TABLE OF APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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 20th day of December, two thousand twenty-four.

PRESENT:
JOSÉ A. CALABRANES,
RICHARD J. SULLIVAN,
MYRNA PÉREZ,
Circuit Judges.

JOHN DOES 1–2, JANE DOES 1–3, JACK DOES 1–750, JOAN DOES 1–750,

Plaintiffs-Appellants,

v. No. 22-2858

KATHY HOCHUL, Governor of the State of New York, JAMES V. MCDONALD, Commissioner, New York State Department of Health, TRINITY HEALTH, INC., NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM, INC., WESTCHESTER MEDICAL CENTER ADVANCED PHYSICIAN SERVICES, P.C., as assignee of WMC Health,

Defendants-Appellants.

For Plaintiffs-Appellants: Daniel J. Shcmid (Mathew D. Staver, Horatio G. Mihet, Roger K. Gannam, *on the brief*), Liberty Counsel, Orlando, FL

For Defendants-Appellees Kathy Hochul and James V. McDonald: MARK S. GRUBE, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Judith N. Vale, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General for the State of New York, New York, NY.

For Defendant-Appellee Trinity Health, Inc.: ERIN TRAIN (Jacqueline Phipps Polito, *on the brief*), Littler Mendelson P.C., Fairport, NY.

For Defendant-Appellee New-York Presbyterian Healthcare System, Inc.: EMILY A. VANCE (Bruce Birenboim, Michael E. Gertzman, Liza M. Velazquez, Gregory F. Laufer, Jonathan H. Hurwitz, *on the brief*), Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY.

For Defendant-Appellee Westchester Medical Center Advanced Physician Services, P.C.: MARC A. SITTENREICH (Michael J. Keane, Anthony Prinzivalli, *on the brief*), Garfunkel Wild, P.C., Great Neck, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Ann M. Donnelly, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is **DISMISSED** in part as moot, that the September 30, 2022 judgment of the district court is **VACATED** in part and **AFFIRMED** in part, and that the case is **REMANDED** to the district court with instructions to dismiss Plaintiffs' claims against Governor Kathy Hochul and Commissioner James V. McDonald without prejudice.

Plaintiffs, a group of healthcare workers, appeal from the district court's judgment dismissing their claims against the Governor of New York and the Commissioner of New York State's Department of Health (the "State Defendants"), in their official capacities, for violations of the Free Exercise and Equal Protection Clauses of the United States Constitution, and against three nonprofit

corporations that operate healthcare facilities in New York (the "Private Defendants") for discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"). Plaintiffs' claims all stem from a New York State regulation ("Section 2.61") enacted during the COVID-19 pandemic that directed covered healthcare facilities to "continuously require personnel to be fully vaccinated against COVID- 19." N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61(c) (2021). While this regulation contained an exemption for medical reasons, it did not include any religious exemptions. *See id.* § 2.61(d). Each of the Plaintiffs allege that they "have sincerely held religious beliefs that preclude them from accepting or receiving any of the three available COVID-19 vaccines." J. App'x at 34. When Plaintiffs refused to comply with the vaccination requirements, they were terminated from their employment by the Private Defendants. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We review *de novo* a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See ECA & Loc. 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009). Generally, to survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In reviewing a motion to dismiss, "we accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d. Cir. 2007). When reviewing the district court's decision, we are permitted to consider

"documents attached to the complaint as an exhibit or incorporated in it by reference, [or] matters of which judicial notice may be taken." *Roth v. CitiMortgage Inc.*, 756 F.3d 178, 180 (2d Cir. 2014) (internal quotation marks omitted).

I. Plaintiffs' Claims Against the State Defendants Are Moot

Under the mootness doctrine, a court's "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) (internal quotation marks omitted). In other words, 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) (internal 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*, 25 F.4th 67, 70 (2d Cir. 2022) (internal quotation marks omitted). Therefore, "[e]ven if a case were live at the outset, events occurring during the pendency of the appeal may render the case moot on appeal," making us "duty bound to dismiss the appeal." *Arthur v. Manch*, 12 F.3d 377, 380 (2d Cir. 1993).

