No. 22A178

IN THE

Supreme Court of the United States

ANTHONY MARCIANO,

Petitioner,

v.

ERIC ADAMS, MAYOR OF THE CITY OF NEW YORK, *et al.*,

Respondents.

ON EMERGENCY APPLICATION FOR WRIT OF INJUNCTION TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* LBA, CEA AND UFOA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE

The Lieutenants' Benevolent Association of the City of New York ("LBA"), the Captains' Endowment Association of the City of New York ("CEA"), and the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO ("UFOA") (collectively, *Amici*) move this Court for leave to file an *Amici Curiae* brief in support of Applicant's Emergency Application for Writ of Injunction. This motion is unopposed (Applicant's counsel provided consent; Respondent's counsel stated they take no position).

The LBA is the designated and recognized collective bargaining representative for approximately 1,700 Lieutenants employed by the New York City Police Department. The CEA is the designated and recognized collective bargaining representative for approximately 800 supervisors in the ranks and designations of Captain, Deputy Inspector, Inspector, Deputy Chief, and Police Surgeon employed by the New York City Police Department. The UFOA is the designated and recognized collective bargaining representative for approximately 2,600 uniformed employees in the titles of Lieutenant, Captain, Battalion Chief, Deputy Chief, Fire Medical Officer, and Supervising Fire Marshal employed by the New York City Fire Department. The functions and primary purposes of LBA, CEA, and UFOA are to represent their members in connection with wages, hours, and other terms and conditions of employment. They represent such employees in collective bargaining and protect their statutory and contractual rights and benefits. A core function of the *Amici* unions are to advocate for, protect, and advance the rights and interests of their members and of public employees.

In support of this motion, *Amici* assert that the emergency stay is necessary to protect fundamental bargaining rights for public employee unions in New York and the ability of government agencies to provide essential services for the public. *Amici* request that this motion to file the attached *Amici Curiae* brief be granted.

Amici Unions requests to make this motion without ten days' advance notice to the parties. No counsel for a party authored this motion or the proposed brief in whole or in part, and no person other than *Amici*, their members or their counsel made a monetary contribution to fund the motion or brief.

Dated: October 4, 2022
Lake Success,
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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Other Authorities

IDENTITY AND INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae Lieutenants Benevolent Association ("LBA"), Captains Endowment Association ("CEA"), and the Uniformed Fire Officers Association ("UFOA") are the designated, recognized, and exclusive collective bargaining representatives for certain uniformed public employees within the New York City Police Department or New York City Fire Department. All three are labor organizations duly organized under the New York City Collective Bargaining Law ("NYCCBL"), New York City Administrative Code § 12-301 *et seq*., and are public employee organizations within the meaning of § 12-303(j) of the NYCCBL. At all times herein, the LBA, CEA, and UFOA (collectively, the "Unions") represent thousands of active City employees, negotiates and advocates for them in matters of law, policy, terms and conditions of employment, and their general welfare.

Applicant Marciano's request for an emergency stay is of central concern to the Unions because they are all uniformed employees of the City and, in the case of the LBA and CEA, are employed within the same agency as Marciano. The impact of his case may not be limited

1. In compliance with Supreme Court Rule 37(6), no counsel for a party authored the brief in whole or in part, and no person other than the *Amici*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. Applicant's counsel has provided consent to the making of the motion and the filing of this *Amici Curiae* brief. Respondent's counsel states they take no position in the making of the motion and the filing of this *Amici Curiae* brief.

to him personally; each of the *Amici* Unions represent employees who had not been vaccinated, were placed on leave without pay, and/or faced termination under the same policy Marciano challenges.

This brief is being submitted pursuant to leave requested by the unopposed accompanying motion.

SUMMARY OF ARGUMENT

Like with government-imposed bodily intrusions, resolving whether and how a governmental employer may unilaterally impose a mandatory vaccination policy for its employees involves balancing interests. Here, the interests are not simply of government and of individual but of employer and of represented employee. *Amici* here will therefore focus on explaining how the ultimate decision in this matter may impact both fundamental bargaining rights for public employee unions in New York and the ability of government agencies to provide essential services for the public. In so doing, we hope to highlight relevant matters not previously brought to the attention of the Court that support the Applicant's emergency request for a stay.

For more than a century, the Court described bodily autonomy as the most "sacred" of rights, with bodily intrusions permitted only under a high standard of "clear and unquestionable authority of law." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891). Acknowledging that governments have a responsibility to protect the public's "general comfort, health, and prosperity," the Court has similarly recognized the judiciary's responsibility to guard against arbitrary

impositions of a state's police powers. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Thus, while permitted in limited circumstances, the government's powers are not absolute, particularly when it involves vaccination mandates.

