.

16 Thanks again. Bye-bye.

17 (Adjourned)

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**APPENDIX 5**  
**(Dist. Ct. Dkt. No. 42)**

M2S1MARA

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----X

3 ANTHONY MARCIANO, individually  
4 and on behalf of all other  
5 individuals similarly  
6 situated,

Plaintiff,

v. 21 Civ. 10752 (JSR)

7 BILL de BLASIO, *et al.*,

8 Defendants.

Oral Argument (Remote)

-----X

9 February 28, 2022  
10 3:35 p.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge

14 APPEARANCES

15 PATRICIA FINN, ESQ.  
16 Attorney for Plaintiff

17 NEW YORK CITY LAW DEPARTMENT  
18 OFFICE OF THE CORPORATION COUNSEL  
19 Attorneys for Defendants  
20 BY: EUGENIA FOWLKES, ESQ.  
21 Assistant Corporation Counsel  
22  
23  
24  
25

M2S1MARA

1 THE COURT: This is Judge Rakoff. Would counsel  
2 please identify themselves.

3 MS. FINN: Good afternoon. Patricia Finn, F-I-N-N,  
4 for Anthony Marciano, plaintiff. Good day, sir.

5 THE COURT: And counsel for the defendants?

6 MS. FOWLKES: Good afternoon, your Honor. This is  
7 Eugenia Fowlkes, assistant corporation counsel, and counsel for  
8 defendants.

9 THE COURT: Okay. So we're here on both the  
10 defendants' motion to dismiss and the plaintiff's renewed  
11 request for a temporary restraining order. Let me deal with  
12 the latter first.

13 Ms. Finn, do I understand that your client has  
14 appealed the denial of his request for an exemption for an  
15 accommodation. And so he still is on active duty, yes?

16 MS. FINN: Yes, your Honor.

17 THE COURT: So there's no reason to have a TRO at this  
18 point. Aren't we in the position that we were at once before?  
19 You know, if and when he is actually in immediate danger of  
20 losing his job, you could come before this Court and ask for a  
21 TRO and I will give it expedited treatment at that time,  
22 probably the very same day, but until that happens, there's no  
23 reason for a TRO, is there?

24 MS. FINN: Well, you know, your Honor, I think there  
25 is and primarily Detective Marciano has a 3 percent chance of

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1 getting his religious exemption approved. And when we met last  
2 time, you know, irreparable harm was a very important issue.  
3 And at the time, your Honor, we discussed whether or not  
4 Detective Marciano, you know, had a large trust fund and, you  
5 know, would be able to withstand that financial or pecuniary  
6 injury. And, you know, I thought a lot about that, and I  
7 explained to you that there is no way for him to recover any  
8 type of damage, even in the end --

9 (The reporter interrupted for clarification)

10 MS. FINN: If he were to be injured, whether  
11 physically by the vaccine, or whether or not he was discharged  
12 from his job. Your Honor, I would read a Supreme Court  
13 decision, *Elrod v. Burns*. I cited it in my papers. And the  
14 Supreme Court upheld the Court of Appeals, a decision to grant  
15 the preliminary injunction, where the plaintiff was threatened  
16 with dismissal based on a lack of patronage for the political  
17 party in power. And I was very clear on what you explained,  
18 and I understood that, but I do believe that he's got a very,  
19 very slim chance here, and the constitutional violations are  
20 the irreparable harm. It's not necessarily a pecuniary loss  
21 but rather it is the denial of his Fourteenth Amendment and  
22 Ninth Amendment due process rights to the statutory protections  
23 and --

24 THE COURT: But he has so far taken the position that  
25 he's not going to comply because he thinks he's exempt or he

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1 thinks it's illegal or whatever, and so in the meantime, he's  
2 remained on active duty. And we all know that things are  
3 changing rapidly and lots of restrictions are being eliminated  
4 or reduced. It just seems to me that I shouldn't willy nilly  
5 start issuing temporary restraining orders until there's a real  
6 genuine imminence of harm because he's about to be taken off  
7 active duty. And what I say to you, once again, is, if that  
8 were to happen, then of course it would be easy for you to  
9 reapply because you've already done your papers, so to speak,  
10 and ditto the defendants, and I would decide that matter on a  
11 highly expedited basis, probably within a matter of hours. But  
12 I just don't see why it's a prudent use of this Court's  
13 resources to issue a temporary restraining order now, assuming  
14 arguendo that you qualify for one, when in fact nothing has  
15 happened. I recognize that -- and we'll sort of get into this  
16 on the standing issue when we turn to the motion -- that  
17 threats of being fired and the like provide standing and maybe  
18 even a basis for a TRO, but I just don't see it. It seems to  
19 me like it's a waste of everyone's time at this point.

20           So I'm going to deny the TRO but expressly without  
21 prejudice to your reapplying on an expedited basis if he is  
22 told, you're about to be taken off active duty. So let's turn  
23 to --

24           MS. FINN: Thank you.

25           THE COURT: Let's turn to what I think is the more



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1 interesting issue, frankly, which is the motion to dismiss.

2 And let me hear first from defense counsel, then from  
3 plaintiff's counsel.

4 MS. FOWLKES: Good afternoon. This is Eugenia Fowlkes  
5 for the defense.

6 I want to start off by saying that the standing issue,  
7 as I recognize you just mentioned it, your Honor, the standing  
8 issue is still -- defendants believe it's still the  
9 predominating argument here because the decision has not been  
10 finalized and so there is no injury in fact yet that plaintiff  
11 can bring forth and can bring forth to this Court for it to be  
12 redressed, and so --

13 THE COURT: Well, there are cases out there that seem  
14 to suggest that the imminent threat of action can provide  
15 standing.

16 MS. FOWLKES: Yes, your Honor. Defendants recognize  
17 that there is this imminent threat piece, but that imminent  
18 threat consideration is not necessarily a factor here for the  
19 same or similar reasons that the TRO -- that defendants argue  
20 that the TRO should not be granted, because there has not been  
21 anything that has occurred yet, and so there is yet no standing  
22 on the part of the plaintiff to argue an injury that has yet to  
23 occur. And in terms of imminence, it's not yet clear what the  
24 injury might be, and it's hard to tell -- as your Honor  
25 mentioned previously, things are changing, and things are

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1 changing in a matter of moments. And so it's hard to tell  
2 whether this may be imminent, that plaintiff's denial will be  
3 finalized and it will be affirmed. That's too attenuated at  
4 this moment to tell whether or not it is imminent and whether  
5 it can be considered under the imminence prong.

6 THE COURT: So do we have any idea what the time frame  
7 is here?

8 MS. FOWLKES: Your Honor, I was trying to get an  
9 answer so far, and what it looks like here is -- you've read  
10 the papers and opposing counsel has read the papers as well --  
11 that now that the appeal is before the Citywide Panel. The  
12 Citywide Panel is handling all of these appeals, and there seem  
13 to be as many as thousands of appeals in the process. The  
14 first appeals in this batch, according to the Citywide Panel,  
15 is the BOE, and then we have the fire department, FDNY. So the  
16 NYPD just recently, as of last week, sent over the latest batch  
17 of appeals, which means that they are essentially -- if they're  
18 being considered in order, they are at the end. So it's really  
19 difficult to tell at this moment how long that appeal will be.

20 But as you've mentioned, as you recognized earlier,  
21 your Honor, while it's being appealed, the plaintiff is not  
22 going to be moved. Plaintiff is not -- his status is going to  
23 be unchanged. And so even though it's not quite clear or even  
24 though we cannot articulate a very clear time line right now,  
25 it is before the Citywide Panel, and they're just having to

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1 handle a lot of appeals at the moment.

2 THE COURT: So it's not imminent, at least in any  
3 ascertainable respect.

4 MS. FOWLKES: Correct.

5 THE COURT: Okay. So there are other arguments I know  
6 that moving counsel has raised, but let me go, on this  
7 argument, to Ms. Finn.

8 MS. FINN: Your Honor, I was told that the information  
9 being shared in the department is that it can be quite some  
10 time before they get to discussing whether or not the appeal is  
11 valid. So I think we would be looking at quite a long time.  
12 And there seems to be some dilatory tactic, waiting to the last  
13 minute to turn us down, things like that, so I think it's going  
14 to be quite a stretch. However, you know, my client had  
15 standing in state court, and the city came to this court and  
16 argued that there was jurisdiction for you to hear the case.  
17 And you agreed, and here we are. And now for them to allege no  
18 standing because there's no injury, well, I, again, dispute  
19 that. I would direct your Honor's attention to the Supreme  
20 Court's determination in *National Federation* case, a decision  
21 rendered January 7th, and that case upheld the Fifth Circuit's  
22 ruling in *BST*. And I suggest in my papers that all you really  
23 need to do in our case is swap out the words "President Biden"  
24 for "Mayor Adams" and then swap out "OSHA mandates" for "the  
25 vaccine orders." And I would also point out that in *BST*, and

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1 in the *National* case in the Supreme Court, the issue of whether  
2 or not those people had been fired was not relevant to this  
3 determination. What the Supreme Court and the Fifth Circuit  
4 are looking at is whether or not there is an alleged  
5 constitutional violation, and I do believe that it was -- I  
6 think the language was even a minimal violation was sufficient.  
7 The substance of those cases I think is -- the conclusion that  
8 the Court had was you can't take a public health mandate and  
9 then convert it to a workplace mandate through regulations.  
10 They are -- regulations, particularly by the Court of Appeals  
11 in *Garcia* and under the statute, public health law.

12           Moreover, if the health department was going to  
13 attempt to impose a mandatory vaccine that is not provided for  
14 in the legislation, my client is entitled to a hearing under  
15 the Public Health Law 2120, and in that situation, the burden  
16 would shift to the city to prove that my client is infected or  
17 suspected of infection and that the vaccination is the least  
18 restrictive alternative as opposed to PCR or -- PCR testing  
19 or -- I suppose, or masking.

20           Your Honor, there were several early release inmate  
21 cases, and it was held in one of those cases that the fact that  
22 the inmate seeking early release had been exposed to COVID and  
23 recovered demonstrated that natural immunity has a prophylactic  
24 type of effect.

25           There is also evidence to suggest that an individual

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1 that has natural immunity, like my client, could suffer an  
2 adverse reaction. I don't know if you read the paper today,  
3 but CDC is reporting 21 children -- I realize that's out of  
4 millions, but there's a connection being made to people that  
5 have previous immunity and are vaccinated again experience  
6 hyper-immediate reaction. Now we're not here on the science;  
7 we're here on the law. And the law protects my client's  
8 substantive and procedural due process rights to the statutory  
9 protections afforded to him under Public Health Law 2120, and  
10 under that, he can file an Article 78 proceeding and demand a  
11 hearing, and he did that, and we were ready to go in state  
12 court, and now the city is claiming you have jurisdiction but  
13 he doesn't have standing because he wasn't injured. Well, he  
14 is injured, because he's entitled to a hearing, and in that  
15 hearing, the burden shifts to the city. It is off of my  
16 client. My client would have an opportunity to demonstrate  
17 natural immunity, he would have an opportunity to demonstrate  
18 PCR and masking, and he would be able to demonstrate that he's  
19 not infected or suspected of infection, and that --

20 THE COURT: I don't think it's an issue I need to  
21 reach on the pending motion, but just out of curiosity, how do  
22 you propose to prove that he has natural immunity?

23 MS. FINN: Well, he has positive titers, and positive  
24 titers are blood work showing that somebody is naturally  
25 immune, and that is on the record.

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1                   And I would add that when it comes to childhood  
2 vaccines, where we all have a lot more experience, there are  
3 many vaccines required under state law whereby an individual is  
4 able to avoid that vaccine when they provide a positive titer.  
5 For example, the measles MMR vaccine, where an individual has  
6 the positive titers to the MMR vaccine, they can get a medical  
7 exemption. So these issues would be appropriate, and I believe  
8 we would have had an opportunity with Judge Nervo to present  
9 this type of evidence.

10                   THE COURT: All right. Let me go back to defense  
11 counsel, and you can say anything you want to in response, but  
12 also, if you wanted to briefly say anything on the merits, I'm  
13 happy to hear that as well.

14                   MS. FOWLKES: Your Honor, as far as the -- in response  
15 to standing, defendants have already made the distinctions in  
16 their papers, but to the extent that opposing counsel is  
17 proposing that the right way for the defendants to proceed is  
18 through Public Health Law 2120, Public Health Law 2120 only  
19 applies to the control of dangerous patients. It's explicitly  
20 titled as such. And so that is inapplicable here. We have the  
21 New York City Charter, Section 553, which gives the  
22 Commissioner and Board of Health the authority to promulgate  
23 these types of issues in pursuit of protecting the public  
24 health, and the New York City Administrative Code empowers the  
25 Department of Health, specifically Section 17-109, which is

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1 specifically about taking measures for vaccination. And so the  
2 citations to the public health law are inapplicable here  
3 because they ultimately do not -- they don't apply to the  
4 plaintiff.

