No. 23-

IN THE

Supreme Court of the United States

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

Petitioner,

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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PATRICIA A. FINN
Counsel of Record
PATRICIA FINN ATTORNEY, P.C.
275 North Middletown Road, Suite 1E
Pearl River, New York 10965
(845) 398-0521
patriciafinnattorney@gmail.com

Counsel for Petitioner

321922

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

This case invokes law settled over a century ago in the landmark case *Jacobson v. Massachusetts*, 197 US 11 (1905), involving the police power of state legislatures to require vaccinations. In upholding state law in *Jacobson*, this Court affirmed that such power was in the hands of the legislature, analogizing the power to enforce vaccination to the power to enforce quarantines. *Id.*, at 25, 29.

In January 2021, the legislature of New York enacted *Novel Coronavirus Covid-19 Legislation*, restricting Covid-19 countermeasures to "contact tracing" only, consistent with the health department's existing authority to regulate and *encourage* FDA-licensed vaccination.

In October 2021, the health department and the Mayor of the City of New York mandated that city employees receive emergency use authorization (EUA) (*non*-FDA licensed) vaccines as a condition of continued employment.

The question presented is whether the Mayor of the City of New York, through his appointed police and health commissioners, acts without legislative authority by mandating municipal employees to be vaccinated with unlicensed EUA drugs, where both state and federal law preempts such mandates without informed consent, or at least without the health department's obtaining a judicial order of quarantine when informed consent is withheld, under the due process protections that apply to quarantines under state law and New York City's health code.

LIST OF PARTIES

Petitioner

ANTHONY MARCIANO, appearing on behalf of himself, and all others similarly situated.

Plaintiff and Appellant in the courts below.

Respondents

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.

Defendants and Appellees in the courts below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual.

LIST OF DIRECTLY RELATED CASES

Marciano v. Adams, et al., No. 22-570, United States Court of Appeals for the Second Circuit. Summary Order entered May 16, 2023.

Marciano v. Adams, et al., Application No. 22A178, Supreme Court of the United States. Application denied October 11, 2022.

Marciano v. De Blasio, et al., No. 21-cv-10752 (JSR), United States District Court for the Southern District of New York. Judgment entered March 8, 2022.

Marciano v. De Blasio, et al., Index. No. 160914/2021, Supreme Court of the State of New York, New York County. Judgment entered January 12, 2022.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

Page

Page

Statutes & Other Authorities

Cited Authorities

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Marciano ("Marciano") respectfully petitions for a writ of certiorari to review a judgment of the Second Circuit Court of Appeals.

OPINIONS BELOW

The Second Circuit Court of Appeals' dismissal by Summary Order appears at Appendix A (1a-7a), and is unpublished at *Marciano v. Adams, et al.*, 2023 U.S. App. LEXIS 11915 and 2023 WL 347119 (2d Cir. May 16, 2023). The District Court's opinion appears at Appendix B (8a-33a) and is reported at *Marciano v. De Blasio, et al.*, 589 F. Supp. 3d 423 and 2022 U.S. Dist. LEXIS 41151.[1]

JURISDICTION

The Second Circuit Court of Appeals issued its judgment on May 16, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant state and federal laws and regulatons are reproduced at Appendix D, as follows:

- PHL § 206(1)(l), *Commissioner: general power and duties* (39a)

1. Petitioner's application for injunction addressed to Justice Thomas and referred to this Court was denied October 11, 2022, No. 22A178, and is reported at 143 S. Ct. 298, 2022 U.S. LEXIS 4588, and 2022 WL 6571783.

- PHL § 613 *State aid, immunization* (39a-40a)
- PHL § 2120(3), *Judicial Order of Quarantine* (40a)
- PHL § 2442(a) *Protection of Human Subjects, informed consent* (40a-41a)
- PHL § 2180(1–3), *Novel Coronavirus Covid 19 Legislation* (41a)
- NYC Health Code, 24 RCNY § 11.23 (k), *vaccination* (41a-42a)
- 45 C.F.R. § 46.401, *et seq.*, *Protection of Human Subjects* (43a)
- 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III) *Food, Drug and Cosmetic Act (*FDCA) *Emergency Use Authorization* (EUA)(44a); 42 USC § 247d-6d(a), (b) *Public Readiness and Emergency Pre-paredness Act* ("PREP Act")(44a-53a)
- NYC Administrative Code § 17-109 (53a)
- NYC Charter § 553(b) (Board of Health) (54a)
- October 20, 2021, Order of the Commissioner of Health and Mental Hygiene to Require Covid-19 Vaccination for City Employees and City Contractors (55a-65a)

- October 31, 2021, Supplemental Order of the Commissioner of Health and Mental Hygiene to Require Covid-19 Vaccination for City Employees and City Contractors (66a-71a)

- Executive Law § 24, *Local state of emergency, local emergency orders by chief executive* (72a-77a)

INTRODUCTION

Petitioner requests a ruling from this Court on a case of national importance involving a novel virus and EUA vaccines authorized by Secretary of Health and Human Services (HHS) for emergency use only, requiring informed consent and attaching a waiver of liability to its use. Petitioner was subjected to an EUA Covid-19 adult vaccination mandate, preempted both by Congress and the New York legislature from being mandated on any person without informed consent.

Federal law also preempts Petitioner from obtaining any other form of relief or damage award in any court for injuries, including negligence, intentional infliction of emotional distress, harassment, medical monitoring, battery and assault, along with the concrete injuries he has sustained in this case.

The only relief available to him is a declaratory relief denied him by the Second Circuit, in derogation of this Court's precedents on mootness, and in conflict with the Third, Fourth, Fifth and Ninth Circuits' determinations on mootness of an issue capable of repetition and likely to evade review. *See, e.g., Parker v. St. Lawrence Cnty. Pub. Health Dep't,* 102 A.D.3d 140 (N.Y. App. Div. 2012).

Petitioner seeks a ruling finding the executive mandates issued by Respondents void *ab initio* for violating the separation of powers and informed consent doctrines, as well as state and federal law. Without a ruling from this Court declaring the parties' jural rights and legal obligations under the statutes, Petitioner has no other remedy, is irreparably injured, and subject to another illegal mandate when Respondents engage in the same unlawful conduct in a future emergency, still in the absence of state legislative authority.

The specific issues raised herein, regarding the state *and* federal preemption of EUA mandates, and state law *guarantees* of a right of due process to refuse informed consent to involuntary medical treatments, quarantines, and adult vaccination, appear to be of first impression.

STATEMENT OF THE CASE

Petitioner, Anthony Marciano, is a Detective with the New York Police Department with over a decade of service to the residents of the City of New York. He was deemed an essential worker and reported for duty throughout the early stages of Covid-19 when consequences were still uncertain and predicted to be dire. He contracted Covid-19 from exposure as a frontline worker and recovered quickly, acquiring natural immunity.

On August 31, 2021, former Mayor Bill de Blasio ordered an adult vaccination mandate for NYC employees with respect to Emergency Use Authorization vaccines made available under the Food, Drug and Cosmetic Act (FDCA) Emergency Use Authorization (EUA) (21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III) (44a) and PREP Act (42

U.S.C. §§ 247d–6d and 42 U.S.C. 247d–6e) (44a-53a). This vaccination order was continued by Mayor Eric Adams upon taking office in January of 2022. (57a). On numerous occasions both Mayors stated to the press that they had the "power" and would impose the mandate again if they deemed a need existed. On March 5, 2020, for example, Mayor de Blasio stated to the press:

> This is the first Commissioner's Order, I doubt it will be the last. You will see evolving actions. This one refers only to city workers – obviously, the Commissioner has a power and I have the power to do things related to the general public as well … we are prepared to do a lot more the moment we need to.[2]

On October 20 and 31, 2021, the Commissioner of the New York City Department of Health and Mental Hygiene issued vaccination orders. (60a-71a). These orders required that any employee who had not provided proof of Covid-19 vaccination would be excluded from the work premises beginning on November 1, 2021, except for "per diem poll workers hired by the New York City Board of Elections" (64a) and "uniformed Department of Corrections ("DOC") employees," (59a), who were arbitrarily excused due to staff shortage, and apparently able to avoid Covid-19 without vaccination.