Unlike in *Jacobson*, which involved a statutorily permitted regulation requiring individuals to be vaccinated or else be fined, the *Marciano* case involves an employer-imposed mandate on its union-represented employees whose failure to comply may result in a loss of livelihood. Thus, the *Jacobson* holding is not entirely instructive in this instance. Furthermore, the governmental employer's purported goals in mandating vaccination should not be considered in a vacuum; it must be evaluated with the benefit of the current circumstances (not with hindsight) and in the backdrop of strong, well-settled State and City policies that favor collective bargaining, both in and of itself as well as a means to protect the public by assuring, at all times, the orderly and interrupted operations and functions of government. *N.Y. Civ. Serv. L. ("CSL") § 200.*

It is within that context, *Amici* will address how permitting the continued implementation of the governmental employer's vaccine mandate pending final determination of the full scope and breadth of its bargaining obligations attendant to the policy may constitute a takedown of fundamental employee rights and disrupts the orderly and uninterrupted operations and functions of government.

ARGUMENT

Without a Stay, the City will be permitted to Bypass its Bargaining Obligations, May Render *Marciano*'s Appeal Moot, and May Render Subsequent Agency Decisions Ineffectual

The duty to bargain with unionized or represented public employees is inextricably intertwined with a governmental employer's decisions over terms and conditions employment. And even when an employer's decision is determined to be within management discretion, the impact of the exercise of that prerogative on terms and conditions of employment are mandatorily negotiable. Permitting the City of New York to continue to unilaterally implement its employee vaccine mandate is an extreme and unnecessary measure, the imposition of which involves the violation of fundamental collective bargaining rights. Failure to grant a stay pending the resolution of bargaining disputes over the vaccine mandate could create a loophole employers use to continue to bypass their bargaining obligation, refusing to negotiate in good faith, dragging its feet and running the proverbial clock out, thereby rendering any decision by State and City agencies in an employee's (or their labor union's) favor moot.

Applicant is a New York City police detective and a member of separate *Amicus Curiae* Detectives' Endowment Association, Inc. ("DEA"), the bargaining representative for detectives employed by the New York City Police Department ("NYPD"). Collectively, *Amici* here are the exclusive collective bargaining representatives for thousands of City employees in other

ranks and designations employed with the NYPD and elsewhere. The LBA and CEA represent police lieutenants and captains, respectively, while the UFOA represents employees of the supervisory ranks within the Fire Department of New York. By operation of both State and City laws, these and other public employee organizations exist to protect the rights of public employees and to represent those employees concerning their wages, hours, and working conditions. A vaccine mandate is a working condition, the decision and/or impact of which is required to be negotiated with the respective labor unions. Challenges by such employee organization to the City's vaccine mandate (and to a similar mandate by the State for its employees) are pending before State and City agencies statutorily created to resolve such disputes.

Although waiting for decisions in those matters, a recent decision and order by the Supreme Court of New York County is instructive. In *New York City Police Benevolent Association of the City of New York, Inc. v. City of New York*, Supreme Court, New York County, September 23, 2022, Index No. 151531/2022, Justice Lyle E. Frank held "the vaccine mandate is invalid to the extent it has been used to impose a new condition of employment to current [police union] members." In so concluding, the Court explained that the "unilateral imposition of a condition of employment is not something that either the [City Department of Health] or the Mayor can do without collective bargaining."

Pending before the New York City Board of Collective Bargaining, the City agency established by City Charter to resolve bargaining and other labor disputes between the City and its public employees, are various improper

practice charges involving the City's vaccine mandate. In one, *Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO and Uniformed Fire Officers Association of Greater New York, Local 854, IAFF, AFL-CIO [Amicus* UFOA here], BCB-4461-21, the decision to implement a mandatory vaccine is being challenged. In another, *New York City Municipal Labor Committee,* BCB-4458-21, an umbrella organization representing City municipal employee organizations including *Amici* Unions here, challenge the implementation of the mandate without bargaining; that is, the charge challenges the impact or effects of such a mandate (e.g., use of time and leave, discipline, and reasonable accommodations). Those cases have been submitted and are awaiting a decision.

Without a stay, the City may continue to unilaterally impose the vaccine mandate without having to bargain. By the time determinations of the pending matters are made and all appeals exhausted the resulting final decisions may have no effect. The City has no incentive or reason to sit at the bargaining table in good faith. Delay has historically been management's best friend. However, a failure to stay further implementation in the instant matter may constitute a takedown of collective bargaining rights on this subject. The employer can simply bypass the essential and legally required process to bargain, claim an unending emergency, superficially label its action not subject to negotiation, and run the clock out on the affected unions.

Since 1967, the State has declared it is public policy "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."

CSL § 200. For nearly as long, the City of New York has also established a strong public policy favoring collective bargaining. *NYCCBL §12-302*. And both make it an improper employer practice to refuse to or fail to negotiate in good faith over terms and conditions of employment. *CSL § 209-a.1(d)*; *NYCCBL §§ 12-306(a)(4)* and *12-307*. It is well documented that both the State and City have placed thousands of employees who were not vaccinated on a leave without pay and/or terminated them without due process.

The balancing of interests that is required when evaluating policies such as vaccine mandates must require consideration of collective bargaining obligations and the interests of labor unions. Otherwise, the Court may, by its inaction, implicitly create a bargaining loophole that renders the State's and City's bargaining laws (and the agencies created to administer and enforce them) ineffectual.