5 Plaintiff is asserting a right to bodily autonomy, but  
6 defendants are not forcing plaintiff to do anything.  
7 Defendants are not holding plaintiff down. And so the cases  
8 that are cited to that reference detainee or confining  
9 patients, they're not applicable here. And so this case and  
10 similar cases have been upheld as a condition of a job, as a  
11 condition of employment. And so that's not implicating a  
12 fundamental right. And it's implicating the right to pursue  
13 your employment, but it's not absolute. And defendants propose  
14 that plaintiff had a choice here, and has a choice still. So  
15 defendants will emphasize that we are not holding anyone down  
16 for a vaccination, but we are proposing a choice here, and as a  
17 condition of employment for a municipality—here, for the New  
18 York City Police Department—a condition of employment was  
19 lawfully promulgated, and that condition of employment is not  
20 far off and it does not implicate a substantial fundamental  
21 right.

22 And so, your Honor, defendants maintain that as of  
23 this moment, plaintiff's requests are premature. There is  
24 nothing for which he needs to be redressed at this moment. But  
25 even on the merits, his claims would fail in light of the fact

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1 that cases similar to this, disputing the vaccine mandate, have  
2 continued to be upheld as a condition of employment, and it's  
3 no different here.

4 THE COURT: All right. Thank you very much.

5 And I'll hear finally from plaintiff's counsel.

6 MS. FINN: Your Honor, first of all, the cases that  
7 the city is referring to involve First Amendment claims,  
8 collective bargaining, and EEOC violations. Every one of those  
9 cases presumes the lawfulness of the mandate. We do not  
10 presume any such lawfulness. The executive law does not give  
11 the mayor the authority to implicate -- to mandate a vaccine  
12 under the charter. The fact is that the court was crystal  
13 clear in *Garcia* that the Board of Health authority is limited.

14 And I ask you this, your Honor. This is something  
15 that occurred to me. If *Garcia* is interpreting the way the  
16 city is suggesting, to give them the authority to impose an  
17 adult mandate -- first of all, that's not what *Garcia* said.

18 *Garcia* said it was a child mandate that was provided for in  
19 2164 and 2165. And in that case, schools requiring a flu shot  
20 was what was at issue, and they at the same time clarified this  
21 is not an adult mandate.

22 And the courts in *Boreali*, which was the smoking ban  
23 case; *Hispanic Coalition*, which was the soda cup case; or in  
24 *Garcia*, ruled that the authority was to oversee repeated  
25 vaccinations and not to impose a mandatory vaccine.



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1                   And finally, if indeed the board of health has the  
2 authority to mandate a vaccine, then why is it that the mayor  
3 and the police commissioner and the fire commissioner and all  
4 the department heads are trying to mandate this as an employee  
5 mandate, which has already been shut down by the Supreme Court.

6                   And I think *BST* from the Fifth Circuit is completely applicable  
7 here. There was no allegation there that anybody had been  
8 fired. But if indeed the Board of Health of the City of New  
9 York has the authority to mandate a vaccine in the same way  
10 they did to a flu shot, then why didn't the Board of Health do  
11 this? There is absolutely no explanation from the City of New  
12 York as to why they're deviating from the precedent in *Garcia*.  
13 *Garcia* said you can do this for kids. If they think that  
14 applies to adult mandates, then what is the explanation for  
15 trying to do this through an employee mandate? It's arbitrary  
16 and capricious. That alone demonstrates arbitrary and  
17 capricious, because the Supreme Court, in a case called *In re*  
18 *Charles* -- I'm sorry -- Court of Appeals, in a case called *In*  
19 *re Charles*, specifically held that when a board or a body  
20 deviates from preexisting precedent and they fail to provide an  
21 explanation, that would be arbitrary and capricious. If the  
22 city has authority to do this, then why is there a mandate? It  
23 is arbitrary and capricious.

24                   I believe you read all my papers, though. I'll end on  
25 that point. But that is something that occurred to me.

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1 THE COURT: Okay. So I'm sure that there are further  
2 things that both sides might want to say, but I have your  
3 excellent briefs and I also have other matters still later this  
4 afternoon that I have to turn to. So this has been very  
5 helpful. I will take the matter under advisement. You have my  
6 ruling for the TRO, but on the motion, I will get you a  
7 decision certainly, in the next week or two. And I thank both  
8 counsel again for their excellent help. Thanks very much.  
9 Bye-bye.

10 MS. FOWLKES: Thank you.

11 MS. FINN: Thank you.

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**APPENDIX 6**  
**(Dist. Ct. Dkt. No. 20-5)**

1 SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:

2x -----

3 ANTHONY MARCIANO, Individually, and on behalf of  
all other individuals similarly situated,

4 Plaintiff/Petitioners,

5 -against-

Index:  
160914/21

6  
7 BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK, in  
his Official Capacity; DAVE A. CHOCKSHI,  
8 COMMISSIONER OF HEALTH AND MENTAL HYGIENE, in his  
Official Capacity; DERMOT SHEA, POLICE COMMISSIONER,  
9 In his Official Capacity; THE NEW YORK CITY BOARD  
OF HEALTH; and THE CITY OF NEW YORK,

10 Defendants/Respondents.

-----x

11 MICROSOFT TEAMS New York County Supreme Court  
12 80 Centre Street  
New York, New York 10013  
13 December 14, 2021

14 B E F O R E: FRANK P. NERVO, Justice of the Supreme Court

15  
16 A P P E A R A N C E S:

17 PATRICIA FINN, ESQ.  
Attorney for Plaintiff/Petitioners  
18 58 East Route 59, Suite 4  
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20 NEW YORK CITY LAW DEPARTMENT  
OFFICE OF THE CORPORATION COUNSEL  
21 Attorneys for Defendants/Respondents  
100 Church Street  
22 New York, New York 10007  
BY: EUGENIA FOWLKES, ESQ.  
23 IVAN A. MENDEZ, JR., ESQ.

24  
25 Tal R. Hahn,  
Senior Court Reporter

Proceedings

1                   COURT OFFICER: All rise. Supreme Court,  
2 State of New York, Civil Term is now in session.  
3 Honorable Frank Nervo presiding. Be seated and come to  
4 order.

5                   THE COURT: All right. Be seated please.  
6 Before we begin, I am going to request that counsel  
7 address the Court from the podium. When you are  
8 addressing the Court from the podium, if you are  
9 comfortable with it, you could remove your mask. When  
10 not addressing the Court and when at counsel table  
11 kindly leave your masks on. You will see the Court is  
12 without a mask so I could be heard through the PA  
13 system. I hermetically sealed myself in this little  
14 box as best as I could. Under the new modified rules  
15 of the court that is permissible, what I just  
16 suggested.

17                   So this is the matter of Anthony Marciano,  
18 individually, and on behalf of all other individuals  
19 similarly situated. Plaintiff/petitioner is against  
20 Bill De Blasio, Mayor of the City of New York and  
21 others, under Index Number 160914 of 2021.

22                   May we have your appearances for the record,  
23 please, initially on behalf of the plaintiff.

24                   MS. FINN: Yes. Good afternoon, your Honor.

25                   THE COURT: I can't hear. Sorry.

Proceedings

1 MS. FINN: Patricia Finn, F-I-N-N, for  
2 plaintiff.

3 THE COURT: Okay. Very good. And on behalf  
4 of the defendant/respondents?

5 MS. FOWLKES: Good afternoon.

6 COURT OFFICER: Press the button.

7 MS. FOWLKES: Good afternoon. This is  
8 Eugenia Fowlkes, assistant corporation counsel, counsel  
9 for the City, respondents.

10 MR. MENDEZ: And Ivan Mendez, your Honor,  
11 just observing.

12 THE COURT: The Court has reviewed the  
13 submissions by the plaintiff and of course by the  
14 defendants. And it's -- it appears to the Court, and I  
15 am sure I will be corrected if I am wrong, that the  
16 petition is based on essentially three premises; the  
17 order that was issued -- the orders that were issued  
18 violate certain of petitioner's constitution on civil  
19 rights to, among other things, refuse informed consent;  
20 that it violates the petitioner's right to Due Process  
21 because the vaccinations have not been approved.

22 Secondly, that the authority to make the  
23 determination to impose vaccination mandates is in the  
24 legislature. And with respect to the action against  
25 the Police Department and the Commissioner, that said

Proceedings

1 Commissioner had no right or authority to issue said  
2 rules and then enforce them, both constitutionally and  
3 because they violate a contract.

4 Ms. Finn, did I essentially state your  
5 position?

6 MS. FINN: Yes, your Honor.

7 THE COURT: Okay. I would like you to  
8 address, if you don't mind, at the outset, the  
9 allegation that the Mayor had no authority to issue  
10 these orders to begin with in as much as, among other  
11 reasons, there was no legislative authorization  
12 provided?

13 MS. FINN: There or here?

14 THE COURT: Please. I think it's probably  
15 best if you go from the podium.

16 MS. FINN: Sure.

17 THE COURT: If that works for you.

18 MS. FINN: Yes.

19 (Brief pause.)

20 MS. FINN: Your Honor, I -- our position is  
21 indeed that the respondents do not have the authority  
22 to mandate a mask on any NYPD employee. And you had  
23 mentioned that it was a lack of legislative authority,  
24 but I think we could peel that back and go one further;  
25 it's actually preempted by Congress. That goes to the

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1 issue of informed consent.

2 In the documents that I received last night  
3 from the City in opposition, docket entry 19, paragraph  
4 25, the City indicates that the vaccine has been  
5 approved. That is incorrect. While indeed in August  
6 the FDA issued a rather confusing and convoluted  
7 emergency use authorization, the fact is the only  
8 vaccine -- although it's a Pfizer vaccine, the only  
9 Pfizer vaccine is called Comirnaty. And Comirnaty is  
10 not available in the United States. So it's somewhat  
11 disingenuous to suggest that the Pfizer vaccine, the  
12 EAU Comirnaty is available in the United States. It  
13 definitely is not. And that's likely because there is  
14 no liability protection.

15 Comirnaty is available -- or will be  
16 available this month in Europe. But here in the United  
17 States vaccines are typically liability-free,  
18 particularly vaccines given to children. If you are  
19 injured by vaccines, you go to vaccine court where you  
20 sue the government. You don't sue the pharmaceutical  
21 company. So right off the bat, that is a big problem.  
22 And, you know, I could brief you on it, but the  
23 Comirnaty vaccine, which is the only FDA approved  
24 vaccine, is not available.

25 So, therefore, this brings in to the



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1 emergency use authorizations for the Pfizer and Moderna  
2 vaccine that are available. Under the Food and Drug  
3 FDA and Cosmetic Act -- sorry, I will look that up.  
4 But it's under the Cosmetic Act, an emergency use  
5 authorized drug, whatever it is, and there are  
6 plenty -- anthrax vaccine was an emergency use drug,  
7 but under Federal Law Congress has preempted mandates  
8 of emergency use drugs. That's the bottom line.

9 I think there is a case that's illustrative  
10 on this point. It was the District Court for D.C., and  
11 it was a 2000 case involving vaccines mandated,  
12 emergency use authorized anthrax vaccines mandated on  
13 the military. And the Court clearly indicated that you  
14 cannot mandate an unapproved off label vaccine. I  
15 believe, also, although I can't keep up with all the  
16 orders striking down all the mandates, but I do believe  
17 a Florida court had struck down the Biden mandate on  
18 soldiers. That would be in line with the case that I  
19 talked about.

20 Secondly, under the state law, in December of  
21 2020, a couple weeks after the emergency use vaccines  
22 became available in New York, the legislature under the  
23 novel coronavirus legislation specifically did not  
24 mandate emergency use vaccinations, and the only  
25 authority that the legislature had given to the Health

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1 Department, or in this case the City, was to do contact  
2 tracing. There is absolutely no mandate for masks,  
3 there is no mandate for PCR testing, and there is no  
4 mandate for the vaccine allowed under the novel  
5 coronavirus legislation, and the reason being Congress  
6 preempted it under the Cosmetic Act. Period.

7 Now, if Comirnaty was available, you know,  
8 that might be a horse of a different color, but it's  
9 not. And I am not even sure if it's even being  
10 distributed. So I draw the Court's attention to the  
11 affirmation, paragraph 25, which boldly declares the  
12 Pfizer vaccine is authorized. So now we have the novel  
13 coronavirus legislation. I explained to you it only  
14 allows for contact tracing; nothing else.

15 And then we move to the statute. Public  
16 Health Law 206(1)(1) specifically prohibits an adult  
17 mandate. Now, there is an exception for children. And  
18 that issue has been exhaustively litigated in the 2nd  
19 Department. We have the C.F. case, which respondents  
20 -- the respondents referenced in their opposition. And  
21 several other cases. And so there is a massive  
22 difference between a childhood vaccine that if you are  
23 injured from that you get to go to court and you -- you  
24 get to go to vaccine court and get compensation.

25 Currently right now under the emergency use

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1       you can't do that. But, very specifically, this  
2       statute clearly prohibits an adult vaccination mandate.  
3       And I would suggest, or I would draw the Court's  
4       attention to a recent Fifth Circuit Decision in BST  
5       Holdings versus OSHA that shot down the Biden mandate.  
6       And I think the Court's language in BST is highly  
7       relevant here because the Mayor is doing exactly what  
8       the President had tried to do. They are trying to take  
9       a public health mandate that involves fundamental  
10      decision-making about one's bodily autonomy and they  
11      are trying to bypass legislative determination and  
12      decision-making and convert this public health mandate  
13      into an employment mandate. And that is exactly what  
14      the Fifth Circuit reviewed in BST.