Petitioner is not willing, and is not required by federal law, to assume health risks associated with experimental,

---

2. https://www.nyc.gov/office-of-the-mayor/news/119-20/transcript-mayor-de-blasio-provides-onnew-york-city-s-covid-19-response. Last accessed on August 10, 2023.

unlicensed drugs he does not need, and which by state law he does not have to submit to as part of his employment with the City of New York (NYC). (44a-45a).

Petitioner further asserts a due-process right to refuse informed consent to any involuntary medical treatment, considered a form of quarantine under state law and NYC's health code, PHL §2120(3) and 24 RCNY 11.23(k). (40a-42a).[3] Under those provisions, a Judicial Order of Quarantine must be obtained by the health department from a New York State (NYS) Supreme Court Magistrate when informed consent is withheld to any involuntary medical treatment. PHL §2120(3) and 24 RCNY 11.23(k) afford Petitioner, and all others similarly situated, due-process protections including notice, an assignment of counsel when needed, and an opportunity to be heard when opposing involuntary medical treatment coerced without informed consent.

Action in New York state courts

On December 7, 2022, Petitioner commenced an Article 78 - 42 USC §1983 hybrid action in the New York State Supreme Court, challenging the health commissioner's vaccination orders as facially invalid and preempted by state and federal law, violating the separation of powers and informed consent doctrines, and invalid as applied, being arbitrary and capricious, *inter alia* violating the substantive and procedural due process rights of all municipal workers to refuse an EUA Covid-19 vaccination

3. A. Moss, M.D., et ano. *Rethinking the Ethics of the Covid-19 Pandemic Lockdowns*, August 7, 2023, https://onlinelibrary.wiley.com/doi/10.1002/hast.1495.

without informed consent or without the health department obtaining a Judicial Order of Quarantine. (15a). *See* PHL §206(1)(l)(39a); PHL §613 (39a-40a); PHL §2120(3) (40a); PHL §2442 (40a-41a); 24 RCNY §11.23(k) (41a-42a); and 45 C.F.R. § 46.401 *et seq* (43a); 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III) (44a-45a); 42 USC § 247d-6d(a), (b) ("PREP Act") (EUA "covered countermeasure" immunity from liability) (44a-53a).

Petitioner sought and obtained a Temporary Restraining Order in the State Supreme Court for New York County on December 14, 2021, and that order dissolved upon removal to the U.S. District Court for the Southern District of New York on December 15, 2021. (15a-17a, 37a-38a; TRO vacated December 29, 2021).

Action in federal courts

Petitioner opposed removal and sought to sever the state law claims so they might be remanded to the state court on the issue of the legality of coerced medical treatments and adult vaccination mandates without informed consent or a Judicial Order of Quarantine. The District Court denied any remand, and further, overlooked (1) that EUA Covid-19 vaccinations cannot be mandated in the State of New York because they are unlicensed drugs, and (2) that no adult vaccination mandate is permitted under New York law (in contrast to the authorized student vaccination schedule found in PHL §2164 and §2165). Instead, the District Court decided the legality of adult mandates was a question of state law "left open" by the Court of Appeals in *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601 (N.Y. 2018), and dismissed Petitioner's case with prejudice as to all claims.

Petitioner then moved for an emergency stay in the Second Circuit and sought to certify a question of law — whether adult vaccination was preempted by state statute from being mandated without informed consent under *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, supra* — back to the NYS Court of Appeals. On August 2, 2022, the Second Circuit denied this request on grounds that the New York Court of Appeals had addressed the question already, without identifying *how* said question had been resolved by that court. (No. 22-570, Doc. 117).

Petitioner next petitioned for an emergency stay in this Court, and was denied on October 11, 2022, so the appeal continued in the Second Circuit.

In the interim, Petitioner was coerced to take the shot or lose his job, health benefits and pension. (5a). On October 24, 2022, the week after he received the experimental Covid-19 vaccination, Respondents were restrained in *Garvey v. The City of New York,* 180 N.Y.3d 476 (N.Y. Sup. Ct. 2022) on a different theory, finding the mandate arbitrary and capricious. Respondents then suspended the vaccination orders for municipal workers who had yet to receive the vaccination, but it was too late for Petitioner, who had been coerced to vaccinate a few days earlier and now finds himself without a remedy. (6a).

The Second Circuit dismissed Petitioner's appeal of the District Court's judgment on May 16, 2023, on grounds that Respondents' vaccine mandates were repealed and we "cannot enjoin what no longer exists," quoting *Exxon Mobil Corp. v. Healey*, 28 F.4th 383,393 (2d Cir. 2022). The Court refused also to award declaratory relief, stating

that the case "does not fit within the 'capable of repetition yet evading review' mootness exception," where "there is a reasonable expectation that the same complaining party will be subject to the same action again," citing *Kingdomware Techs, Inc. v. United States*, 579 U.S,. 162, 170 (2016).

Because there is a reasonable expectation that Petitioner will be subjected to further vaccination mandates in the future with regard either to the Covid-19 pandemic, or another disease, Petitioner files the instant petition to receive adjudication on, and to preserve, his rights under state and federal law to refuse EUA drugs, involuntary medical treatments and adult vaccinations not legislatively authorized in the State of New York. (5a).[4]

REASONS FOR GRANTING THE WRIT

I. Circuit conflict warrants review.

The Second Circuits' dismissal of this case as moot is reversible error, and conflicts with the Fifth Circuit's ruling in *BST Holdings v. Occupational Safety & Health*

---

4. *World Health Assembly agrees to launch process to develop historic global accord on pandemic prevention, preparedness and response.* 1 December 2021, News release, Geneva https://us01.z.antigena.com/l/sV2vylfYg-zi5gpZxsqlj2zRa2tjLf-vU6YYH-ramJ5o_0MleuflST2MzIT7HyzZBO0KoQ5sWG_fC~zq6tGOLA-OvbFm4pi7zWKcAghu1WkcU9UEntoKkfkRLrMhp1UwQX19PWaRGgjcVhKso0JPVkVm9YlP6gE43vQISw_unrkAfFKaZVyjQKhxp_UPAk08b37E_MxCYyXufpTVICmTD3Oo0LM6ZVaDevQ_UbNUexbLWcbVRH9Pz8~lF4-lBh5xzWUHUE9e2oKuo3cco3C9uwXht3

Admin. (OSHA), 17 F.4th 604 (5th Cir. 2021), restraining similar employee workplace Covid-19 vaccination mandates, but reasoning a pre-enforcement challenge of a Covid-19 vaccination mandate that was lacking legislative authorization *was* ripe for review.

This case continues as a pre-enforcement challenge requiring declaratory relief, because the Mayor has retained his perceived authority to impose involuntary medical treatment, experimental drugs and adult vaccination mandates as a condition of employment.

The Fifth Circuit addressed the ripeness of a pre-enforcement challenge to the Covid-19 vaccination mandate applicable here, and upheld a preliminary injunction to a challenge nearly identical to this case in *Feds for Medical Freedom, et al., v. Joseph Biden*, 63 F.4th 366 (5th Cir. 2023). The Fifth Circuit stated:

> True, when a plaintiff seeks pre-enforcement review of a government mandate, ripeness is always a concern. *See, e.g., Abbott Lab'ys*, 387 U.S. at 148. But in this case, it's not difficult "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. The issue for judicial decision is the purely legal one of whether the President can lawfully enact this order. *See ibid.* (holding "the issues presented are appropriate for judicial resolution at this time" because "all parties agree that the issue tendered is a purely legal one"). And the hardships to the plaintiffs of withholding a decision are plain: they'll be forced to undergo irrevocable medical

> procedures and comply with a potentially unlawful order or face unknown consequences that "may be even more costly." *See id.* at 153; *id.* at 152 (finding hardship and hence ripeness where "[t]he regulations are clearcut and were made effective immediately upon publication; [and the Government's lawyers made clear] that immediate compliance with their terms was expected"). The mandate thus plainly affects plaintiffs' "primary conduct" and hence is ripe for review irrespective of any personnel actions the Government has taken or might eventually take. *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 810 (2003).

Feds for Medical Freedom, at 386.

Here, a pre-enforcement challenge was dismissed for mootness by the Second Circuit, although it is nearly identical to the pre-enforcement challenges to perceived executive authority present in *Feds for Medical Freedom*.