It is well-settled that a public employer cannot unilaterally impose public safety or public health measures affecting terms and conditions of employment on represented employees without first bargaining over procedures to implement the policy. *Bd. of Educ. of the City of New York*, 21 PERB ¶ 7001, 1988 WL 1590474 (N.Y. Sup. Ct. Albany Cnty., 1998) ("Under the Taylor Law, public employers[‘] obligation to bargain as to all terms and conditions of employment is broad and unqualified, except where there is an explicit statutory prohibition.")

The City's mandate impacts municipal employees' term and conditions of employment by requiring them to show proof of vaccination before permitting them to work; those who fail to comply face leave without pay and

termination. In *PBA*, *supra*, the court noted the City's "dealings with other municipal unions" as additional evidence of its bargaining obligation, reasoning that "[s]hould this Court give any credence to the City's argument that it can impose whatever conditions of employment it deems necessary pursuant to a [Department of Health] issued mandate that position is in clear contrast to its practice on the same issue." *PBA* at 3. Further, even if PERB or BCB concludes that the mandate is within management's prerogative, that would not absolve the City of its obligation to negotiate in good faith over implementing procedures.

Last November 10, 2021, the National Labor Relations Board's ("NLRB") Office of the General Counsel issued a memorandum (Memorandum OM 22-03)[2] reminding covered employers that they have decisional bargaining obligations regarding those aspects of the Department of Labor's vaccination policy that affect terms and conditions of employment. Further, "leaving aside decisional bargaining obligations, the employer is nonetheless obligated to bargain about the effects of the decision." *OM 22-03* at 2. While the NLRB does not have jurisdiction over public sector labor relations in New York State, its guidance is instructive and consistent with well-settled law governing the relationship between State and local municipalities and its employees.

PERB (and, for matters within its jurisdiction, BCB) has primary and nondelegable jurisdiction to determine improper practices and to fashion a remedy that will

2. https://www.nlrb.gov/guidance/memos-research/operations-management-memos

effectuate the policies of Civil Service Law, Article 14, known as the Taylor Law. *See CSL § 205.5(d)*; *Uniformed Firefighters Assn. of Greater NY*, 79 N.Y.2d 236 (1992). Therefore, courts defer to PERB's determinations whether there is reasonable cause to believe an improper practice has occurred and whether PERB can fashion an appropriate remedial order that will satisfy its mandate under CSL § 205.5(d) to effectuate the policies of the Taylor Law, including the need to maintain the *status quo*. *See e.g. Matter of NYS Pub. Empl. Relations Bd. v. County of Monroe*, 42 PERB ¶ 7007, 2009 WL 8159766 [Sup Ct., Albany County 2009]; *Town of Islip*, 41 PERB ¶ 7005, 2008 WL 8578614 [Sup Ct., Albany County 2008]; *Matter of NYS Pub. Emp. Relations Bd. v. City of Buffalo*, 28 PERB ¶ 7008, 1995 WL 17945825 [Sup Ct, Albany County 1995]. Granting a stay simply permits PERB, BCB, and the Second Circuit (in the *Marciano* appeal) the opportunity to do their jobs and ensures that any resulting judgment on the merits will not be rendered ineffectual.

Public employees who are not vaccinated and who do not qualify for exemptions are faced with the *Hobson's* choice between violating their own body autonomy or face loss of livelihood (leave without pay and/or termination). Once administered, a vaccine cannot be removed from an individual's body. Simply put, it is irreversible. Members of *Amici* Unions are permanent employees with a property interest in their long-held civil service positions that could be lost. These employees are all frontline workers, first responders who bravely and valiantly performed their jobs during the throes of the pandemic (doing so effectively without being vaccinated). Given the less intrusive alternative means to deal with COVID, including the mitigation strategies and widely available treatments,

the City should not be permitted to implement the severe measure of a vaccine mandate at this juncture.

Even beyond the direct impact on "terms and conditions" in the traditional sense, there are increasing concerns that such a mandate has caused or may cause damaging effects on social well-being, psychological reactance causing diminishment in public trust and vaccine confidence, as well as increased political polarization. All of these factors contribute to greater stress on employees who are increasingly overworked and understaffed. The staffing shortages described by Applicant and *Amicus Curiae* DEA appear propagated by the continued mandate. And this may adversely affect the delivery of essential services to the public now and into the future.

In sum, the interests of the public are best served by the granting of the emergency stay pending a determination in the Applicant's appeal by the Second Circuit and pending final determinations by the State and City agencies statutorily tasked with determining the employer and union bargaining rights and obligations regarding mandatory vaccinations.

CONCLUSION

For the reasons stated herein, Applicant-Petition NYPD Detective Marciano's Emergency Application for Writ of Injunction should be granted, pending the outcome of his Appeal in the Second Circuit, and pending the final outcome of the Unions' charges related to the City's obligation to bargain before the respective State and City agencies.

Dated: October 4, 2022
Lake Success,
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