15               In addition to that, the Fifth Circuit talked  
16      about how over-inclusive -- how overbroad and at the  
17      same time under-inclusive this mandate is for the NYPD.  
18      Specifically, it's overbroad because it takes no  
19      account of natural immunity. Now, I want to be clear.  
20      I am not -- this is not a battle of the experts. Half  
21      of that opposition that I got last night is praising  
22      the glories of the vaccines. I am not at all  
23      challenging safety and efficacy of the vaccines. This  
24      is a purely legal argument; preemption, separation of  
25      power, and statutory construction, which brings me to

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1 my next point.

2 In the City's opposition they spend quite a  
3 bit of time talking about the union cases that have  
4 been brought and reasonable accomodation. I could  
5 simply tell you this case is not that. This is not a  
6 PERB issue. It's not a collective bargaining issue.  
7 And the reason is you cannot contract for a mandate  
8 that is fundamentally illegal. You cannot negotiate a  
9 contract term that imposes an illegal mandate. And,  
10 again, starting at the top, Food and Cosmetic Act,  
11 novel coronavirus legislation, Public Health Law 206.

12 So, although I respect what the unions are  
13 trying to do, and they may ultimately prevail, but  
14 without a temporary restraining order which I am asking  
15 you for here on the basis of statutory construction,  
16 not bargaining, okay, I think it's so important to make  
17 that decision. Those cases could take years to be  
18 resolved because of the inability to really obtain a  
19 TRO in a collective bargaining, unlike this case where  
20 there are clear statutory problems, constitutional  
21 problems, preemption, and of course separation of  
22 powers, which brings us to the Mayor.

23 The Mayor has absolutely no authority to --  
24 nor does he have any authority to order it or to direct  
25 subordinates to direct the Police Commissioner or the

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1 Health Department. Now, an important distinction here  
2 might be with the Board of Health. If this Court is  
3 familiar with Garcia versus City of New York, it's a  
4 very interesting case. In the State Supreme Court that  
5 involved a flu mandate that was added to the childhood  
6 schedule. And the Court struck that down as -- as --  
7 it was violating the separation of powers. The 1st  
8 Department upheld that, but on different grounds,  
9 finding it was ultra vires.

10 The Board of Ed did have the authority, but  
11 in this particular instance it had been overturned.  
12 However, the Court of Appeals, you know, reversed and  
13 said that the Board of Health does have the authority.  
14 But, again, I emphasize, that flu shot was for children  
15 and Public Health Law excludes adult mandates. It does  
16 carve-out school-related vaccines. So I think Garcia  
17 is illustrative here, and Garcia absolutely explained  
18 Public Health Law and the difference between the adult  
19 mandate.

20 THE COURT: Since you have segued into the  
21 authority, or lack of authority of the Board of Health,  
22 what is it --

23 MS. FINN: Yes?

24 THE COURT: -- what is it -- this might be a  
25 question perhaps directed to the Corporation Counsel

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1           when they are at the podium, but under what authority  
2           did the Department of Health, and of course you would  
3           say they had no authority, to issue the mandate that  
4           they issued?

5                       MS. FINN:   They don't.

6                       THE COURT:   What authority -- so let me  
7           rephrase the question for you.

8                       What authority would they have needed to  
9           issue the mandate that they issued?

10                      MS. FINN:   Okay, but it applied to children  
11           on --

12                      THE COURT:   Adults only.

13                      MS. FINN:   There is none.   It's precluded.

14                      THE COURT:   Well, can it be argued that the  
15           Commissioner has the authority under circumstances, and  
16           of course they would argue this is one of those  
17           circumstances, that the Commissioner could, in fact,  
18           issue an emergency mandate such as we have here, but  
19           then it would have to be brought before the Board  
20           within five days for it to continue?

21                      MS. FINN:   No, it could not.

22                      THE COURT:   Could not.   So you say -- your  
23           position is that the -- that the Commissioner of the  
24           Health and Mental Hygiene Service the Department of  
25           Health has no authority under any circumstances to

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1 direct adults to be vaccinated?

2 MS. FINN: No, and the point I was making is  
3 in Garcia you had a different situation. The Court of  
4 Appeals found that the Board of Health does have the  
5 authority to regulate childhood vaccines, but there is  
6 no corresponding authority.

7 Moreover, even if the Board of Health was to  
8 do it, there is procedural rules. There has to be a  
9 notice. There has to be a hearing and there has to be  
10 a vote.

11 THE COURT: That's right. And the hearing  
12 and vote would be by whom?

13 MS. FINN: The Board of Health.

14 THE COURT: Okay.

15 MS. FINN: So --

16 THE COURT: Was that done in this case?

17 MS. FINN: Pardon me?

18 THE COURT: Was that done in this case?

19 MS. FINN: No.

20 THE COURT: Okay. My question may be  
21 rhetorical, but I just want to confirm my understanding  
22 of the facts.

23 MS. FINN: No, it's a procedural issue. But  
24 let me explain to your Honor why the Mayor is doing  
25 this and not the Board of Health. Because the law is

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1 very --

2 THE COURT: Wait a minute. The Board of  
3 Health issued -- didn't the Board of Health also issue  
4 a mandate?

5 MS. FINN: No.

6 THE COURT: It was just the --

7 MS. FINN: Okay. Why is the Mayor tackling  
8 this beast instead of the Board of Health?

9 THE COURT: So why is the Board of Health --  
10 why is the Commissioner of Health and Mental Hygiene in  
11 this case?

12 MS. FINN: Pardon?

13 THE COURT: Why did you sue the Commissioner  
14 of Health and Mental Hygiene?

15 MS. FINN: Because they reissued a series of  
16 orders that lack any legislative underpinning. And  
17 they're a necessary party. We had to sue them. I  
18 would have preferred to leave them out, but they are  
19 in.

20 But the bottom line is, the Board of Health  
21 is -- let's say even if the Board of Health wanted to  
22 try and do this, it is possible that if the Board of  
23 Health determined that a particular officer was a  
24 threat, and they wanted to either impose a physical  
25 restraint such as a mask mandate or they demanded they



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1 get tested every week, or the dreaded emergency use  
2 vaccine, they would have to petition a magistrate under  
3 Public Health Law 2120, and they would have to  
4 demonstrate two important things; they would have to  
5 demonstrate that the person being restrained or subject  
6 to a judicial order of quarantine, that person would  
7 actually have to be infected or suspected of infection.

8 My client has natural immunity. He tested  
9 positive. He has already had COVID. So you can't make  
10 that. Then we get to the second part; the least  
11 restrictive means. Your Honor, I respectfully say -- I  
12 do not diminish the totality of this COVID nightmare.  
13 It has affected everybody. I mean, me personally.  
14 Everybody in this room is struggling. But when you  
15 look at this opposition document, everything is  
16 hysterical. It's all exaggerated. It's one hundred  
17 percent increase. Well, what does that mean? We went  
18 from two people to four people? The fact is, the  
19 government, the City is trying to, you know, drag us  
20 into this battle of the experts where, you know, the  
21 Courts are differential to a public health authority --

22 THE COURT: Well, we don't get there, do we,  
23 Ms. Finn, until we first establish that the Mayor had  
24 authority to issue this order to begin with.

25 MS. FINN: I think, your Honor, even if the

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1 Mayor -- the Mayor cited an Executive Law authority,  
2 but if you look at the Executive Law, Section 22-A,  
3 it's a -- it defines disaster, and that definition  
4 includes an epidemic. But although the City pointed  
5 out the C.F. case, which was a completely different  
6 case; you had a nuisance, it was declared by the Board  
7 of Health that was procedurally appropriate, nothing  
8 like what is going on here, the 2nd Department held in  
9 C.F. that it was temporary, it had been over by the  
10 time it got to the court, and the issue was whether or  
11 not it was arbitrary and capricious. It's not.

12 What I am trying to point out here is that  
13 the Executive Law, in order to enact an emergency  
14 regulation, you have to have an emergency. The CDC --  
15 this is not -- this is not Patricia Finn or a couple  
16 people that are protesting against vaccines. The CDC  
17 is our authority. I didn't bring in a scientist from  
18 Germany or someone else. I am asking you, your Honor,  
19 to take a look at what CDC is saying. Aside from the  
20 fact that they are all over the place scaring everyone  
21 to death, unaware of the potential of the variants -- I  
22 mean, everyone knows diseases have variants. How are  
23 they so shocked that an omicron variant, or that the  
24 delta variant -- is it reality? Is it really the  
25 number of cases? Sometimes, your Honor, you want

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1 cases. Currently children seem to have a prevalence of  
2 COVID antibodies, and yet they experience zero -- few  
3 to none symptoms. Any children that have been injured  
4 tended to have comorbidities; overweight, other  
5 illnesses. I will set aside for a moment the total  
6 inability to even track COVID data -- COVID deaths.  
7 But the fact is that children, if they get COVID, they  
8 decrease the prevalence of the illness in the  
9 population. That's a good thing. Cases are a good  
10 thing.

11 What we want to look at is infection fatality  
12 rate. And according to the CDC we have a 98.7 percent  
13 survival rate. And I would respectfully ask your Honor  
14 to give me a ruling as to whether or not a 98.7 percent  
15 survival rate rises to the level of an epidemic or  
16 disaster as defined in the Executive Law.

17 I believe Judge Colon also in the I.R.O.A.R.  
18 case specifically went through what the Mayor has to do  
19 in order to declare an emergency. And she found that,  
20 you know, this ain't it. This is not it. So, your  
21 Honor, it's not case -- it's not the number of cases;  
22 it's infection fatality rate.

23 THE COURT: Why are you limiting the criteria  
24 to fatalities?

25 MS. FINN: Pardon me?

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1 THE COURT: Why are you limiting the criteria  
2 to just fatalities? Why can't serious illnesses or  
3 hospitalizations constitute an emergency?

4 MS. FINN: That is an excellent point, but  
5 prior to COVID-19 we already had a hospital shortage.  
6 The problem, what's going on in the -- there was  
7 insufficient healthcare workers, insufficient --

8 THE COURT: I am just questioning the  
9 criteria that you are developing for what establishes  
10 an emergency.

11 MS. FINN: That is what I am asking you. In  
12 W.T. versus County of Rockland upheld by the 2nd  
13 Department a week --

14 THE COURT: How could I make that  
15 determination without expert testimony as to what an  
16 emergency is?

17 MS. FINN: Well, your Honor, you could rely  
18 on the statistics and the definition in the Executive  
19 Law. Judge Thorsen held that the minuscule number of  
20 measles cases did not, in his opinion, and that was  
21 based on government data -- it was actually based on  
22 data offered by the county -- that the number of cases  
23 did not rise to level of an epidemic. And that was  
24 appealed to the 2nd Department and it was upheld. So  
25 it wasn't disturbed. And then a week later Judge

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1 Knipel ruled in C.F. that that measles mandate was  
2 lawful. The point being, in Rockland County and in  
3 Brooklyn you have these concentrations of has Hasidic  
4 communities. And what was happening in these  
5 communities, they weren't intentionally spreading  
6 measles to a point having to be vaccinated. It wasn't  
7 an outbreak; it was an in-break.

8 And so the Health Department went through  
9 appropriate procedures, Board of Health rules, they  
10 declared a nuisance and, you know, I personally -- I  
11 mean, I tried that case in Rockland, so I think I did a  
12 good job. But I think my counterparts in Brooklyn  
13 might have missed the mark slightly.

14 So, your Honor, in summary, unless you have a  
15 question, you know, in addition to all this I would ask  
16 you to think about what the Court -- the 2nd Department  
17 did in C.F.. The 2nd Department specifically upheld  
18 Jacobson versus Massachusetts. I know a lot of lawyers  
19 have argued it's bad law, it's old law, it should be  
20 updated, and that may be true, but this lawyer doesn't  
21 believe that. I think Jacobson is an excellent  
22 holding. And recently the Supreme Court, Justice  
23 Gorsuch in Candan v. Newsome and Doe v. Mills -- I am  
24 sorry, your Honor, it was Roman Catholic Archdiocese  
25 versus Cuomo and Justice Gorsuch said that if Jacobson

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1 was to come in front of them today it would be upheld.  
2 Why would it be upheld? Because Jacobson, all he faced  
3 was a five dollar fine. He wasn't facing losing his  
4 job, a suffocating mask mandate, an invasive PCR test  
5 that could cause injury to the nasal cavity and the  
6 brain. All he had to do was pay five bucks. And I  
7 doubt that there's very few people that would pay five  
8 dollars to get out of one of these mandates.

9 Jacobson foresaw the possibility of a vaccine  
10 mandate being a plain and palpable invasion of  
11 fundamental rights, and it's here. This is it. COVID  
12 is absolutely overblown. It's the infection fatality  
13 rate that matters, not the case rate. And that is true  
14 of many, many viruss. We are an ecosystem. People  
15 need exchange in order to develop immunity.

16 But, again, I really do not want to get  
17 sucked into the science. Jacobson said a vaccine  
18 mandate had to be necessary, harm avoiding,  
19 proportional and nondiscriminatory. This mandate  
20 imposed by NYPD is none of those things. Jacobson said  
21 in order to -- the legislature, not the Executive, not  
22 the regulatory agencies, for the legislature to impose  
23 a mandate there must be grave danger. The Court -- I  
24 believe the language was "imperils society." There  
25 must be an epidemic, there must be an emergency, which

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1 is how this ties into the statute, the Executive Law  
2 20.A. 20.A defines a disaster as an epidemic. And the  
3 2nd Department upheld Judge Thorsen's determination  
4 that the rate of measles infection, which is higher  
5 than COVID now, did not rise to the level of an  
6 epidemic.