To see the close similarity of the cases, one need only swap out plaintiff "Feds for Medical Freedom" with "Marciano," and defendant "Biden" with "Adams." This is enough to discern the split in the Circuits' decisions. Accordingly, a declaratory judgment on this important issue concerning public health and EUA medical product mandates, enacted through repetitive executive orders akin to legislation, is critical to preserving Petitioner's rights, and all those who are similarly situated. See *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) ("[W]hile a statutory change 'is usually enough to render a case moot,' an executive action that is not governed by any clear or codified procedures cannot moot a claim.")

Just as *Feds for Medical Freedom,* this case concerns state and federal statutes *that have not expired and are not moot,* and to which challenges will certainly rise again in the near future. Now is the best time to address these challenges, where Petitioner, as well as many others across this nation, have been put to great expense and extensive litigation to preserve their rights. The vaccine mandates recently imposed, *ultra vires*, upon Petitioner Marciano are not only '"capable of repetition yet evading review," but "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again," *Kingdomware Techs, Inc. v. United States*, 579 U.S. 162, 170 (2016) (citing *Spencer v. Kemna*, 523 U.S. 1, 17 (1998), brackets in original).

Indeed, when the next "emergency" occurs — even if it were simply an increase in Covid-19 cases to impose "booster" (revaccination) mandates[5] — it will be as short-lived as the last, outrunning the deliberative judicial process. The result: repeated costly challenges to *ultra vires* executive mandates, which would once again be rendered moot upon the repeal of the declared emergency, leaving millions of Americans in perpetual uncertainty about the state of the law and the requisite authority for such executive mandates.

This Court recently noted this concern:

> Despite [the guardrails enacted in the National Emergencies Act of 1976], the number of

5. Covid-19 cases are said to be rising again in New York City this August, *see* https://projects.thecity.nyc /2020_03_covid-19-tracker/. Last accessed August 11, 2023.

> declared emergencies has only grown in the ensuing years. And it is hard not to wonder whether, after nearly a half century and in light of our Nation's recent experience, another look is warranted. It is hard not to wonder, too, whether state legislatures might profitably reexamine the proper scope of emergency executive powers at the state level. At the very least, one can hope that the Judiciary will not soon again allow itself to be part of the problem by permitting litigants to manipulate our docket to perpetuate a decree designed for one emergency to address another. Make no mistake-decisive executive action is sometimes necessary and appropriate. But if emergency decrees promise to solve some problems, they threaten to generate others. And rule by indefinite emergency edict risks leaving all of us with a shell of a democracy and civil liberties just as hollow.

Arizona v. Mayorkas, 143 S.Ct. 1312, 1316 (2023).

Accordingly, now is the time to address the split in the Circuits, and to clarify that the police power for vaccination requirements resides with the state legislatures, and with them only.

II. Conflict with this Court's exception-to-mootness precedent warrants review.

The Second Circuit's grant of Respondents' motion to dismiss for mootness leaves millions of New Yorkers without a ruling, overlooking this Court's exception to

the mootness doctrine that applies here. Simply because the vaccine orders promulgated by public officials were repealed, and the federally declared Covid-19 emergency ended in May of 2023, this case was not moot. The emergency in NYC was largely over *before* the municipal mandate was even adopted,[6] and yet it continued for nearly two years, coercing millions of EUA Covid-19 vaccinations on city employees and residents without legislative authority, under a series of repetitive emergency declarations akin to legislating, violating the separation of powers doctrine.

The Second Circuits' dismissal of this case as moot conflicts with this Court's precedent, and its holding in *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor,* 142 S. Ct. 661 (2022), that without clear authorization from Congress, OSHA, a creature of statute, has no authority to impose a vaccine mandate on the nation's employees, and such mandate violates the separation of powers doctrine.

Further:

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.

City of Mesquite v. Aladdin' s Castle, Inc., 455 U.S. 283, 289 (1982).

---

6. Mayor de Blasio reopened NYC on July 1, 2021, two weeks after Governor Cuomo reopened the entire state. Mayor de Blasio began issuing orders requiring masks indoors and vaccine passports beginning in August of 2021.

Voluntary cessation of challenged conduct moots a case, however, only if it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn., Inc.,* 393 U.S. 199, 203 (1968) (emphasis added). And the "'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness*." *Friends of the Earth*, *ante,* at 189 (emphasis added) ...

As we recently noted in *Friends of the Earth*, however, "the plain lesson of [our precedents] is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," petitioner's cause of action remains alive. ...

It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.

Adarand Constructors v. Slater, 528 U.S. 216, 222, 224 (2000) (some citations omitted).

The Mayor of NYC has publicly stated more than once that he has the power to impose an EUA drug, adult vaccination mandate without informed consent, and that he would do it again should he deem the need, deriving his claimed "emergency powers" from Executive Law §24, which do not exist. Indeed, throughout the litigation, Respondents have forcefully asserted the perceived legality of their actions and have not assured the courts that the same conduct would not happen again. *See United States v. Government of the Virgin Islands,* 363 F.3d 276, 285 (3d Cir. 2004), *DeJohn v. Temple University*, 537 F.3d 301, 309 (3d Cir. 2008), *Wall v. Wade*, 741 F.3d 492, 497, 498 (4th Cir. 2014) ("[W]hen a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot."; "[B]ald assertions of a defendant – whether governmental or private – that it will not resume a challenged policy fail to satisfy any burden of showing that a claim is moot.")

Petitioner is a stakeholder in the outcome of the litigation because as a municipal employee, he is still subject to the Mayor's putative authority to impose involuntary medical treatments, experimental drugs and adult vaccinations as a condition of employment, to which he refuses *coerced* informed consent.

A declaratory ruling is warranted to prevent future abuse of power that is dangerous to public health. Not every person affected and irreparably injured, like Petitioner, is suitable for the EUA Covid-19 vaccination mandate, or indeed, future emergency vaccine mandates.

The prejudice to Petitioner, and those similarly situated, by denying them a declaratory ruling, is undeniable. Thousands of Covid-19 countermeasures lawsuits were filed, and the majority dismissed, often under an overbroad *mis*application of *Jacobson v Massachusetts*, 197 U.S. 11 (1905). Not a single ruling from any Court exists to stop the Mayor from inventing more emergency powers for himself, and mandating involuntary medical treatments, experimental drugs and vaccines again under his pretended authority. Still, "[s]triking a proper balance among health concerns, cost and privacy interests is a uniquely legislative function." *Fagan v. Axelrod*, 146 Misc.2d 286, 299 (N.Y. Sup. Ct. 1990), citing *Boreali v. Axelrod*, 71 N.Y. 2d 1, 12 (1987).

Petitioner now has no other remedy than a declaratory judgment, and is suffering a continuing irreparable harm.

III. Review of state and federal law implicating constitutional rights is timely and necessary

In *Jacobson v Massachusetts*, *supra,* this Court reasoned it within the province of the state's legislature to decide whether enforced vaccination is necessary. *Id.* at 29-30. The majority of this Court would likely agree, however, that the *executive* branch of government has no "emergency power" equivalent to the legislative "police power" articulated in *Jacobson.*

In practice, lower courts often defer to public health officials' perceived expertise, particularly in emergencies, and routinely uphold vaccination mandates as a permissible exercise of the states' police power. Yet crises do not afford enough time for even experts to understand "the science." This has never been more true, perhaps, than of the rush

to roll out experimental Covid-19 vaccines with very little knowledge of their efficacy or safety.[7] And invoking *Jacobson* to summarily dismiss challenges to public health enforcement *can* result in tragedy. *See, e.g., Buck v. Bell*, 274 U.S. 200, 207 (1927). ("The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.")

Crises, whatever they may be, cannot vitiate the due process guarantees of the Constitution under the Fifth and Fourteenth Amendments:

> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? ... much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do. (Gorsuch, J., concurring).

---

7. As an example, Rochelle Walensky, former head of the CDC, stated to Rachel Maddow of MSNBC on March 29, 2021: "We know that the vaccines work well enough that the virus stops with every vaccinated person. ... We can end this thing ..." Five months later, on August 5, 2021, she admitted to Wolf Blitzer of CNN that the CDC had changed its guidelines, because the vaccines "work well ... with regard to severe illness and death, they prevent it. But what they can't do anymore is prevent transmission." https://www.msnbc.com/transcripts/transcript-rachel-maddow-show-3-29-21-n1262442l; https://www.cnn.com/ 2021/08/05/health/us-coronavirus-thursday/index.html. Last ac-cessed August 10, 2023.

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 71 (2020).