7 So I am not asking you to rule on the science  
8 per say; I am asking you to rule on the legal  
9 definition, and particularly to rely on the 1905  
10 landmark vaccine refusal case, Jacobson versus  
11 Massachusetts. The Court held there was a duty for --  
12 the Supreme Court held there was a duty for this Court  
13 to adjudicate when a vaccine mandate is cruel -- not  
14 sure if I remember the language specifically, but it  
15 was -- it would be cruel to vaccinate people. And, you  
16 know, that is what is going on right now.

17 May I just sum up thirty seconds?

18 THE COURT: Absolutely.

19 MS. FINN: So, your Honor, I will start at  
20 the top. It's always a good place to start.

21 Congress has under the Food and Drug and  
22 Cosmetic Act prohibits emergency use authorized drugs  
23 from being mandated. It's preempted that the Comirnaty  
24 vaccine is not available in the United States. And, by  
25 the way, we have two weeks before Mayor De Blasio is

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1 replaced by Mayor Adams -- soon-to-be Mayor Adams. And  
2 he's expressed relaxing these mandates. So I think a  
3 temporary restraining order is appropriate because  
4 think of the damage it's going to cause.

5 Secondly, that statement about Comirnaty to  
6 the best of my knowledge is completely false. It's not  
7 available. It's only EAU. Second, in December of  
8 2020, when the EAU vaccines were already available the  
9 legislature did not mandate a vaccine. And they  
10 couldn't because they were preempted under the Food and  
11 Drug and Cosmetic Act. It's simple as heck. And then  
12 you got the statute 206(1)(1) which prohibits adult  
13 vaccines. You have the authority of Garcia versus City  
14 of New York for a resource on interpreting that  
15 statute.

16 Finally, even if the Board of Health or the  
17 Governor, or the Mayor, or the Police Commissioner  
18 determined that an individual officer is a particular  
19 threat, Public Health Law 2120 requires an additional  
20 order of quarantine. I am sure this Court is well  
21 aware of cases of people that may be mentally ill, or  
22 someone who is sick that refuses to follow guidance.

23 It is the burden of the local Health  
24 Department to petition the Court to establish that the  
25 person is infected or suspected of infection, and it is



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1 the least restrictive means. They have not done that,  
2 and they cannot do it, which is why the Board of Health  
3 can't mandate a blanket mandate like they have. And  
4 that was reaffirmed in BST versus OSHA in the Fifth  
5 Circuit. And the Court was crystal clear; you cannot  
6 convert a public health mandate into an employment  
7 mandate particularly when the mandate is overbroad,  
8 does not include a potential for natural immunity which  
9 Federal Courts have recognized in the prisoner release  
10 cases that -- inmates that had already been infected  
11 and were let out, or were petitioning to be let out,  
12 they had no risk of reinfection because they had  
13 already gotten COVID and recovered.

14 So I think it's clearly defined that this  
15 mandate, even if it was legal, is overbroad. It's also  
16 at the same time under-inclusive. What about the  
17 people being arrested? What about the mailman that's  
18 coming into the police department? Or the Fed-Ex guy  
19 or delivery guy, or whoever is there? The Court has  
20 struck down mandates for larger companies over one  
21 hundred as being both overbroad and under-inclusive.  
22 And we have the same thing here. These police officers  
23 are involved with people all over.

24 And, you know, I take issue with this  
25 conclusion that eighty percent of the population is

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1 vaccinated. I highly doubt that. And I will just  
2 leave it at that. But if they are, I would submit to  
3 your Honor that the majority of them acquiesced because  
4 they were afraid of losing their jobs. So I ask you,  
5 your Honor, this does not rise to the level of a  
6 disaster that imperils society. It's bad, I get it,  
7 but it's not there. Thank you.

8 (Brief pause.)

9 THE COURT: Ms. Fowlkes, you care to respond?

10 MS. FOWLKES: Yes, your Honor. Just one  
11 moment.

12 (Brief pause.)

13 MS. FOWLKES: Your Honor, we have addressed  
14 these arguments as presented in the petition in our  
15 opposition papers that we submitted last night. So to  
16 the extent that you have any specific questions, I'd be  
17 happy to answer them after I give my formal  
18 presentation.

19 Now, specifically here for the purposes of  
20 today, this issue regarding the vaccine mandate and  
21 specifically regarding granting a preliminary  
22 injunction on the vaccine mandate, this has been  
23 litigated over and over again. It has been litigated  
24 repeatedly and each time the courts here in New York  
25 and the Second Circuit have refused to grant a

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1 preliminary injunction. And this Court's decision  
2 today should be no different.

3 Now, specifically here for the purposes of  
4 this preliminary injunction, opposing counsel has not  
5 addressed the existence of irreparable harm. Now,  
6 first, this case was brought over a month after the  
7 Commissioner's order, over a month after the  
8 Commissioner's order was distributed to municipal  
9 employees and over a month after Mr. Marciano  
10 presumably had notice on the order. So this delay  
11 contradicts any irreparable harm --

12 THE COURT: Sorry. Sorry for interrupting.

13 Has Mr. Marciano been put on leave without  
14 pay status?

15 MS. FOWLKES: Your Honor, all that we are  
16 aware of right now is that Mr. Marciano has applied for  
17 a reasonable accomodation, and is awaiting a decision  
18 on that. So since he applied for it he is not yet on  
19 leave without pay status.

20 THE COURT: He is not yet on --

21 MS. FOWLKES: That's correct. He is not yet  
22 on leave without pay status because he has submitted a  
23 reasonable accomodation request.

24 THE COURT: Okay.

25 MS. FOWLKES: Now, as for the irreparable

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1           harm, the only points that are brought up in the  
2           petition is that Mr. Marciano would be forced to  
3           succumb to a vaccine. Now, the vaccine mandate is not  
4           compelling anyone to receive a vaccine. It's not  
5           holding someone down and forcing them to receive a  
6           vaccine. Rather, it is -- that the vaccine mandate is  
7           asking municipal employees to comply with a term of  
8           employment.

9                        THE COURT: Was this term of employment in  
10           effect at the time these people were initially  
11           employed?

12                       MS. FOWLKES: No, it was not, your Honor.

13                       THE COURT: So it was a term of employment  
14           that has been recently added under the current emergent  
15           conditions?

16                       MS. FOWLKES: That's correct, your Honor.  
17           This is a term of employment that was, as you just  
18           stated, your Honor, added as of recent developments in  
19           the last few months. Now, the vaccine mandate is  
20           asking municipal employees to meet this term of  
21           employment, and they have the choice to meet this term  
22           of employment or to not meet this term of employment.

23                       THE COURT: And face possible -- being placed  
24           on leave without pay?

25                       MS. FOWLKES: That's correct, your Honor.

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1 THE COURT: Isn't that -- to use to a  
2 colloquial term, strong-arming tactic?

3 MS. FOWLKES: No, your Honor, it is not. And  
4 petitioner, plaintiff/petitioner would be subject to --

5 THE COURT: Oh, it's a motivation. It's a  
6 motivation for these employees to comply with this  
7 mandate -- or this order which we will discuss in a few  
8 moments with respect to its validity in the first  
9 place -- to comply with the order that the Mayor issued  
10 or you will be on leave without pay. So it's an  
11 incentive, correct?

12 MS. FOWLKES: That's correct, your Honor.

13 THE COURT: Like the other incentives we've  
14 heard about where the City offers one hundred dollars  
15 to get a vaccination, things of that nature.

16 MS. FOWLKES: Similar.

17 THE COURT: Similar, but different effect to  
18 the party.

19 MS. FOWLKES: Effectively, this would be  
20 different in the sense that the Mayor is asking  
21 pursuant to his authority as the Executive Branch. And  
22 as --

23 THE COURT: He is asking? So the ask is,  
24 kindly follow my directive or you will soon be without  
25 income?

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1 MS. FOWLKES: Your Honor, essentially yes, it  
2 is to -- for municipal employees specifically to comply  
3 with this term of employment, and it's a lawful  
4 directive by the Mayor as has been --

5 THE COURT: Under what authority can the  
6 Mayor establish a term of employment after people have  
7 been employed by the City of New York, or, in this case  
8 the New York Police Department for some period of time?  
9 How does that work?

10 MS. FOWLKES: Yes, your Honor. Allow me to  
11 outline the process for this authority here. The Mayor  
12 has the authority, and this was specifically outlined  
13 in the I.R.O.A.R. case that opposing counsel cited to.  
14 Judge Coleman described that the Executive Branch made  
15 issue with reference to those entities within its  
16 authority.

17 Now, Judge Coleman specified who is within  
18 the authority. Those are subject to the Mayor's orders  
19 and these are generally employees of the Executive  
20 Branch which include municipal employees. Now,  
21 additionally, this order was provided -- or was created  
22 by the Department of Health and Mental Hygiene. And  
23 that is pursuant to their own authority, specifically  
24 that is brought in the City Charter.

25 Now, the City Charter, specifically Section

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1           556 -- 556 Subsection C, empowers the DOHMH with  
2           jurisdiction to regulate all matters effecting the  
3           health in the City of New York, including communicable  
4           diseases. And, furthermore, the New York City  
5           Administrative Code, Section 17-109 Subsection B  
6           delegates this authority to the DOHMH to take measures  
7           of general and gratuitous vaccines, or vaccination. So  
8           the DOHMH has authority to adopt these vaccine  
9           measures, and as for the --

10           THE COURT: Pardon my unfamiliarity with some  
11           of statutes you are referencing, and how they all work  
12           together. Let me ask you this. Can the DOH do this in  
13           total abrogation of Section 3.01(c) of the Health Code  
14           which states, in substance, "the Health Code does not  
15           require the immunization of adults?"

16           MS. FOWLKES: Your Honor, I am not sure I got  
17           the first part of the -- before you asked the question.

18           THE COURT: Well, can the Department of  
19           Health ignore Section 3.01(c) of the Health Code which  
20           states "the Health Code does not require the  
21           immunization of adults?" How does that factor into  
22           what you just said?

23           MS. FOWLKES: Yes, your Honor. The  
24           authorities that we cited separate from what you just  
25           cited to the Section 3.01 of the Health Code, they are

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1 not exclusive of each other. Because the authority  
2 that we are citing to here is legislatively -- this was  
3 brought by legislative means. And this delegated the  
4 authority to specific actors. And here it was  
5 delegated specifically to DOHMH, and specifically to  
6 the Commissioner.

7 THE COURT: And what statute was that that  
8 was delegated by the legislature?

9 MS. FOWLKES: So, first, this is the New York  
10 City Charter.

11 THE COURT: Yes?

12 MS. FOWLKES: And then we have the New York  
13 City Administrative Code. New York City Charter 556,  
14 Subsection C. New York City Administrative Code  
15 Section 17-109, Subsection B, as in boy.

16 (Brief pause.)

17 THE COURT: Doesn't 17-109 refer specifically  
18 to vaccinations that may be provided gratuitously, and  
19 does not provide for mandatory vaccination?

20 MS. FOWLKES: That is correct, your Honor, it  
21 doesn't say anything about mandatory vaccinations but  
22 it does provide for gratuitous vaccinations. But this  
23 is important because, as we have made clear in the  
24 papers, this was promulgated in -- under the lawful  
25 authority of what we just cited here. And the DOHMH is



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1           essentially providing a choice to municipal employees,  
2           because it is able to provide this term of condition to  
3           municipal employees specifically. This is not for the  
4           rest of the city. This is not for private citizens.  
5           This is for employees that work for the city. And it's  
6           giving them a choice that they could either comply with  
7           this or they could choose to find a job somewhere else  
8           that has no vaccine mandate.

9                   THE COURT: And that's a reasonable choice in  
10           your estimation?

11                   MS. FOWLKES: Your Honor, this is reasonable  
12           because this is a term of employment. And although  
13           this was something that they may not have signed on to  
14           when they initially joined, this is a term of  
15           employment that's been promulgated in light of  
16           circumstances recently.

17                   THE COURT: In terms of employment, can  
18           themselves be changed during the course of somebody's  
19           employment?

20                   MS. FOWLKES: Your Honor, yes.

21                   THE COURT: Not to be flip, were the  
22           Commissioner of the Police Department or the Mayor  
23           decide, well, we have a new term of employment;  
24           everybody must be six foot tall to be a policeman. If  
25           you don't fit that term of employment, nice knowing

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1           you.

2                       MS. FOWLKES: Your Honor --

3                       THE COURT: How is that different?

4                       MS. FOWLKES: -- unfortunately, your Honor, a  
5           hypothetical such as that or any sort of analogy is not  
6           spot-on to the case at hand. But in an attempt to  
7           answer the logic there, that would be subject to some  
8           sort of judicial review as is the case here.

9                       THE COURT: Exactly right. That is why we  
10          are here; Judicial review of this term of employment,  
11          which you are arguing is permissible by the  
12          Commissioner -- by the Police Commissioner and is  
13          reasonable --

14                      MS. FOWLKES: Yes, your Honor.

15                      THE COURT: -- under the circumstances.

16                      MS. FOWLKES: Yes. And, your Honor, I would  
17          like to specifically point to the New York City Charter  
18          Section 434 --

19                      THE COURT: Okay.

20                      MS. FOWLKES: -- which delegates authority to  
21          the New York Police Department's Commissioner to have  
22          control of the government, administration, disposition  
23          and discipline of the department and the police force  
24          of the department.

25                      And so specifically as to the argument that

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1 the Commissioner was unable to promulgate or enforce  
2 the order at issue here, the Section 434 states that  
3 this is within the Commissioner's authority.

4 THE COURT: Okay.

5 MS. FOWLKES: And, your Honor, specifically  
6 here, as stated before, petitioner is not being  
7 compelled to succumb to a vaccine. The petitioner is  
8 being given a choice.

9 Now, essentially what the petitioner is  
10 alleging is irreparable harm, for purposes of the  
11 preliminary injunction, is that there is a loss of  
12 employment. And the loss of employment has been the  
13 type of harm that is plainly repairable. It can be  
14 redressed through monetary damages. And as compared to  
15 what is the situation currently, that we are fighting  
16 this public health issue, petitioner should not be able  
17 to -- should not be allowed to pause a vaccine mandate  
18 that is designed to cover the public health's  
19 interests, to cover the public health issues here just  
20 for their personal interests.

21 They -- if they are successful, they could be  
22 redressed after the merits have been heard, after the  
23 conclusion of this. Loss of employment is not an  
24 irreparable harm and, thus, should not be the reason  
25 why the preliminary injunction is granted as to the

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1 vaccine mandate.

2 THE COURT: I understand that, without  
3 question. But as a matter of discretion, let's say,  
4 what harm would there be to the defendants in this case  
5 were the Court to issue a TRO? And I am aware that's  
6 not the standard, but I am just asking, what harm would  
7 there be to the defendants in this case were the Court  
8 to issue the TRO so that, in effect, the plaintiffs  
9 such as Mr. Marciano and others similarly situated  
10 could continue to litigate these matters without the  
11 possibility of being without income, and all the  
12 problems that would raise, including possible  
13 foreclosure on their homes, their children -- of course  
14 maybe I am exaggerating to make the point -- and their  
15 wife and children to be homeless? What would the harm  
16 be to the City under those circumstances?

17 MS. FOWLKES: Your Honor, the harm would be  
18 that there would be nothing in place to at least  
19 attempt to mitigate coronavirus COVID-19 infections.  
20 If the City is unable to --

21 THE COURT: So you are making my point that  
22 what this effectively is, is strong-arming the  
23 plaintiff and others to get the vaccine or face the  
24 possibility of homelessness.

25 MS. FOWLKES: Your Honor, we disagree, but

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1           essentially if that is -- you know, if that is the  
2           position you wish to take, absolutely.

3                   THE COURT:   It's a reasonable perspective.

4                   MS. FOWLKES:   Yes.

5                   THE COURT:   Okay.

6                   MS. FOWLKES:   But specifically here it is a  
7           reasonable -- it's also reasonable for the Executive  
8           Branch to create a term of employment, and the terms of  
9           employment have been created time and again here,  
10          specifically for municipal employees.  So this is  
11          limited to municipal employees and it is not as for any  
12          other private citizens or private entities.

13                   THE COURT:   How does the reality that police  
14          officers such as Mr. Marciano, detectives such as  
15          Mr. Marciano are employed pursuant to a contract factor  
16          into your argument?

17                   MS. FOWLKES:   Your Honor, you are referring  
18          to the collective bargaining agreement?

19                   THE COURT:   Exactly.

20                   MS. FOWLKES:   Yes.  So the Commissioner, the  
21          NYPD Commissioner's order is, in effect, supplementing  
22          the CBA, so the Commissioner, by the authority that was  
23          promulgated to him, was the New York City Charter, is  
24          able to supplement the terms of conditions here.  And  
25          so with respect to the CBA, this -- as for the specific

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1 terms that might be effected here, the Commissioner's  
2 order would replace that.

3 THE COURT: Are there any restrictions on the  
4 terms of employment that can be added or modified by  
5 the Police Commissioner, or is it anything he believes  
6 in the best interests of the City and police department  
7 is appropriate?

8 MS. FOWLKES: Your Honor, the New York City  
9 Charter has not specified, or lists any terms of  
10 conditions that may be modified or that cannot be  
11 modified. But the Commissioner by his or her very  
12 position would have the authority to decide those  
13 issues if and when they arise.

14 THE COURT: So there is no beginning point  
15 and no ending point as to the Commissioner's authority  
16 in that regard?

17 MS. FOWLKES: No, your Honor. There is  
18 absolutely a beginning point in terms of the -- they  
19 could not surpass what has been lawfully promulgated to  
20 them. But it's specific to the administration of the  
21 police force, specific to the governance of the police  
22 force. And separate from whatever is at issue here --

23 THE COURT: And you say that is not subject  
24 to review?

25 MS. FOWLKES: Your Honor, you mean --

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1 THE COURT: The terms of employment change.

2 MS. FOWLKES: Presumably this could be  
3 subject to Judicial review if they are being asked to.  
4 But we submit, your Honor, that this is -- this has  
5 been upheld by numerous courts. And specifically as  
6 for the New York Police Department's authority and the  
7 order that he promulgated, this is not any different  
8 from on the other orders as specific to the Fire  
9 Department of New York, or to the Department of  
10 Education. And so those two have been affirmed  
11 unanimously.

12 THE COURT: By the 1st Department?

13 MS. FOWLKES: Sorry?

14 THE COURT: By the Appellate Division, 1st  
15 Department?

16 MS. FOWLKES: By the 2nd Department.

17 THE COURT: Appellate Division, 1st  
18 Department?

19 MS. FOWLKES: I would have to --

20 THE COURT: I don't think you will find any.

21 MS. FOWLKES: Sorry?

22 THE COURT: I don't think you will find any.

23 MS. FOWLKES: So, your Honor, it's that the  
24 Police --

25 THE COURT: I understand the rules that I am

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1 bound by any Appellate Division whose already taken a  
2 position on it, and I will take that into  
3 consideration.

4 MS. FOWLKES: Thank you, your Honor.

5 THE COURT: Yes.

6 MS. FOWLKES: Is there -- does your Honor  
7 have --

8 THE COURT: May I look at my notes? I think  
9 you'll concede it's an awful lot of material to absorb  
10 in a week, particularly in view of all our busy  
11 schedules.

12 All right. The orders were issued by the  
13 Department of Health.

14 MS. FOWLKES: That's correct.

15 THE COURT: Was it issued by the Board of the  
16 Department of Health or just the Commissioner?

17 MS. FOWLKES: The Commissioner, your Honor.

18 THE COURT: Correct me if I am wrong, I may  
19 have read the cases differently, but isn't there a  
20 requirement for the Commissioner then to present the  
21 matter to the Board for a full vote of that board?

22 MS. FOWLKES: There is that requirement in  
23 the statute but that requirement is not applicable  
24 here. What the Commissioner ordered here is something  
25 that has already been promulgated to him, and that is



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1 the -- that's a measure regarding a communicable  
2 disease.

3 THE COURT: That was promulgated to him by?

4 MS. FOWLKES: By the New York City Charter,  
5 or more specifically, by the Administrative Code  
6 Section 17-109.

7 THE COURT: Just as a thought, there seems to  
8 be an awful lot of run-arounds for the Executive to  
9 take to avoid certain statutory or legislative  
10 requirements. That obviously I will take a closer look  
11 at.

12 MS. FOWLKES: If I may respond?

13 THE COURT: Sure.

14 MS. FOWLKES: The City is of the position  
15 that this is not anything -- this is not skirting  
16 around any sort of legislative policy making. This is  
17 rule making, which is -- it's what the legislature gave  
18 to the agencies. The legislature chose the end of  
19 public healthcare and the means to promote that end by  
20 empowering the agencies to add these necessary  
21 directives or measures. And here it's specific to  
22 mitigate this threat of communicable diseases.

23 So this is not -- this is not law making or  
24 legislation creation, policy making, this is just  
25 embracing the directives and the measures have been

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1 lawfully promulgated by statute.

2 THE COURT: Which would be -- which an  
3 examiner of the various statutes may come to the  
4 conclusion are inconsistent with other statutes  
5 developed by the legislature. For example, Public  
6 Health Law 206 which clearly says -- it was mentioned  
7 in Garcia, Public Health Law 206, "does not authorize  
8 the mandatory vaccination of adults."

9 MS. FOWLKES: Your Honor, we would submit  
10 that specifically without trying to go into the  
11 specifics of Garcia, I would have to brief you at a  
12 later date, this specifically is not in contradiction  
13 with any other statutes because this is specific to the  
14 Executive Branch and specific to municipal employees as  
15 is provided by the statutes that we've discussed.

16 THE COURT: We are not dealing with the  
17 general public, we are dealing with municipal employees  
18 and, therefore, there is other criteria to be met.

19 MS. FOWLKES: That's correct.

20 THE COURT: All right. I understand there  
21 are a number of other matters pending addressing  
22 similar or the same issues in this one in other courts,  
23 correct? One in particular, Justice Hagler of this  
24 court, which has been put over to February.

25 MS. FOWLKES: I would have to confirm.

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1           THE COURT: I only mention it because it  
2           appears to me that it's going to take some time for  
3           these cases to work their way through the trial and  
4           perhaps Appellate process.

5           MS. FOWLKES: Yes, your Honor.

6           THE COURT: At the -- frankly, at the risk of  
7           stating the obvious, I presume there are others  
8           elsewhere.

9           Did you want to speak to your co-counsel?

10          MR. MENDEZ: I just want to --

11          THE COURT: Use the mic.

12          MR. MENDEZ: I just want to share with the  
13          Court, yes, the matter before Justice Hagler that was  
14          brought by the Correction Officers Benevolent  
15          Association has been put off to February. There is  
16          another matter tomorrow before Judge Frank on  
17          preliminary injunction. That is in a case brought by  
18          the Police Benevolent Association, the union  
19          representing the police officers. And in that case the  
20          union is challenging -- they claim not to be  
21          challenging the mandate, though they actually are, but  
22          they are focused on the reasonable accommodation process  
23          that was offered to police officers.

24          THE COURT: Which raises the question in this  
25          case, which either counsel could address; why is the

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1 reasonable accomodation standard not applicable to  
2 Officer Marciano? Or is it your position that there is  
3 no possible way to reasonably accommodate someone that  
4 hasn't been vaccinated?

5 MR. MENDEZ: No, your Honor, he has requested  
6 an accomodation. That is pending with the NYPD. No  
7 decision has been met. While that is pending he's not  
8 on leave without pay. He tests. He can continue to  
9 work until such time as that request is provided.

10 THE COURT: Until such time as the hammer  
11 comes down and the Commissioner says you are now  
12 without pay, unless they come up with a reasonable  
13 accomodation.

14 MR. MENDEZ: That's correct, your Honor.

15 THE COURT: All right. I just want to make  
16 sure I was seeing the obvious.

17 MR. MENDEZ: Just briefly, your Honor, if I  
18 may?

19 THE COURT: Certainly.

20 MR. MENDEZ: There's been a lot of talk about  
21 Detective Marciano and, quote, unquote, other similarly  
22 situated. I just want to put before the Court there is  
23 no record before the Court as to the individual  
24 circumstances of any other officers. There are no  
25 affidavits, there is no testimony. We don't even have

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1 testimony from Detective Marciano.

2 So the assumption that as a result of the  
3 imposition of the mandate the detective would  
4 potentially lose his home and go homeless, that is not  
5 a reasonable assumption based on this record, your  
6 Honor. It's not in the record. They -- petitioner  
7 made the record.

8 THE COURT: I understand your position.  
9 Sure. For all we know Mr. Marciano could be  
10 independently wealthy and in the end the proposition is  
11 totally moot. But we don't know that.

12 MR. MENDEZ: That is as possible as some of  
13 the other speculation that we could sit here and engage  
14 in all day with the circumstances of thousands of other  
15 police officers. Without a proper record, counsel  
16 doesn't have organizational standing like a union  
17 potentially would to bring a claim on behalf of  
18 similarly situated individuals. There is one  
19 petitioner.

20 THE COURT: All right. So, therefore, it's  
21 your position that, at best, the caption is  
22 inappropriate.

23 MR. MENDEZ: That and --

24 THE COURT: And --

25 MR. MENDEZ: And any order issued by the

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1 Court should necessarily be limited to Detective  
2 Marciano because there is nobody else before --

3 THE COURT: Well, that may be an argument you  
4 may have to make in another court before another Judge  
5 or not. I have not determined that yet.

6 MR. MENDEZ: We will just point out, we  
7 addressed the standing issue in the papers.

8 THE COURT: Sure.

9 MR. MENDEZ: There is only one petitioner  
10 here.

11 THE COURT: Right. Very good. Anything  
12 further you wish to advise the Court, Ms. Fowlkes?

13 MS. FOWLKES: Nothing else, your Honor.

14 THE COURT: Okay. Ms. Finn, would you like  
15 to respond?

16 MS. FINN: Yes.

17 THE COURT: I thought so. Okay.

18 (Brief pause.)