Further, experimental injections — which the Covid-19 vaccinations unequivocally were[8] — coerced without informed consent violate not only state and federal statutes, but also human rights laws and *jus cogens* norms.

> We have little trouble concluding that a norm forbidding nonconsensual human medical experimentation [which includes unlicensed medical products] is every bit as concrete – indeed even more so – than the norm prohibiting piracy.…

Abdullah v. Pfizer, Inc., 562 F.3d 163, 184 (2nd Cir. 2009). *See also In Re Cincinnati Radiation Litig.*, 874 F. Supp.796, 816–18 (S.D. Ohio 1995).

In *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 305 (1990) this Court 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.'" *Id.* (quoting

---

8. As the National Institutes of Health ("NIH") explained in 2021 with regard to a vaccine granted EUA: "The issuance of an EUA is different than an FDA approval (licensure) of a vaccine. A vaccine available under emergency use authorization is still considered investigational." And as the FDA explains, "An investigational drug can also be called an experimental drug," because these two terms are synonymous. *See* http://web. archive.org/web/20210619162617/https://www.niaid.nih.gov/diseases-conditions/covid-19-vaccine-faq (web capture June 19, 2021); https://www.fda.gov/media/138490/download. Last accessed August 10, 2023.

Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). *See also Washington v. Harper*, 494 U.S. 210 (1990) and *Washington v. Glucksberg*, 521 U.S. 702 (1997).

In mandating the EUA Covid-19 adult vaccination, Respondents violated Petitioner's due process right to refuse informed consent to an involuntary experimental medical treatment not legislatively authorized. Further, there is no doubt that Respondents have retained their pretended authority to violate this due process right again under supposed "emergency powers" of Executive Law §24 by ostensibly rendering this case moot.[9] Thus, without the intervention and supervisory control of this Court, Respondents are free to evade review again under the pretext of the next emergency.

The vaccination orders which are the subject of this petition, and which have been replicated across this nation, are ripe for review because they violate separation of powers as well as informed consent doctrines. In this case, state and federal law both preempt such local mandates and protect the rights of citizens.

A. State law preemption.

Respondents' adult vaccination mandate is in direct conflict with state law protecting Petitioner's due process rights to refuse involuntary, experimental medical treatments. "Here we have a direct prohibition. It would seem logical to determine that an act which is

9. There is always the possibility that Respondents' timing of the lifting of the EUA Covid-19 mandate was contrived to avoid an inevitable unfavorable opinion in this case.

directly prohibited by statute is an illegal act." *Smith v. Woodworth*, 142 Misc. 889, 891 (N.Y. Sup. Ct. 1932). *See also Matter of N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 694 (N.Y. Sup. Ct. 1932). ("Respondents, however, contend that the Board of Health is a unique body that has inherent legislative authority. We disagree.").

The law of New York provides, at PHL §2120, *Control of Communicable Diseases; (3), Judicial Order of Quarantine*:

> 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.

The law further provides, at PHL §§ 2440-2446, *Protection of Human Subjects;* § 2442, *Informed Consent*:

> 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 ... 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.

The licensed version of the Covid-19 vaccine, "Comirnaty," is not distributed in the United States for liability reasons. (11a). In contrast, EUA experimental vaccinations attach a waiver of liability as a "countermeasure," which is exactly why Congress also requires informed consent to EUA drug use. *See* 42 USC § 247d-6d(a), (b) (44a-53a); 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III) (44a-45a). See generally, *Parker v. St. Lawrence Cnty. Pub. Health Dep't,* 102 A.D.3d 140 (N.Y. App. Div. 2012); 45 C.F.R. § 46.401, *et seq.*, Protection of Human Subjects (43a).

Further, the Department of Health and Mental Hygiene (DOHMH) has limited authority only to "regulate" and offer "gratuitous vaccinations," not to require vaccination.[10]

Similarly, the authority of the Mayor, under Executive Law § 24(c)(1) to "declare an emergency" and close places of "amusement and assembly" for thirty days does not create the police power to coerce irreversible, experimental vaccination on civil servants without written informed consent.

Under state law and NYC's health code, involuntary medical treatment is a form of quarantine that requires either informed consent, or a Judicial Order of Quarantine when informed consent is withheld. PHL §2120(3) and 24 RCNY 11.23(k). *In re Athena Y.*, 201 A.D.3d 113, 119 (N.Y. Sup. Ct. 2021) (" In determining whether to exercise this power, a court must carefully balance the potential benefits to be attained against the risks involved in the

10. *See* NYC Admin. Code § 17-109.

treatment, as well as the validity of the parent's objections to the treatment"). State law and the health code thus shift the burden of proof to Respondents that the targeted person is infected, and the drug being coerced is the least restrictive alternative.

A magistrate's review was essential here, and more importantly, required by law, 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). It is now common knowledge that the Covid-19 vaccines have been extraordinarily injurious, and that natural immunity conveys protection.[11] The federal government's *Vaccine Adverse Reporting System* (VAERS) data shows to date that 39,759 people are reported to have died from the EUA Covid-19 vaccination, and countless more seriously injured.

Petitioner had natural immunity to Covid-19 when he was coerced to vaccinate, and thus was not infected or suspected of infection. Moreover, the EUA Covid-19 vaccination is an epic failure, according to the government's own data, which was evidence to be reviewed by a magistrate in a state court due process hearing required when issuing a quarantine order. "Breakthrough cases occur, even for those who have been vaccinated and boosted." *Garvey v. City of New York, supra*, at 488.

---

11. *See, e.g.,* Mahesh B. Shenai, Ralph Rahme, Hooman Noorchashm. *Equivalency of Protection from Natural Immunity in COVID-19 Recovered Versus Fully Vaccinated Persons.* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8627252/. Last accessed August 8, 2023.

District Court did not apply state law

This difference between school-required vaccinations authorized by state statute and an adult mandate *preempted* by state statute, is a substantive issue in this case, one clearly articulated by the New York Court of Appeals in *Garcia, supra.*

In New York law, no adult vaccinations are authorized to be mandated. *See Garcia* at 620. ("Rather, the legislature intended to grant [the Department of Health] authority to oversee voluntary adult immunization programs, while ensuring that its grant of authority would not be construed as extending to the adoption of mandatory adult immunizations.").

If there *were* a statutorily authorized adult vaccination schedule in the state, then DOHMH would have added the Covid-19 vaccination to that schedule, in the same way it added the flu shot for toddlers to the school schedule in 2018, an addition upheld in *Garcia.* In so doing, the Court of Appeals clearly distinguished between legislatively authorized, licensed school vaccinations, and adult vaccination. *Garcia* at 604-05.

The District Court erroneously determined that the legality of adult mandates was a question "left open" by *Garcia*. The Second Circuit, in contrast, held the issue resolved by the Court of Appeals, but never explained how, and dismissed the case as moot. This has created a judicial vacuum on the lawfulness of adult vaccinations and the informed consent required to quarantine a targeted individual who is protected by state law.

Since no adult vaccination schedule exists, Respondents manufactured the unprecedented vaccination orders without legislative authority, and coerced civil servants to submit to EUA Covid-19 injections without informed consent, violating due process. The New York Court of Appeals has curtailed the Board of Health's perceived "unique" legislative authority in the past, striking down cigarette bans and soda cup size regulations when it deemed DOHMH delving too far into decision making reserved for the legislature. *See Boreali v. Axelrod* at 9. ("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.'") If this case had not been removed to the District Court, the Court of Appeals would have been able to easily render a decision along these lines here. As it stands, the District Court failed its duty, misapplying an intermediate appellate court case without consideration of the highest court's decisions.

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. *See V.S. v. Muhammad*, 595 F.3d 426, 432 (2d Cir. 2010). Clearly, if the state's highest court has previously determined that the health department lacks legislative authority to ban cigarette smoking and dictate the size of a soda cup, it would not permit the imposition of an unprecedented, adult vaccination mandate by *fiat*.

Second Circuit precluded application of state law

Similarly, the Second Circuit should have granted certification of the question of law involved in *Garcia*, *supra*. Where the District Court had dismissed Petitioner's federal § 1983 claims at an early stage, the case should not have continued in the federal courts. Generally speaking, where the federal claims are dismissed at a relatively early stage and remaining claims involve 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).