19 MS. FINN: Thank you. Your Honor, there is  
20 indeed testimony on this record. Detective Marciano  
21 has given an affidavit. And, quite frankly, and  
22 respectfully, it doesn't matter if he's a millionaire  
23 or if he is the poorest person in the world. The fact  
24 is that he has a 14th Amendment Due Process right to  
25 the statutory protections that prohibit adult vaccine

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1 mandates. He voted in the election. He voted for  
2 legislatures that were in the position to engage in  
3 fundamental medical decision-making, and the Court in  
4 *Boreali versus Axelrod* specifically indicated in the  
5 smoking ban, that it's -- it's an excess of power to  
6 get involved with things involving fundamental medical  
7 decision-making.

8 I mean, what could be more fundamental than  
9 injecting someone with a substance they don't want  
10 which could potentially injure them if they already  
11 have natural immunity? You are absolutely correct, all  
12 of these police officers are being strong-armed. And  
13 the decision here is not about one police officer. If  
14 it's invalid to him, it's invalid to everybody. And I  
15 believe *Garcia* was a case also representative of others  
16 individually situated, and that holding in *Garcia*  
17 affected all children in numerous cases.

18 *F.F. versus State of New York*, the 2019  
19 Fourth Department case challenging the repeal of the  
20 religious exemption. That was a vaccine mandate case  
21 brought on behalf of all similarly situated. So if it  
22 violates Detective *Marciano's* rights, it violates  
23 everybody.

24 And I would like to address one thing about  
25 the temporary restraining order. I find it remarkable

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1           that the City actually claims that my client dragged  
2           his heels when they have had this vaccine available for  
3           over a year now. What is the hubbub? Another variant?  
4           Another omicron? These things are coming like  
5           watershed. You know what, the emergency is over. We  
6           have to learn to deal with it. And the law, as you  
7           absolutely pointed out, prohibits adult vaccine  
8           mandates. It's the City that dragged their heels here.  
9           It's the City that is manufacturing an emergency. If  
10          they were so concerned about police officers, fireman,  
11          sanitation workers, why didn't they do this last year?  
12          I think that is an important point.

13                         Further, Detective Marciano tried to obtain  
14          anonymity. I am not sure if you were aware of that.  
15          That was declined in the ex-parte division. And I  
16          would respectfully ask that you allow me to reargue  
17          that, because this case could end up to be another  
18          Jacobson. And my client is a modest man. He's a  
19          police detective. He takes his job and family life  
20          seriously. And he doesn't want to be the poster case  
21          for refusing vaccine mandates. But the fact is, he is  
22          not.

23                         With respect to the litany of cases raised by  
24          the City, I respectfully advise this Court that those  
25          cases involve religious freedom, religious



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1 accomodation, and whether or not this is a union  
2 contract. Our case is different. There is no other  
3 case out there. We have challenged this on preemption  
4 and separation of power and statutory construction.

5 And regarding DOH's authority, as again you  
6 aptly pointed out, it's gratuitous. Traditionally, the  
7 authority of the Department of Health has been to  
8 provide vaccine information. Free vaccines. Subway  
9 signs. There's never before been this type of mandate.  
10 I mean, all over the world people are looking at New  
11 York and wondering what is going on here. The City is  
12 crumbling under the weight of this. But the fact is,  
13 you could offer free vaccines, you could put a sign up  
14 in the subway but you can't hold somebody down and  
15 mandate them without legislative authority; and in the  
16 extreme, a Judicial Order of quarentine would be  
17 required under 2120.

18 My client has a Due Process right to the  
19 statutory protections of the State's law, which  
20 specifically limit adult vaccine mandates.

21 Thank you.

22 THE COURT: Do you wish to be heard further?

23 MS. FOWLKES: No, your Honor.

24 THE COURT: Or Mr. Mendez?

25 MR. MENDEZ: No, your Honor.

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1 THE COURT: I will take a ten minute recess  
2 and we will be back. I will review my notes here.

3 (Recess taken.)

4 COURT OFFICER: All rise.

5 THE COURT: Thank you. Please be seated.

6 All right. Thank you for your indulgence.  
7 After hearing the arguments of both counsel and reading  
8 the documents that have been submitted with all  
9 appropriate references and exhibits, while the Court is  
10 not unmindful of the precedent with respect to  
11 temporary restraining orders, this Court at this time  
12 grants the temporary restraining order in the interests  
13 of equity and this Court's overarching power to  
14 exercise the Court's inherent interest of justice  
15 jurisdiction. They attempted no prejudice asserted by  
16 the municipal defendants that they will retain the  
17 right to seek fiscal recovery in the event they  
18 ultimately prevail.

19 Conversely, requiring the individual  
20 first-responders to bear the financial difficulties  
21 during the pendency of these matters is not only an  
22 unjust burden, but perhaps more concerning, provides  
23 the defendants with the ability to exercise their  
24 financially strong opposition to coerce the  
25 first-responders to succumb to the demands of the

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1 Executive at the expense of losing their right to be  
2 heard on the merits.

3 While a number of other judicial opinions on  
4 the one hand recognize the sacrifices of our vaccinated  
5 and unvaccinated first-responders during these  
6 unprecedented times, such as the plaintiff in this  
7 case, and on the other hand deny them the benefits of  
8 their assured continued pay status while these matters  
9 proceed through the courts, this Court will not adhere  
10 to what this Court perceives as a most blatant  
11 injustice and hindrance to the plaintiff's right to be  
12 heard on the petition.

13 So, therefore, the temporary restraining  
14 order is issued pending the determination of this  
15 application. Thank you all very much.

16 MS. FINN: Thank you, Judge.

17 MR. MENDEZ: Your Honor, if I may?

18 THE COURT: How could I stop you?

19 MR. MENDEZ: I would just ask the Court to  
20 clarify as to whom the TRO is being issued, which  
21 employees? Are we talking all police officers?

22 THE COURT: I presume your argument is only  
23 Mr. Marciano; and the petitioner -- counsel on the  
24 behalf of petitioner is arguing all police officers.  
25 Court declines to clarify anything further.

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Thank you all very much.

\* \* \* \*

Certified to be a true and accurate transcript of the stenographic minutes taken within.

-----  
Tal R. Hahn,  
Senior Court Reporter

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**APPENDIX 7**  
**(N.Y.S. Ct. Dkt. No. 5)**



**ORDER OF THE COMMISSIONER  
OF HEALTH AND MENTAL HYGIENE  
TO REQUIRE COVID-19 VACCINATION FOR  
CITY EMPLOYEES AND CERTAIN CITY CONTRACTORS**

**WHEREAS**, on March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents, and such order remains in effect; and

**WHEREAS**, on March 25, 2020, the New York City Commissioner of Health and Mental Hygiene declared the existence of a public health emergency within the City to address the continuing threat posed by COVID-19 to the health and welfare of City residents, and such declaration and public health emergency continue to be in effect; and

**WHEREAS**, pursuant to Section 558 of the New York City Charter (the “Charter”), the Board of Health may embrace in the Health Code all matters and subjects to which the power and authority of the Department of Health and Mental Hygiene (the “Department”) extends; and

**WHEREAS**, pursuant to Section 556 of the Charter and Section 3.01(c) of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health; and

**WHEREAS**, the U.S. Centers for Disease Control and Prevention (“CDC”) reports that new variants of COVID-19, identified as “variants of concern” have emerged in the United States, and some of these new variants which currently account for the majority of COVID-19 cases sequenced in New York City, are more transmissible than earlier variants; and

**WHEREAS**, the CDC has stated that vaccination is an effective tool to prevent the spread of COVID-19 and the development of new variants, and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated; and

**WHEREAS**, the Department reports that between January 17 and August 7, 2021, people who were unvaccinated or not fully vaccinated accounted for 96.1% of COVID-19 cases, 96.9% of COVID-19 hospitalizations, and 97.3% of COVID-19 deaths in New York City; and

**WHEREAS**, a study by Yale University demonstrated that the Department’s vaccination campaign was estimated to have prevented about 250,000 COVID-19 cases, 44,000 hospitalizations, and 8,300 deaths from COVID-19 infection since the start of vaccination through July 1, 2021, and by information and belief, the number of prevented cases, hospitalizations, and death has risen since then; and

**WHEREAS**, on August 16, 2021, Mayor de Blasio issued Emergency Executive Order No. 225, the “Key to NYC,” requiring that patrons and employees of establishments providing indoor entertainment, dining, and gyms and fitness centers must show proof that they have received at least one dose of an approved COVID-19 vaccine, and such Order, as amended, is still in effect; and

**WHEREAS**, on August 24, 2021, I issued an Order requiring that Department of Education employees, contractors, and visitors provide proof of COVID-19 vaccination before entering a DOE building or school setting, and such Order was re-issued on September 12 and

15, 2021, and subsequently amended on September 28, 2021, and such Orders and amendment were ratified by the New York City Board of Health on September 17, 2021 and October 18, 2021; and

**WHEREAS**, on August 26, 2021, the New York State Department of Health adopted emergency regulations requiring staff of inpatient hospitals and nursing homes to receive the first dose of a COVID-19 vaccine by September 27, 2021, and staff of diagnostic and treatment centers, hospices, home care and adult care facilities to receive the first dose of a COVID-19 vaccine by October 7, 2021; and

**WHEREAS**, on August 31, 2021, Mayor de Blasio issued Executive Order No. 78, requiring that, beginning September 13, 2021, City employees and covered employees of City contractors be vaccinated against COVID-19 or submit on a weekly basis proof of a negative COVID-19 PCR diagnostic test; and

**WHEREAS**, on September 9, 2021 President Biden issued an Executive Order stating that “It is essential that Federal employees take all available steps to protect themselves and avoid spreading COVID-19 to their co-workers and members of the public,” and ordering each federal agency to “implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law”; and

**WHEREAS**, on September 12, 2021, I issued an Order requiring that staff of early childhood programs or services provided under contract with the Department of Education or the Department of Youth and Community Development provide proof of COVID-19 vaccination; and

**WHEREAS**, Section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and effective measures to prevent the communication of infectious diseases such as COVID-19, and in accordance with Section 17-109(b), the Department may adopt vaccination measures to effectively prevent the spread of communicable diseases; and

**WHEREAS**, City employees and City contractors provide services to all New Yorkers that are critical to the health, safety, and well-being of City residents, and the City should take reasonable measures to reduce the transmission of COVID-19 when providing such services; and

**WHEREAS**, a system of vaccination for individuals providing City services and working in City offices will potentially save lives, protect public health, and promote public safety; and

**WHEREAS**, there is a staff shortage at Department of Corrections (“DOC”) facilities, and in consideration of potential effects on the health and safety of inmates in such facilities, and of the benefit to public health and employee health of a fully vaccinated correctional staff, it is necessary that the requirements of this Order for DOC uniformed personnel not assigned to posts in healthcare settings be delayed; and

**WHEREAS**, pursuant to Section 3.01(d) of the Health Code, I am authorized to issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat and a public health emergency has been declared pursuant to such Section;

**NOW THEREFORE** I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that it is



necessary for the health and safety of the City and its residents, do hereby exercise the power of the Board of Health to prevent, mitigate, control and abate the current emergency, and order that:

1. My Order of August 10, 2021, relating to a vaccination or testing requirement for staff in City operated or contracted residential and congregate settings, shall be **RESCINDED** as of November 1, 2021. Such staff are subject to the requirements of this Order.
2. No later than 5pm on October 29, 2021, all City employees, except those employees described in Paragraph 5, must provide proof to the agency or office where they work that:
  - a. they have been fully vaccinated against COVID-19; or
  - b. they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or
  - c. they have received the first dose of a two-dose COVID-19 vaccine

Any employee who received only the first dose of a two-dose vaccine at the time they provided the proof described in this Paragraph shall, within 45 days after receipt of the first dose, provide proof that they have received the second dose of vaccine.

3. Any City employee who has not provided the proof described in Paragraph 2 must be excluded from the premises at which they work beginning on November 1, 2021.
4. No later than 5pm on October 29, 2021, City agencies that contract for human services contracts must take all necessary actions to require that those human services contractors require their covered employees to provide proof that:
  - a. they have been fully vaccinated against COVID-19; or
  - b. they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or
  - c. they have received the first dose of a two-dose COVID-19 vaccine.

Any covered employee of a human service contractor who received only the first dose of a two-dose vaccine at the time they provided the proof described in this Paragraph shall, within 45 days after receipt of the first dose, provide proof that they have received the second dose of vaccine.

All such contractors shall submit a certification to their contracting agency confirming that they are requiring their covered employees to provide such proof. If contractors are non-compliant, the contracting City agencies may exercise any rights they may have under their contract.

5. Notwithstanding Paragraphs 3 and 4 of this Order, until November 30, 2021, the provisions of this Order shall not apply to uniformed Department of Corrections (“DOC”) employees, including staff serving in Warden and Chief titles, unless such uniformed employee is assigned for any time to any of the following locations: Bellevue Hospital; Elmhurst Hospital; the DOC

infirmary in North Infirmary Command; the DOC West Facility; or any clinic staffed by Correctional Health Services.

Uniformed employees not assigned to such locations, to whom this Order does not apply until November 30, 2021, must, until such date, either:

- a. Provide DOC with proof that:
  - i. they have been fully vaccinated against COVID-19; or
  - ii. they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or
  - iii. they have received the first dose of a two-dose COVID-19 vaccine, provided that they must additionally provide proof that they have received the second dose of vaccine within 45 days after receipt of the first dose; or
- b. On a weekly basis until the employee submits the proof described in this Paragraph, provide DOC with proof of a negative COVID-19 PCR diagnostic test (not an antibody test).

6. For the purposes of this Order:

“City employee” means a full- or part-time employee, intern, or volunteer of a New York City agency.

“Contract” means a contract awarded by the City, and any subcontract under such a contract, for work: (i) to be performed within the City of New York; and (ii) where employees can be expected to physically interact with City employees or members of the public in the course of performing work under the contract.

“Contractor” means a person or entity that has a City contract, including a subcontract as described in the definition of “contract.”

“Covered employee” means a person: (i) employed by a contractor or subcontractor holding a contract; (ii) whose salary is paid in whole or in part from funds provided under a City contract; and (iii) who performs any part of the work under the contract within the City of New York. However, a person whose work under the contract does not include physical interaction with City employees or members of the public shall not be deemed to be a covered employee.

“Fully vaccinated” means at least two weeks have passed after an individual received a single dose of a COVID-19 vaccine that only requires one dose, or the second dose of a two-dose series of a COVID-19 vaccine as approved or authorized for use by the Food and Drug Administration or World Health Organization.

“Human services contract” means social services contracted by an agency on behalf of third-party clients including but not limited to day care, foster care, home care, health or medical services, housing and shelter assistance, preventive services, youth services, the operation of

senior centers, employment training and assistance, vocational and educational programs, legal services and recreation programs.

- 7. Each City agency shall send each of its human services contractors notice that covered employees of such contractors must comply with the requirement of Paragraph 4 of this Order and request a response from each such contractor, as soon as possible, with regard to the contractor's intent to follow this Order.
- 8. Nothing in this Order shall be construed to prohibit any reasonable accommodation otherwise required by law.
- 9. This Order shall not apply to individuals who already are subject to another Order of the Commissioner of Health and Mental Hygiene, Board of Health, the Mayor, or a State or federal entity that requires them to provide proof of full vaccination and have been granted a reasonable accommodation to such requirement.
- 10. This Order shall not apply to per diem poll workers hired by the New York City Board of Elections to conduct the election scheduled for November 2, 2021.
- 11. Subject to the authority of the Board of Health to continue, rescind, alter or modify this Order pursuant to Section 3.01(d) of the Health Code, this Order shall be effective immediately and remain in effect until rescinded, except that Paragraph 5 of this Order will be deemed repealed on December 1, 2021.



Dated: October 20, 2021

\_\_\_\_\_  
Dave A. Chokshi, M.D., MSc  
Commissioner

**APPENDIX 8**  
**(N.Y.S. Ct. Dkt. No. 6)**

**SUPPLEMENTAL ORDER  
OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE  
TO REQUIRE COVID-19 VACCINATION FOR CITY EMPLOYEES AND  
EMPLOYEES OF CERTAIN CITY CONTRACTORS**

**WHEREAS**, on October 20, 2021, I issued an Order requiring city employees and human services contractors of city agencies provide proof of COVID-19 vaccination no later than October 29, 2021; and

**WHEREAS**, it is necessary that the requirements of that Order be extended to include all contractors working at locations where human services are provided and all employees of contractors who regularly work alongside City employees at locations controlled by the City of New York; and

**WHEREAS**, to ensure an orderly election, the requirements of that Order for employees of the Board of Elections must be delayed; and

**WHEREAS**, pursuant to Section 3.01(d) of the Health Code, I am authorized to issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat and a public health emergency has been declared pursuant to such Section;

**NOW THEREFORE** I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that it is necessary for the health and safety of the City and its residents, do hereby exercise the power of the Board of Health to prevent, mitigate, control and abate the current emergency, and order that:

1. The requirements of my Order of October 20, 2021, relating to a vaccination requirement for City employees and human services contractors of City agencies, are continued and incorporated herein.
2. City agencies must take all necessary actions to require that their contractors (not covered by my Order of October 20, 2021) ensure their covered employees who provide services in locations where human services are provided and covered employees of any other contractors whose work responsibilities require them to regularly work alongside City employees at a location controlled by the City of New York, provide proof no later than 5pm on November 8, 2021, that:
  - a. they have been fully vaccinated against COVID-19; or
  - b. they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or
  - c. they have received the first dose of a two-dose COVID-19 vaccine.

Any covered employee of such a contractor who received only the first dose of a two-dose vaccine at the time they provided the proof described in this Paragraph shall, within 45 days after receipt of the first dose, provide proof that they have received the second dose of vaccine.

All such contractors shall submit a certification to their contracting agency confirming that they are requiring their covered employees to provide such proof. If contractors are non-compliant, the contracting City agencies may exercise any rights they may have under their contract.

3. Notwithstanding Paragraph 2 of this Order and Paragraph 3 of my Order of October 20, 2021, the vaccination requirements of such Orders shall not apply to any Board of Elections (“BOE”) employee or any contractor of the BOE until 5pm on November 30, 2021.

Until November 30, 2021, BOE employees must provide to BOE, and BOE must take any necessary action to require its contractors to require that their covered employees provide to their employer, either:

- a. Proof that:
  - i. they have been fully vaccinated against COVID-19; or
  - ii. they have received a single-dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or
  - iii. they have received the first dose of a two-dose COVID-19 vaccine, provided that they must additionally provide proof that they have received the second dose of vaccine within 45 days after receipt of the first dose; or
- b. On a weekly basis until the employee submits the proof described in this Paragraph, proof of a negative COVID-19 PCR diagnostic test (not an antibody test).

4. For the purposes of this Order:

“City employee” means a full- or part-time employee, intern, or volunteer of a New York City agency.

“Contract” means a contract awarded by the City, and any subcontract under such a contract, for work: (i) to be performed within the City of New York; and (ii) where employees can be expected to physically interact with City employees or members of the public in the course of performing work under the contract. “Contractor” means a person or entity that has a City contract, including a subcontract as described in the definition of “contract.”

“Covered employee” means a person: (i) employed by a contractor or subcontractor holding a contract or subcontract; (ii) whose salary is paid in whole or in part from funds provided under a City contract; and (iii) who performs any part of the work under the contract within the City of New York. However, a person whose work under the contract does not include physical interaction with City employees or members of the public shall not be deemed to be a covered employee.

“Fully vaccinated” means at least two weeks have passed after an individual received a single dose of a COVID-19 vaccine that only requires one dose, or the second dose of a

two-dose series of a COVID-19 vaccine as approved or authorized for use by the Food and Drug Administration or World Health Organization.

“Human services contract” means social services contracted by an agency on behalf of third-party clients including but not limited to day care, foster care, home care, health or medical services, housing and shelter assistance, preventive services, youth services, the operation of senior centers, employment training and assistance, vocational and educational programs, legal services and recreation programs.

5. Each City agency shall send each of its contractors to whom Paragraph 2 of this Order applies, notice that such covered employees must comply with the requirement of Paragraph 2 of this Order and request a response from each such contractor, as soon as possible, with regard to the contractor’s intent to follow this Order.
6. Nothing in this Order shall be construed to prohibit any reasonable accommodation otherwise required by law.
7. Subject to the authority of the Board of Health to continue, rescind, alter or modify this Order pursuant to Section 3.01(d) of the Health Code, this Order shall be effective immediately and remain in effect until rescinded.

Dated: October 31, 2021



Dave A. Chokshi, M.D., MSc  
Commissioner

**APPENDIX 9**  
**(Court of Appeals Docket)**



**General Docket  
Court of Appeals, 2nd Circuit**

**Court of Appeals Docket#:** 22-570

**Docketed:** 03/17/2022

**Nature of Suit:** 3440 CIVIL RIGHTS-Other

Marciano v. Adams

**Appeal From:** SONY (NEW YORK CITY)

**Fee Status:** Paid

**Case Type Information:**

- 1) Civil
- 2) Private
- 3) -


Anthony Marciano, individually and on behalf of all other individuals similarly situated,


Plaintiff - Appellant,


v.


ERIC ADAMS, Mayor of the City of New York, in his official Capacity; ASHWIN VASAN, Commissioner of Health and Mental Hygiene, in his official capacity; KEECHANT SEWELL, Police Commissioner, in her official capacity; **THE NEW YORK CITY BOARD OF HEALTH;** and **THE CITY OF NEW YORK**


Defendants - Appellees.


03/17/2022  1  
11 pg, 182.32 KB NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Anthony Marciano, FILED. [3281237] [22-570] [Entered: 03/21/2022 11:26 AM]


03/17/2022  2  
28 pg, 203.4 KB DISTRICT COURT MEMORANDUM ORDER, dated 03/08/2022, RECEIVED.[3281241] [22-570] [Entered: 03/21/2022 11:28 AM]


03/17/2022  i  
1 pg, 113.26 KB DISTRICT COURT JUDGMENT, dated 03/15/2022, RECEIVED.[3281243] [22-570] [Entered: 03/21/2022 11:29 AM]


03/17/2022  -4...  
10 pg, 300.81 KB ELECTRONIC INDEX, in lieu of record, FILED.[3281244] [22-570] [Entered: 03/21/2022 11:29 AM]


03/21/2022  ●  
1 pg, 59.01 KB NOTICE OF APPEARANCE AS SUBSTITUTE COUNSEL, on behalf of Appellee Dave A. Chockshi, City of New York, Bill De Blasio, New York City Board of Health and Dermot Shea, FILED. Service date 03/21/2022 by CM/ECF. [3281782] [22-570] [Entered: 03/21/2022 04:57 PM]


03/23/2022  Q  
10 pg, 141.08 KB AMENDED NOTICE OF APPEAL, with copy of district court docket, on behalf of Appellant Anthony Marciano, FILED.[3283142] [22-570] [Entered: 03/23/2022 11:16 AM]


03/23/2022  ● 7  
FORM C, on behalf of Appellant Anthony Marciano, FILED. Service date 03/23/2022 by CM/ECF. [3283549] [22-570] [Entered: 03/23/2022 03:46 PM]


03/23/2022  ● Ji.  
1 pg, 102.23 KB FORM D, on behalf of Appellant Anthony Marciano, FILED. Service date 03/23/2022 by CM/ECF. [3283552] [22-570] [Entered: 03/23/2022 03:47 PM]


03/23/2022  9  
2 pg, 128.17 KB DEFECTIVE DOCUMENT, Form C, [7], on behalf of Appellant Anthony Marciano, FILED.[3283566] [22-570] [Entered: 03/23/2022 03:55 PM]


03/23/2022  ● 10  
ATTORNEY, Jesse A. Townsend, [fil, in place of attorney Georgia M. Pestana, SUBSTITUTED.[3283576] [22-570] [Entered: 03/23/2022 04:03 PM]


03/23/2022  ● 11  
FORM C, on behalf of Appellant Anthony Marciano, FILED. Service date 03/23/2022 by CM/ECF. [3283688] [22-570] [Entered: 03/23/2022 05:39 PM]


03/24/2022  If  
2 pg, 129.6 KB DEFECTIVE DOCUMENT, FORM C, [11], on behalf of Appellant Anthony Marciano, FILED.[3283802] [22-570] [Entered: 03/24/2022 09:01 AM]


03/24/2022  ● 13  
FORM C, on behalf of Appellant Anthony Marciano, FILED. Service date 03/24/2022 by CM/ECF. [3284598] [22-570] [Entered: 03/24/2022 06:37 PM]


03/25/2022  H  
2 pg, 149.33 KB DEFECTIVE DOCUMENT, Form C, [13], on behalf of Appellant Anthony Marciano, FILED.[3284655] [22-570] [Entered: 03/25/2022 08:26 AM]


03/25/2022  ● 15  
FORM C, on behalf of Appellant Anthony Marciano, FILED. Service date 03/25/2022 by CM/ECF. [3285290] [22-570] [Entered: 03/25/2022 03:37 PM]


03/28/2022  ● 16  
FORM C, on behalf of Appellant Anthony Marciano, FILED. Service date 03/25/2022 by CM/ECF. [3285934] [22-570] [Entered: 03/28/2022 11:57 AM]


03/28/2022  J.S.  
95 pg, 755 MB FORM C, on behalf of Appellant Anthony Marciano, FILED. Service date 03/28/2022 by CM/ECF. [3286002] [22-570] [Entered: 03/28/2022 12:44 PM]


03/28/2022  ● 19  
CURED DEFECTIVE FORM C [iii, [12.], [HJ, [1\$], on behalf of Appellant Anthony Marciano, FILED. [3286047] [22-570] [Entered: 03/28/2022 01:14 PM]


03/28/2022  R  
1 pg, 29.73 KB STRIKE ORDER, striking Appellant Anthony Marciano Form C [16], [15] from the docket, FILED.[3286345] [22-570] [Entered: 03/28/2022 03:46 PM]


03/30/2022  ● 23  
PAYMENT OF DOCKETING FEE, on behalf of Appellant Anthony Marciano, district court receipt# ANYSDC-25927370, FILED.[3287738] [22-570] [Entered: 03/30/2022 09:59 AM]


03/30/2022  ● 26  
MOTION, for restraining order, on behalf of Appellant Anthony Marciano, FILED. Service date 03/30/2022 by CM/ECF. [3288406] [22-570] [Entered: 03/30/2022 06:12 PM]

03/31/2022  ●  
2 pg, 151.86 KB DEFECTIVE DOCUMENT, Motion, for restraining order [26], on behalf of Appellant Anthony Marciano, FILED.[3288495] [22-570] [Entered: 03/31/2022 08:57 AM]