> 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). *See also Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

B. State law field preemption.

If there was any doubt as to conflict preemption and Congressional intent, on January 1, 2021, the NYS Legislature enacted PHL §§ 2180–2182, *Novel Coronavirus Covid-19 Legislation*, restricting available Covid-19 countermeasures to "contact tracing" only, consistent with DOHMH's authority to regulate and encourage FDA licensed vaccinations. The legislature did *not* mandate adult vaccinations because EUA drugs may not be mandated on adults or children under state law and federal regulations. "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, or (2) imposes restrictions beyond those imposed by the State law." *Robin v. Hempstead*, 30 N.Y.2d 347, 350-352 (1972).

C. Federal law preemption.

Under the doctrine of federal preemption, Congress may preempt state laws, either expressly or impliedly. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In every inquiry into the scope of a statute's preemptive effect, the intent and purpose of Congress is the ultimate touchstone.

EUA Covid-19 adult vaccinations may not be mandated per federal law. Congress was explicit in 21 U.S.C. §360bbb-3 that only the Secretary of HHS has the authority to grant expanded access protocols to drugs, biologics, and devices not licensed for their intended use under a declared emergency. (44a-45a).

> 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 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, 135 (D.D.C. 2003).

John Doe #1 affirms Petitioner's position that mandates are incompatible with EUA products. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III)(44a-45a). Congress was unambiguous that EUA drugs cannot be mandated:

> Nothing in this section provides the Secretary any authority to require any person to carry out any activity that becomes lawful pursuant to an authorization under this section, and no person is required to inform the Secretary that the person will not be carrying out such activity ...

Id.

A majority of this Court would likely agree that Respondents usurped the HHS Secretary's authority when establishing conditions prohibited by Congress. Respondents acted unlawfully when refusing to follow federal law and the rights it confers upon Petitioner to refuse informed consent.

Congress preempted Respondents' authority to interfere with any product or activity under the PREP Act and FDCA's EUA. Congress declared in 42 USC 247d-6d(b)(8) that:

> During the effective period of a declaration under subsection (b) … no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that — (a) is different

> from, or is in conflict with, any requirement applicable under this section; and (b) relates to the … administration … of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter, or under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 *et seq.*]."

The Mayor unlawfully used his office to establish a condition that interfered, enforced, and conflicted with the PREP Act and FDCA's EUA restrictions. No authority existed to issue a mandate without informed consent, and to do so violated state and federal law as well as due process.

Congress preempted regulations conflicting with the PREP Act and FDCA because a person such as Petitioner must agree to *more* than product participation in an experiment. He must also agree to forfeit litigation rights from resulting injury, allow his private identifiable information to be known by unknown persons for unknown purposes, allow data collected about his involvement with the product to be utilized by persons for research purposes, and agree to accept greater risks to his health, safety, and legal rights.

Therefore, Respondents mandated, without authority, Petitioner to enter into a legally binding agreement, according to terms and conditions established by Congress, outside of free will and voluntary consent. Because Congress expressly *preempted* state and local authorities from mandating EUA products by *fiat*, this issue is timely, will arise again, and ought to be reviewed now.

D. Mandate is arbitrary and capricious

In *BST Holdings*, *supra*, the Fifth Circuit noted that the Covid-19 vaccination mandate was arbitrary and capricious:

> 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).

BST Holdings, at 611.

In October of 2021, two years into the Covid-19 emergency, the Mayor and DOHMH spontaneously granted to themselves extraordinary emergency powers to impose a vaccination mandate on municipal workers, *except* for corrections officers due to a staffing shortage.

In October of 2021, at the time Petitioner was ordered to be vaccinated, he had demonstrated positive immunity to Covid-19 through blood tests, and weekly PCR tests consistently showed no Covid-19 infection. Petitioner posed no threat to himself or others; he was neither infected nor suspected of infection, a threshold requirement for DOHMH to obtain a Judicial Order of Quarantine. (26a).

In the context of Article 78 proceedings in New York against administrative officers, arbitrary and capricious action is one taken without sound basis in reason and without regard to the facts. *Matter of Konski Engrs. v Levitt,* 69 A.D.2d 940 (3d Dep't. 1979). Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard *Matter of Pell v Board of Educ.,* 34 N.Y.2d 222 (1974). Here, the Mayor and his Commissioners lacked authority to involuntarily quarantine, because the law leaves those decisions to a Supreme Court Magistrate. PHL §2120(3) and 24 RCNY 23.11(k). Involuntary vaccination clearly analogizes to involuntary quarantine, requiring notice and opportunity to defend against the accusation before a judge.

Jacobson foresaw that there might be vaccination mandates so arbitrary it would be "the duty of the courts to so adjudge." *Jacobson* at 31. Cases that have applied state law to involuntary medical treatment have done so in the context of the due process clause which "demand[s] that the decision to order an involuntary emergency [medical treatment] be made in accordance with a standard that promises some reasonable degree of accuracy." *Rodriguez v. City of New York*, 72 F.3d 1051, 1062 (2d Cir. 1995).

Without due process, pandemic measures and mandates become unhinged and arbitrarily enforced.[12]

This Court should grant certiorari and resolve the conflict among the Circuits with respect to mootness, resolve the conflict in the Second Circuit with the District Court and New York Court of Appeals, and address the ripeness of this dispute based on laws that have not expired, are not moot and have escaped review merely because one declared emergency is over.

12. Similarly, the Mayor selectively enforced "Vaccination Passports" on all businesses, barring entry to buildings without proof of vaccination within the five boroughs, enacted under the same pretended "emergency power." He arbitrarily and capriciously excused pandemic measures for some and not others, depending on social status, media pressure and other irrelevant characteristics, permitting movie stars, professional athletes and politicians to ignore mask mandates, for example. *See* https://nypost.com/2021/09/15/masks-for-waiters-and-serva nts-but-not-for-aoc-and-the-rest/ Last accessed August 10, 2023.

CONCLUSION

The issues presented herein are relevant to each and every New Yorker who is or will be subjected to EUA vaccination "mandates" in Covid-19 and other future public health emergencies, and this Court should return the case to the Second Circuit Court of Appeals for thorough review, or should review this case directly, since it is of national importance concerning the preemption, from both Congress and state legislatures, of unilateral municipal vaccination mandates.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICIA A. FINN
Counsel of Record
PATRICIA FINN ATTORNEY, P.C.
275 North Middletown Road, Suite 1E
Pearl River, New York 10965
(845) 398-0521
patriciafinnattorney@gmail.com

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 16, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 22-570-cv

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 16th day of May, two thousand twenty-three.

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

Plaintiff-Appellant,

Appendix A

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.

May 16, 2023, Decided

PRESENT: JOSÉ A. CABRANES,
GERARD E. LYNCH,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

SUMMARY ORDER

Appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is DISMISSED.

Anthony Marciano appeals from a judgment of the United States District Court for the Southern District of New York (Rakoff, *J.*) dismissing his claims against the

City of New York (the "City") and certain of its agencies and officers. Marciano, a New York City Police Department detective, argues that the Defendants' decision to mandate that employees of the City receive a vaccination against COVID-19 was *ultra vires,* preempted by state and federal law, and in violation of the federal Constitution. The Defendants move to dismiss this appeal as moot. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to grant the Defendants' motion to dismiss the appeal.

"[U]nder the general rule of mootness, courts' subject matter jurisdiction ceases when an event occurs during the course of the proceedings or on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party." *County of Suffolk v. Sebelius,* 605 F.3d 135, 140 (2d Cir. 2010) (quotation marks omitted). Accordingly, a "plaintiff's personal stake in the outcome of the litigation must be extant at all stages of review, not merely at the time the complaint is filed." *Stagg, P.C. v. U.S. Dep't of State,* 983 F.3d 589, 601 (2d Cir. 2020) (quotation marks omitted). "Typically, no live controversy remains where a party has obtained all the relief she could receive on the claim through further litigation." *Ruesch v. Comm'r of Internal Revenue,* 25 F.4th 67, 70 (2d Cir. 2022) (quotation marks omitted).

Marciano seeks declaratory and injunctive relief prohibiting the Defendants from enforcing their mandate that City employees receive a vaccination against COVID-19. But the Defendants have repealed that

mandate, and we "cannot enjoin what no longer exists." *Exxon Mobil Corp. v. Healey,* 28 F.4th 383, 393 (2d Cir. 2022). Nor can we award declaratory relief, which requires an ongoing, "real and substantial" underlying dispute to confer subject matter jurisdiction. *California v. Texas,* 141 S. Ct. 2104, 2115-16, 210 L. Ed. 2d 230 (2021) (quotation marks omitted); *see Exxon Mobil,* 28 F.4th at 394-95 ("[A] request for a declaratory judgment as to a past violation cannot itself establish a case or controversy to avoid mootness.").[1]

In this case, no exception to the mootness doctrine applies. This case does not fit within the "capable of repetition yet evading review" mootness exception, which "applies only in exceptional situations, where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Techs., Inc. v. United States,* 579 U.S. 162, 170, 136 S. Ct. 1969, 195 L. Ed. 2d 334 (2016) (cleaned up).[2] Marciano offers only "speculation" that he

1. Marciano's request for attorneys' fees and costs does not affect this calculus. *See London v. Polishook,* 189 F.3d 196, 200 (2d Cir. 1999) (noting that where "the only remaining issues would be attorneys' fees and costs, neither" would be "sufficient to keep the dispute alive").

2. This standard applies "[i]n the absence of a class action," including, as here, where a putative class plaintiff "brought suit assertedly on behalf of all other similarly situated . . . employees, yet made no motion for class certification pursuant to Fed. R. Civ. P. 23." *Haley v. Pataki,* 60 F.3d 137, 141 & n.2 (2d Cir. 1995).

personally could be subject to another similar vaccine mandate; such a "theoretical possibility" "does not rise to the level of a reasonable expectation or demonstrated probability of recurrence." *Exxon Mobil,* 28 F.4th at 396 (quotation marks omitted). And even were the Defendants to reimpose *this same* vaccine mandate, Marciano does not dispute that, subsequent to filing this suit, he has now received the COVID-19 vaccine, and would therefore now be compliant with that mandate. He therefore cannot show, as he must, that "the same controversy will recur involving the same complaining party." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.,* 551 U.S. 449, 463 (2007) (quotation marks omitted).

The voluntary cessation exception is likewise inapplicable because "there is no reasonable expectation that the alleged violation will recur" and because the Defendants' repeal of the vaccination mandate has "completely and irrevocably eradicated the effects of the alleged violation," given that Marciano seeks only injunctive and declaratory relief. *Am. Freedom Defense Initiative v. Metro. Transp. Auth.,* 815 F.3d 105, 109 (2d Cir. 2016) (quotation marks omitted).

And, again, even were the Defendants to reinstate the mandate, Marciano's undisputed vaccination status ensures that such a decision would no longer have any effect on his employment status. *See Conn. Citizens Def. League, Inc. v. Lamont,* 6 F.4th 439, 446 (2d Cir. 2021) (holding that the voluntary cessation exception "does not aid a plaintiff whose own conduct saps the controversy of vitality" (quotation marks omitted)); *DiMartile v. Cuomo,*

834 F. App'x 677, 678 (2d Cir. 2021) (summary order) (dismissing as moot an engaged couple's challenge to pandemic-era restrictions on non-essential gatherings like weddings where the couple "state[d] that they no longer intend to hold a wedding while New York's COVID-19 gathering limitations are in effect").

Accordingly, Marciano's appeal is moot. "When a civil case becomes moot pending appellate adjudication, the established practice in the federal system is to reverse or vacate the judgment below and remand with a direction to dismiss." *Hassoun v. Searls,* 976 F.3d 121, 125 (2d Cir. 2020) (quoting *Arizonans for Off. English v. Arizona,* 520 U.S. 43, 71, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997)) (quotation marks omitted). We follow that practice here because there is no suggestion that Marciano intended to "escape the collateral consequences of the decision below" by deliberately mooting the appeal when he received the COVID-19 vaccine. *Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet,* 260 F.3d 114, 122 (2d Cir. 2001).

We have considered Marciano's remaining arguments and conclude that they are without merit.[3] For the

3. The Defendants also request that we unseal references to Marciano's vaccination status in the parties' filings. The Defendants themselves initially sought permission to seal those references in their motion to dismiss and asked this Court to decide whether they should remain sealed. The Defendants did so because Marciano asserted that his vaccination status was private under the Health Insurance Portability and Accountability Act (HIPAA). We construe the Defendants' request as a motion to unseal the parties' filings in

foregoing reasons, the Defendants' motion to dismiss the appeal is GRANTED, the appeal is DISMISSED, and the case is REMANDED with instructions to the District Court to vacate its order and judgment and dismiss the case as moot.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

---

connection with the Defendants' motion to dismiss. Even assuming that Marciano has a right to privacy regarding his COVID-19 vaccination status that could justify keeping that information under seal, Marciano has waived that right by alleging in his (unsealed) complaint that, at the time of its filing, he was not vaccinated. Accordingly, the Defendants' motion to unseal references to Marciano's vaccination status is GRANTED.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 8, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-cv-10752 (JSR)

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.

March 8, 2022, Decided
March 8, 2022, Filed

JED S. RAKOFF, United States District Judge.

MEMORANDUM ORDER

Appendix B

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.[1] 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 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.[2]

---

1. 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).

2. 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

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. 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

---

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.

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.[3] 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.[4] 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

3. *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).

4. *Id.*

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 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.[5] 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 these order would be placed on LWOP. *See* ECF No.

5. "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 U.S. Dist. LEXIS 38500, 2012 WL 860367, at *4 n.1 (S.D.N.Y. Feb. 27, 2012).

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[6] 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 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

6. 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)).

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.[7]

7. 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 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)).

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, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).[8] 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 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). In applying this standard, the Court accepts as true all well-pled

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

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 U.S. Dist. LEXIS 166690, 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.

Appendix B

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, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (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, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (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.[9]

---

9. 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 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,* 858 F.3d at 736, 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

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, 81 N.Y.S.3d 827, 106 N.E.3d 1187 (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 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

---

likely to suffer irreparable harm before a decision on the merits can be rendered.").

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, 6 Transc. App. 170 (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, 72 N.E. 97 (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, 139 N.Y.S.3d 273 (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, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (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 assets 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)(l) 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.[10] 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

10. 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.

at 33. Such a substantive due process claim, however, is foreclosed by the U.S. Supreme Court's decision in *Jacobson v. Massachusetts,* 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (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, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (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.*, 563 F. Supp. 3d 33, 2021 U.S. Dist. LEXIS 184971, 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 U.S. App. LEXIS 30967, 2021 WL 4814767 (2d Cir. Oct. 15, 2021); *Abadi v. City of New York,* 2022 U.S. Dist. LEXIS 21815, 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).

Appendix B

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 U.S. Dist. LEXIS 92727, 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,* 574 F. Supp. 3d 120, 2021 U.S.

Dist. LEXIS 233142, 2021 WL 5771687, at *5 (E.D.N.Y. Dec. 6, 2021); *see also Broecker v. New York City Dep't of Educ.*, 2022 U.S. Dist. LEXIS 25104, 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. ofEduc. v. Loudermill,* 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (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 8, 2022

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

APPENDIX C — TRANSCRIPT EXCERPTS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED DECEMBER 29, 2021

[1]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21 CV 10752 (JSR)

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

Plaintiffs,

v.

BILL DE BLASIO, MAYOR OF THE CITY OF NEW YORK, IN HIS OFFICIAL CAPACITY, *et al.*,

Defendants.

Hearing
(via Telephone)

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

Before:

HON. JED S. RAKOFF,

District Judge

Appendix C

[14]

* * *

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

Let me once again take the liberty of interrupting. I'm impressed with the arguments, the skill with which you are [15]making those arguments, but I do want to keep the two motions separate.

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

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

But if the plaintiff's arguments really raised novel or complex issues that substantially predominated over the federal claims, that would give me pause. I take a longer view of that and I think it's not really the case. Ever since vaccinations or, as they used to be called, immunizations

came into play more than a hundred years ago, these kinds of issues involving the authority of New York City's Board of Health, as well as the state, to require immunization in certain circumstances has been the subject of litigation. Most of the litigation has resolved itself in favor of the city and the state.

A case that was not mentioned by the parties, and no reason they should, but, in my view, is really the seminal case, is the Metropolitan Board of Health v. Heister, which is [16]37 N.Y. 661. It's a decision by the highest court of the State of New York in 1868. That just shows you how early these kinds of issues got decided. That case very strongly supported the authority of the New York Board of Health to issue the kind of mandates they have issued here. I'm not deciding today whether that is dispositive. I am just saying these issues are not nearly as novel as I think plaintiff believes.