03/31/2022  ● 33  
MOTION, to stay, to hold appeal in abeyance, on behalf of Appellant Anthony Marciano, FILED. Service date 03/31/2022 by CM/ECF. [3288885] [22-570] [Entered: 03/31/2022 02:09 PM]

03/31/2022  M..  
2 pg, 150.62 KB DEFECTIVE DOCUMENT, Motion, to stay, to hold appeal in abeyance, [33],[33], on behalf of Appellant Anthony Marciano, FILED.[3289095] [22-570] [Entered: 03/31/2022 04:54 PM]

04/01/2022  ●  
30 pg, 2.2 MB MOTION, to stay, to hold appeal in abeyance, on behalf of Appellant Anthony Marciano, FILED. Service date 04/01/2022 by CM/ECF. [3289356] [22-570] [Entered: 04/01/2022 10:58 AM]

04/01/2022  36  
CURED DEFECTIVE MOTION, to stay, to hold appeal in abeyance [2,iii, [MI, @fil, @fil, on behalf of Appellant Anthony Marciano, FILED.[3289529] [22-570] [Entered: 04/01/2022 01:53 PM]

04/05/2022 ● 38 ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Anthony Marciano, FILED. Service date 04/05/2022 by CM/ECF.[3291606] [22-570] [Entered: 04/05/2022 03:12 PM]

04/05/2022 ● ML  
2 pg, 149.35 KB DEFECTIVE DOCUMENT, Acknowledgment and Notice of Appearance, [38], on behalf of Appellant Anthony Marciano, FILED.[3291613] [22-570] [Entered: 04/05/2022 03:15 PM]

04/05/2022 • 1Q  
1 pg, 399.78 KB ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Anthony Marciano, FILED. Service date 04/05/2022 by CM/ECF.[3291632] [22-570] [Entered: 04/05/2022 03:23 PM]

04/05/2022 ● 41 CURED DEFECTIVE ACKNOWLEDGMENT AND NOTICE OF APPEARANCE [ , [±Q], on behalf of Appellant Anthony Marciano, FILED.[3291643] [22-570] [Entered: 04/05/2022 03:28 PM]

04/05/2022 ● 42 ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellant Anthony Marciano, FILED. Service date 04/05/2022 by CM/ECF.[3291661] [22-570] [Entered: 04/05/2022 03:43 PM]

04/05/2022 ● -4.5  
1 pg, 129.34 KB STRIKE ORDER, striking Appellant Anthony Marciano Acknowledgment and Notice of Appearance [42] from the docket, FILED.[3291770] [22-570] [Entered: 04/05/2022 04:53 PM]

04/06/2022 • ±a  
1 pg, 88.99 KB NEW CASE MANAGER, Wilson Dudley, ASSIGNED.[3291893] [22-570] [Entered: 04/06/2022 08:33 AM]

04/07/2022 ●  
2 pg, 187.91 KB ACKNOWLEDGMENT AND NOTICE OF APPEARANCE, on behalf of Appellee Eric Adams, Dave A. Chockshi, City of New York, New York City Board of Health and Dermot Shea, FILED. Service date 04/07/2022 by CM/ECF.[3293075] [22-570] [Entered: 04/07/2022 11:50 AM]

04/07/2022 ● 50 NEW PARTY, Appellee Ashwin Vasani, ADDED.[3293157] [22-570] [Entered: 04/07/2022 12:25 PM]

04/07/2022 ● 51 NEW PARTY, Appellee Keechant Sewell, ADDED.[3293160] [22-570] [Entered: 04/07/2022 12:27 PM]

04/07/2022 ● g  
1 pg, 63.79 KB NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Eric Adams, Ashwin Vasani, Keechant Sewell, City of New York and New York City Board of Health, FILED. Service date 04/07/2022 by CM/ECF. [3293261] [22-570] [Entered: 04/07/2022 02:19 PM]

04/07/2022 • --52  
1 pg, 63.49 KB NOTICE OF APPEARANCE AS ADDITIONAL COUNSEL, on behalf of Appellee Eric Adams, City of New York, New York City Board of Health, Keechant Sewell and Ashwin Vasani, FILED. Service date 04/07/2022 by CM/ECF. [3293263] [22-570] [Entered: 04/07/2022 02:21 PM]

04/07/2022 ■ 54 ATTORNEY, Richard Paul Dearing for City of New York Ashwin Vasani Keechant Sewell New York City Board of Health Eric Adams, in case 22-570, [.22.], ADDED.[3293269] [22-570] [Entered: 04/07/2022 02:28 PM]

04/07/2022 ● 55 ATTORNEY, Claude S. Platten for City of New York Ashwin Vasani Keechant Sewell New York City Board of Health Eric Adams, in case 22-570 , [52], ADDED.[3293291] [22-570] [Entered: 04/07/2022 02:44 PM]

04/11/2022 ● g §  
1 pg, 95.36 KB LOCAL RULE 31.2 NOTICE, placing this appeal on the Court's Expedited Calendar, setting appellant's brief due date as 05/16/2022, appellee's brief due date as 06/20/2022, TRANSMITTED.[3294314] [22-570]-[Edited 04/11/2022 by WO] [Entered: 04/11/2022 09:29 AM]

04/11/2022 • fil  
34 pg, 316.95 KB OPPOSITION TO MOTION, to stay[ , to hold appeal in abeyance \_ on behalf of Appellee Eric Adams, City of New York, New York City Board of Health, Keechant Sewell and Ashwin Vasani, FILED. Service date 04/11/2022 by CM/ECF. [3294896] [22-570] [Entered: 04/11/2022 05:05 PM]

04/13/2022 • fil  
1 pg, 159.61 KB MOTION ORDER, referring motion to hold appeal in abeyance filed by Appellant Anthony Marciano; denying motion to **stay** filed by Appellant Anthony Marciano, by SJM FILED. [3295863][61] [22-570] [Entered: 04/13/2022 09:58 AM]

04/13/2022 • fil...  
1 pg, 765.6 KB CERTIFIED ORDER, dated 04/13/2022, to Southern District of New York, ISSUED.[3295878] [22-570] [Entered: 04/13/2022 10:09 AM]

04/13/2022 ● 67 LETTER, on behalf of Appellant Anthony Marciano, for permission to appear, RECEIVED. Service date 04/13/2022 by CM/ECF.[3296131] [22-570]-[Edited 04/13/2022 by WO] [Entered: 04/13/2022 12:49 PM]

04/13/2022 ● §§  
2 pg, 127.17 KB DEFECTIVE DOCUMENT, Letter, [67], on behalf of Appellant Anthony Marciano, FILED.[3296174] [22-570] [Entered: 04/13/2022 01:49 PM]

04/13/2022 ● 69 MOTION, for oral argument, on behalf of Appellant Anthony Marciano, FILED. Service date 04/13/2022 by CM/ECF. [3296414] [22-570] [Entered: 04/13/2022 04:54 PM]

04/13/2022 ● TI  
2 pg, 151.35 KB DEFECTIVE DOCUMENT, Motion for oral argument, [69], on behalf of Appellant Anthony Marciano, FILED.[3296437] [22-570] [Entered: 04/13/2022 05:09 PM]

04/14/2022 ■ n  
371 pg, 14.35 MB MOTION, for oral argument, on behalf of Appellant Anthony Marciano, FILED. Service date 04/14/2022 by CM/ECF. [3297026] [22-570] [Entered: 04/14/2022 02:23 **PM**]

04/14/2022 • 72 CURED DEFECTIVE DOCUMENT: MOTION for oral argument, [.Z.Q], on behalf of Appellant Anthony Marciano, FILED.[3297040] [22-570] [Entered: 04/14/2022 02:34 PM]

04/16/2022 ● 76 REPLY BRIEF, on behalf of Appellant Anthony Marciano, FILED. Service date 04/16/2022 by CM/ECF. [3298267] [22-570] [Entered: 04/16/2022 01:38 PM]

05/03/2022 ● 78 MOTION, to extend time, on behalf of Appellant Anthony Marciano, FILED. Service date 05/03/2022 by CM/ECF. [3308497] [22-570] [Entered: 05/03/2022 05:46 PM]

05/04/2022 ● ..N. DEFECTIVE DOCUMENT, Motion to extend, [78], on behalf of Appellant Anthony Marciano, FILED. [3308762] [22-570] [Entered: 05/04/2022 10:58 AM]  
2 pg, 149.42 KB

05/04/2022 ● Jill. MOTION, to extend time, on behalf of Appellant Anthony Marciano, FILED. Service date 05/04/2022 by CM/ECF. [3308815] [22-570] [Entered: 05/04/2022 11:23 AM]  
5pg, 1.18MB

05/04/2022 ● 81 CURED DEFECTIVE DOCUMENT: MOTION to extend, [Zfil, on behalf of Appellant Anthony Marciano, FILED.[3308857] [22-570] [Entered: 05/04/2022 11:46 AM]

05/04/2022 ● ..M. DEFECTIVE DOCUMENT, Reply brief, [76], on behalf of Appellant Anthony Marciano , FILED.[3308989] [22-570] [Entered: 05/04/2022 01:36 PM]  
2 pg, 129.47 KB

05/04/2022 ● Jlli. REPLY TO OPPOSITION [fill, on behalf of Appellant Anthony Marciano, FILED. Service date 05/04/2022 by CM/ECF.[3309049][85] [22-570] [Entered: 05/04/2022 02:15 PM]  
22 pg, 419.39 MB

05/04/2022 ● 86 CURED DEFECTIVE REPLY TO OPPOSITION, [ML on behalf of Appellant Anthony Marciano, FILED. [3309071] [22-570] [Entered: 05/04/2022 02:32 PM]

05/09/2022 ● MOTION ORDER, granting Appellant's motion to remove this case from the XAC and set 07/22/2022, as the opening brief due date [aQ] filed by Appellant Anthony Marciano, by JON, FILED. [3311059][92] [22-570] [Entered: 05/09/2022 10:11 AM]  
1 pg, 157.73 KB

05/10/2022 ● \_M\_ LETTER, on behalf of Appellee Eric Adams, City of New York, New York City Board of Health, Keechant Sewell and Ashwin Vasana, dates unavailable for oral argument RECEIVED. Service date 05/10/2022 by CM/ECF.[3312314] [22-570]--[Edited 05/10/2022 by WD] [Entered: 05/10/2022 02:16 PM]  
1 pg, 145.47 KB

07/06/2022 ● fill APPENDIX, volume 1 of 2, (pp. 1-183), on behalf of Appellant Anthony Marciano, FILED. Service date 07/06/2022 by CM/ECF.[3343028] [22-570] [Entered: 07/06/2022 04:52 PM]  
187 pg, 3.55 MB

07/06/2022 ● \_fil\_ APPENDIX, volume 2 of 2, (pp. 184-360), on behalf of Appellant Anthony Marciano, FILED. Service date 07/06/2022 by CM/ECF.[3343034] [22-570] [Entered: 07/06/2022 04:54 PM]  
181 pg, 3.02 MB

07/06/2022 ● 100 BRIEF, on behalf of Appellant Anthony Marciano, FILED. Service date 07/06/2022 by CM/ECF.[3343039] [22-570] [Entered: 07/06/2022 04:56 PM]  
69 pg, 574.35 KB

07/06/2022 ● ...IQ1\_ SPECIAL APPENDIX, on behalf of Appellant Anthony Marciano, FILED. Service date 07/06/2022 by CM/ECF.[3343045] [22-570] [Entered: 07/06/2022 05:01 PM]  
45 pg, 671.36 KB

07/07/2022 ● 102 LR 31.2 SCHEDULING NOTIFICATION, on behalf of Appellee Eric Adams, City of New York, New York City Board of Health, Keechant Sewell and Ashwin Vasana, informing Court of proposed due date 10/05/2022, RECEIVED. Service date 07/07/2022 by CM/ECF.[3343453] [22-570] [Entered: 07/07/2022 11:56 AM]  
1 pg, 193.47 KB

07/07/2022 ● 103 SO-ORDERED SCHEDULING NOTIFICATION, setting Appellee Eric Adams, City of New York, New York City Board of Health, Keechant Sewell and Ashwin Vasana Brief due date as 10/05/2022, FILED.[3343726] [22-570]--[Edited 07/21/2022 by WD] [Entered: 07/07/2022 01:54 PM]  
2 pg, 136.56 KB

07/15/2022 ● .....11.Q\_ MOTION ORDER, withdrawing motion for oral argument, [I1] filed by Appellant Anthony Marciano, FILED. [3348749][110] [22-570] [Entered: 07/15/2022 01:57 PM]  
1 pg, 152.03 KB

07/19/2022 ● ...ill. SUBMITTED NOTICE, to attorneys/parties, TRANSMITTED.[3349995] [22-570] [Entered: 07/19/2022 11:46 AM]  
1 pg, 90.13 KB

08/02/2022 ● .....11L MOTION ORDER, denying motion for injunction, for certification, @fil filed by Appellant Anthony Marciano, by JAC, JFB, FILED. [3358213][117] [22-570] [Entered: 08/02/2022 11:30 AM]  
1 pg, 139.77 KB

08/02/2022 ● .....llil CERTIFIED ORDER, dated 08/02/2022, to Southern District of New York, ISSUED.[3358246] [22-570] [Entered: 08/02/2022 11:50 AM]  
1 pg, 751 KB