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

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

* * *

Appendix C

[28]

* * *

THE COURT: No. Thank you very much.

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

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

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

But here he has a pending request for a reasonable accommodation. And while there are cases that go both ways on that issue, it would be, I think, premature to impose a TRO barring the city from going forward with a mandate until, at an [29]absolute minimum, we know that his request for reasonable accommodation has been denied. If it is denied, then on the question of irreparable harm we'd have to get into some of the issues that have been raised, and that would probably require a prompt evidentiary hearing.

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

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

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

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

* * * *

APPENDIX D — RELEVANT STATUTORY PROVISIONS

Public Health Law § 206(1)(l) ***Commissioner: general power and duties;***

1. The commissioner shall:

(l) 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. Such programs may include the purchase and distribution of vaccines to providers and municipalities, the operation of public immunization programs, quality assurance for immunization related activities and other immunization related activities. The commissioner may promulgate such regulations as are necessary for the implementation of this paragraph. 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.

Public Health Law § 613, ***State aid; immunization;***

1. (c) 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. The public health and health planning council, the department of education, the department of family assistance, and the department of mental hygiene shall provide the commissioner with such assistance in carrying out the program as he or she shall request. All other state agencies shall also render such assistance as the commissioner may reasonably require for this program. 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.

Public Health Law § 2120(3), *Judicial Order of Quarantine*;

3. 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.

Public Health Law § 2442 (a), *Protection of Human Subjects; informed consent;*

Informed consent. 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.

Public Health Law §§ 2180 (1 – 3), January 1, 2021, *Novel Coronavirus Covid 19 Legislation;*

§ 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.

2. (a) "Contact tracer" and "contact tracing entity" means an individual or entity employed by or under contract with the state, a local government, a state or local governmental entity, or an agent thereof, to conduct contact tracing, engage in contact tracing, or receive contact tracing information.

NYC Health Code, 24 RCNY § 11.23, (k) vaccination;

(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.

Appendix D

45 C.F.R. § 46.401, *et seq*. Protection of Human Subjects;

§ 46.401 To what do these regulations apply?

(a) This subpart applies to all research involving children as subjects, conducted or supported by the Department of Health and Human Services.

(1) This includes research conducted by Department employees, except that each head of an Operating Division of the Department may adopt such nonsubstantive, procedural modifications as may be appropriate from an administrative standpoint.

(2) It also includes research conducted or supported by the Department of Health and Human Services outside the United States, but in appropriate circumstances, the Secretary may, under paragraph (e) of § 46.101 of subpart A, waive the applicability of some or all of the requirements of these regulations for research of this type.

(b) Exemptions at § 46.101(b)(1) and (b)(3) through (b)(6) are applicable to this subpart. The exemption at § 46.101(b)(2) regarding educational tests is also applicable to this subpart. However, the exemption at § 46.101(b)(2) for research involving survey or interview procedures or observations of public behavior does not apply to research covered by this subpart, except for research involving observation of public behavior when the investigator(s) do not participate in the activities being observed.

(c) The exceptions, additions, and provisions for waiver as they appear in paragraphs (c) through (i) of § 46.101 of subpart A are applicable to this subpart.

21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I-III), *Food, Drug and Cosmetic Act (FDCA),* Emergency Use Authorization (EUA).

(ii) Appropriate conditions designed to ensure that individuals to whom the product is administered are informed—

(I) that the Secretary has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

42 USC § 247d-6d[a], [b], *Public Readiness and Emergency Preparedness Act*, ("PREP Act")

(a) Liability protections

(1) In general

Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

(2) Scope of claims for loss

(A) Loss

For purposes of this section, the term "loss" means any type of loss, including—

(i) death;

(ii) physical, mental, or emotional injury, illness, disability, or condition;

(iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and

(iv) loss of or damage to property, including business interruption loss.

Each of clauses (i) through (iv) applies without regard to the date of the occurrence, presentation, or discovery of the loss described in the clause.

(B) Scope

The immunity under paragraph (1) applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

(3) Certain conditions

Subject to the other provisions of this section, immunity under paragraph (1) with respect to a covered countermeasure applies only if—

(A) the countermeasure was administered or used during the effective period of the declaration that was issued under subsection (b) with respect to the countermeasure;

(B) the countermeasure was administered or used for the category or categories of diseases, health conditions, or threats to health specified in the declaration; and

(C) in addition, in the case of a covered person who is a program planner or qualified person with respect to the administration or use of the countermeasure, the countermeasure was administered to or used by an individual who—

(i) was in a population specified by the declaration; and

(ii) was at the time of administration physically present in a geographic area specified by the declaration or had a connection to such area specified in the declaration.

(4) Applicability of certain conditions

With respect to immunity under paragraph (1) and subject to the other provisions of this section:

(A) In the case of a covered person who is a manufacturer or distributor of the covered countermeasure involved, the immunity applies without regard to whether such countermeasure was administered to or used by an individual in accordance with the conditions described in paragraph (3)(C).

(B) In the case of a covered person who is a program planner or qualified person with respect to the administration or use of the covered countermeasure, the scope of immunity includes circumstances in which the countermeasure was administered to or used by an individual in circumstances in which the covered person reasonably could have believed that the countermeasure was administered or used in accordance with the conditions described in paragraph (3)(C).

(5) Effect of distribution method

The provisions of this section apply to a covered countermeasure regardless of whether such

countermeasure is obtained by donation, commercial sale, or any other means of distribution, except to the extent that, under paragraph (2)(E) of subsection (b), the declaration under such subsection provides that subsection (a) applies only to covered countermeasures obtained through a particular means of distribution.

(6) Rebuttable presumption

For purposes of paragraph (1), there shall be a rebuttable presumption that any administration or use, during the effective period of the emergency declaration by the Secretary under subsection (b), of a covered countermeasure shall have been for the category or categories of diseases, health conditions, or threats to health with respect to which such declaration was issued.

(b) Declaration by Secretary

(1) Authority to issue declaration

Subject to paragraph (2), if the Secretary makes a determination that a disease or other health condition or other threat to health constitutes a public health emergency, or that there is a credible risk that the disease, condition, or threat may in the future constitute such an emergency, the Secretary may make a declaration, through publication in the Federal Register, recommending, under conditions as the Secretary may specify, the manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures, and stating that subsection (a) is in effect with respect to the activities so recommended.

(2) Contents

In issuing a declaration under paragraph (1), the Secretary shall identify, for each covered countermeasure specified in the declaration—

(A) the category or categories of diseases, health conditions, or threats to health for which the Secretary recommends the administration or use of the countermeasure;

(B) the period or periods during which, including as modified by paragraph (3), subsection (a) is in effect, which period or periods may be designated by dates, or by milestones or other description of events, including factors specified in paragraph (6);

(C) the population or populations of individuals for which subsection (a) is in effect with respect to the administration or use of the countermeasure (which may be a specification that such subsection applies without geographic limitation to all individuals);

(D) the geographic area or areas for which subsection (a) is in effect with respect to the administration or use of the countermeasure (which may be a specification that such subsection applies without geographic limitation), including, with respect to individuals in the populations identified under subparagraph (C), a specification, as determined appropriate by the Secretary, of whether the declaration applies only to individuals physically present in such areas or whether in addition the declaration applies to individuals who have a connection to such areas, which connection is described in the declaration; and

(E) whether subsection (a) is effective only to a particular means of distribution as provided in subsection (a)(5) for obtaining the countermeasure, and if so, the particular means to which such subsection is effective.

(3) Effective period of declaration

(A) Flexibility of period

The Secretary may, in describing periods under paragraph (2)(B), have different periods for different covered persons to address different logistical, practical or other differences in responsibilities.

(B) Additional time to be specified

In each declaration under paragraph (1), the Secretary, after consulting, to the extent the Secretary deems appropriate, with the manufacturer of the covered countermeasure, shall also specify a date that is after the ending date specified under paragraph (2)(B) and that allows what the Secretary determines is—

(i) a reasonable period for the manufacturer to arrange for disposition of the covered countermeasure, including the return of such product to the manufacturer; and

(ii) a reasonable period for covered persons to take such other actions as may be appropriate to limit administration or use of the covered countermeasure.

(C) Additional period for certain strategic national stockpile countermeasures

With respect to a covered countermeasure that is in the stockpile under section 247d–6b of this title, if such countermeasure was the subject of a declaration under paragraph (1) at the time that it was obtained for the stockpile, the effective period of such declaration shall include a period when the countermeasure is administered or used pursuant to a distribution or release from the stockpile.

(4) Amendments to declaration

The Secretary may through publication in the Federal Register amend any portion of a declaration under paragraph (1). Such an amendment shall not retroactively limit the applicability of subsection (a) with respect to the administration or use of the covered countermeasure involved.

(5) Certain disclosures

In publishing a declaration under paragraph (1) in the Federal Register, the Secretary is not required to disclose any matter described in section 552(b) of title 5.

(6) Factors to be considered

In deciding whether and under what circumstances or conditions to issue a declaration under paragraph (1) with respect to a covered countermeasure, the

Secretary shall consider the desirability of encouraging the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use of such countermeasure.

(7) Judicial review

No court of the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this subsection.

(8) Preemption of State law

During the effective period of a declaration under subsection (b), or at any time with respect to conduct undertaken in accordance with such declaration, no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—

(A) is different from, or is in conflict with, any requirement applicable under this section; and

(B) relates to the design, development, clinical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration

by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter, or under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.].

(9) Report to Congress

Within 30 days after making a declaration under paragraph (1), the Secretary shall submit to the appropriate committees of the Congress a report that provides an explanation of the reasons for issuing the declaration and the reasons underlying the determinations of the Secretary with respect to paragraph (2). Within 30 days after making an amendment under paragraph (4), the Secretary shall submit to such committees a report that provides the reasons underlying the determination of the Secretary to make the amendment.

Administrative Code § 17-109

a. The department is empowered 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.

b. The department may take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination, disinfection, and for the use of diphtheria antitoxin and other vaccines and antitoxins.

Appendix D

NYC Charter § 553 [b]

b. The nine members other than the chairperson and the member who shall be the chairperson of the mental hygiene advisory board shall serve without compensation and shall be appointed by the mayor, each for a term of six years, commencing at the expiration of the terms of the present incumbents. In case of a vacancy the mayor shall appoint a member to serve for the unexpired term.

Appendix D

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

Appendix D

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:

Appendix D

"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 /s/_____
Dave A. Chokshi, M.D., MSc
Commissioner

Appendix D

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 than5pm 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 /s/_____
Dave A. Chokshi, M.D., MSc
Commissioner

Appendix D

SECTION 24

Local state of emergency; local emergency orders by chief executive

Executive (EXC) CHAPTER 18,
ARTICLE 2-B

§ 24. Local state of emergency; local emergency orders by chief executive. 1. Notwithstanding any inconsistent provision of law, general or special, in the event of a disaster, rioting, catastrophe, or similar public emergency within the territorial limits of any county, city, town or village, or in the event of reasonable apprehension of immediate danger thereof, and upon a finding by the chief executive thereof that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency within any part or all of the territorial limits of such local government; provided, however, that in the event of a radiological accident as defined in section twenty-nine-c of this article, such chief executive may request of the governor a declaration of disaster emergency. Such proclamation shall remain in effect for a period not to exceed thirty days or until rescinded by the chief executive, whichever occurs first. The chief executive may issue additional proclamations to extend the state of emergency for additional periods not to exceed thirty days. Following such proclamation and during the continuance of such local state of emergency, the chief executive may promulgate local emergency orders to protect life and property or to bring the emergency situation under control. As illustration, such orders may, within any part

or all of the territorial limits of such local government, provide for:

a. the establishment of a curfew and the prohibition and control of pedestrian and vehicular traffic, except essential emergency vehicles and personnel;

b. the designation of specific zones within which the occupancy and use of buildings and the ingress and egress of vehicles and persons may be prohibited or regulated;

c. the regulation and closing of places of amusement and assembly;

d. the suspension or limitation of the sale, dispensing, use or transportation of alcoholic beverages, firearms, explosives, and flammable materials and liquids;

e. the prohibition and control of the presence of persons on public streets and places;

f. the establishment or designation of emergency shelters, emergency medical shelters, and in consultation with the state commissioner of health, community based care centers;

g. the suspension within any part or all of its territorial limits of any of its local laws, ordinances or regulations, or parts thereof subject to federal and state constitutional, statutory and regulatory limitations, which may prevent, hinder, or delay necessary action in coping with a disaster or recovery therefrom whenever (1) a request has been

made pursuant to subdivision seven of this section, or (2) whenever the governor has declared a state disaster emergency pursuant to section twenty-eight of this article. Suspension of any local law, ordinance or regulation pursuant to this paragraph shall be subject to the following standards and limits:

(i) no suspension shall be made for a period in excess of five days, provided, however, that upon reconsideration of all the relevant facts and circumstances, a suspension may be extended for additional periods not to exceed five days each during the pendency of the state of emergency;

(ii) no suspension shall be made which does not safeguard the health and welfare of the public and which is not reasonably necessary to the disaster effort;

(iii) any such suspension order shall specify the local law, ordinance or regulation, or part thereof suspended and the terms and conditions of the suspension;

(iv) the order may provide for such suspension only under particular circumstances, and may provide for the alteration or modification of the requirements of such local law, ordinance or regulation suspended, and may include other terms and conditions;

(v) any such suspension order shall provide for the minimum deviation from the requirements of the local law, ordinance or regulation suspended consistent with the disaster action deemed necessary; and

(vi) when practicable, specialists shall be assigned to assist with the related emergency actions to avoid adverse effects resulting from such suspension.

2. A local emergency order shall be effective from the time and in the manner prescribed in the order and shall be published as soon as practicable in a newspaper of general circulation in the area affected by such order and transmitted to the radio and television media for publication and broadcast. Such orders may be amended, modified and rescinded by the chief executive during the pendency or existence of the state of emergency. Such orders shall cease to be in effect five days after promulgation or upon declaration by the chief executive that the state of emergency no longer exists, whichever occurs sooner. The chief executive nevertheless, may extend such orders for additional periods not to exceed five days each during the pendency of the local state of emergency.

3. The proclamation of a local state of emergency and local emergency orders of a chief executive of a county shall be executed in quadruplicate and shall be filed within seventy-two hours or as soon thereafter as practicable in the office of the clerk of the governing board of the county, the office of the county clerk, the office of the secretary of state and the state office of emergency management within the division of homeland security and emergency services. The proclamation of a local state of emergency and local emergency orders of a chief executive of a city, town or village shall be executed in quadruplicate and shall be filed within seventy-two hours or as soon thereafter as

practicable in the office of the clerk of such municipal corporation, the office of the county clerk, the office of the secretary of state and the state office of emergency management within the division of homeland security and emergency services.

4. Nothing in this section shall be deemed to limit the power of any local government to confer upon its chief executive any additional duties or responsibilities deemed appropriate.

5. Any person who knowingly violates any local emergency order of a chief executive promulgated pursuant to this section is guilty of a class B misdemeanor.

6. Whenever a local state of emergency is declared by the chief executive of a local government pursuant to this section, the chief executive of the county in which such local state of emergency is declared, or where a county is wholly contained within a city, the mayor of such city, may request the governor to remove all or any number of sentenced incarcerated individuals from institutions maintained by such county in accordance with section ninety-three of the correction law.

7. Whenever a local state of emergency has been declared pursuant to this section, the chief executive of the county in which the local state of emergency has been declared, or where a county is wholly contained within a city, the chief executive of the city, may request the governor to provide assistance under this chapter, provided that such chief executive determines that the disaster is beyond the

capacity of local government to meet adequately and state assistance is necessary to supplement local efforts to save lives and to protect property, public health and safety, or to avert or lessen the threat of a disaster.

8. The legislature may terminate by concurrent resolution, such emergency orders at any time.

* 9. a. Whenever a local state of emergency is declared pursuant to this section and upon receipt of notification by an electric corporation or the service provider, pursuant to section seventy-three-a of the public service law or section one thousand twenty-mm of the public authorities law, the chief executive shall coordinate with affected police departments, fire departments, ambulance services and advanced life support first response services prewired with an appropriate transfer switch for using an alternate generated power source for the emergency deployment of alternate generated power sources.

b. For the purposes of this section, "alternate generated power source" shall mean electric generating equipment that is of the capacity that is capable of providing adequate electricity to operate all life safety systems and the basic operations of a police department, fire department, ambulance service or advanced life support first response service.

* NB Effective December 22, 2023