We have explained that the mootness "inquiry is more complicated in cases involving states or state agents as defendants – like this one – since the Eleventh Amendment bars the award of money damages against state officials in their official capacities." *Exxon Mobil Corp. v. Healey*, 28 F.4th

383, 392 (2d Cir. 2022).[1] As a result, "for this case to remain live, there must be a possible effectual remedy for the violations it alleges, and the remedy must be prospective relief that would address an ongoing violation of federal law." *Id.*

With respect to their claims against the State Defendants, Plaintiffs seek a permanent injunction barring enforcement of Section 2.61. However, the State has already repealed Section 2.61 as of October 4, 2023. *See* 45 N.Y. Reg. 22 (Oct. 4, 2023). We "cannot enjoin what no longer exists," so Plaintiffs' claim for a permanent injunction is now moot. *Exxon Mobil Corp.*, 28 F.4th at 393. Nor do the other forms of relief sought by Plaintiffs save their claims against the State Defendants. The Supreme Court has held that "a request for a declaratory judgment as to a past violation cannot itself establish a case or controversy to avoid mootness." *Id.* at 394–95 (citing *Green v. Mansour*, 474 U.S. 64, 73–74 (1985)). The Eleventh Amendment also generally bars any claims for damages in a suit against state officials in their official capacities. *See Fulton v. Goord*, 591 F.3d 37, 45 (2d Cir. 2009). And a claim for attorneys' fees cannot create a case or controversy either. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990). As a result, there is no potential prospective relief that we could grant on Plaintiffs' claims against the State Defendants.

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[1] In their complaint, Plaintiffs seek an "award [of] damages," but do not specify whether they seek these damages from the State Defendants, Private Defendants, or both. J. App'x at 66. In their briefing, the State Defendants contend that an award of monetary damages against them would be barred by Eleventh Amendment sovereign immunity, and Plaintiffs do not challenge this assertion

Plaintiffs also fail to establish that any exception to the mootness doctrine applies here. First, a defendant's voluntary cessation of the challenged conduct will not render a case moot unless, among other considerations, "there is no reasonable expectation that the alleged violation will recur." *See Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 815 F.3d 105, 109 (2d Cir. 2016) (internal quotation marks omitted). While the State's repeal of the vaccination mandate certainly constitutes a voluntary cessation, this decision corresponded with the changed conditions surrounding the COVID-19 pandemic, such as the termination of the national state of emergency, changing federal vaccination recommendations, and the federal government's repeal of its own vaccination requirements. *See* State Defendants Br. at 32; *see also Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 240 (2024) ("Sometimes, events in the world overtake those in the courtroom, and a complaining party manages to secure outside of litigation all the relief he might have won in it."). Despite the continued rise and fall of COVID-19 cases since the repeal of Section 2.61 in October 2023, the State has not attempted to reinstate the vaccination mandate. *See Positive Tests over Time, by Region and County*, N.Y. State Dep't of Health (Sept. 5, 2024), https://perma.cc/9PUD-EAJP; *Daily Hospitalization Summary*, N.Y. State Dep't of Health (Sept. 5, 2024), https://perma.cc/VL7S-VD8T; *Fatalities*, N.Y. State Dep't of Health (Aug. 29, 2024), https://perma.cc/QV78-H9V3. As a result, Plaintiffs do not "remain under a constant threat" that the State will reimpose the vaccination requirements.

Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 20 (2020). Rather, the possibility of reinstatement is, "at best, only a theoretical and speculative possibility." *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 86–87 (2d Cir. 2005). Indeed, we recently held that the repeal of a similar COVID-19 vaccination mandate for certain New York City government employees and contractors rendered moot an appeal seeking the recission of that mandate. *See New Yorkers for Religious Liberty, Inc. v. City of New York*, 121 F.4th 448, 456–57 (2d Cir. 2024).

Plaintiffs make much of the fact that the State has continued to defend the vaccination mandate. "But often a case will become moot even when a defendant vehemently insists on the propriety of the conduct that precipitated the lawsuit." *Fikre*, 601 U.S. at 244 (internal quotation marks omitted). Plaintiffs also assert that the State's repeal of the vaccination mandate was a mere litigation tactic, but they offer no support for this claim. Instead, the State explained throughout the regulatory process that repeal of the mandate was based on changed COVID conditions – not litigation concerns. *See* 45 N.Y. Reg. 28, 28–29 (June 28, 2023). With nothing to suggest otherwise, we cannot conclude there is a reasonable expectation that the alleged violation will recur. Plaintiffs' attempt to rely on the mootness exception for "disputes capable of repetition, yet evading review" fares no better. *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This exception applies when "(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." *Id.* (internal quotation marks omitted). Even if we accept Plaintiffs' argument that the vaccination mandate was too short to be fully litigated, there is nothing in the record to suggest that this issue is likely to recur between the parties here. *See Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 94 F.3d 96, 101 (2d Cir. 1996). The mandate was enacted in response to an unprecedented global health crisis. Section 2.61 was repealed more than a year ago and has not been reimposed. And the State has expressed no intention to renew the vaccination requirement; to the contrary, it has expressly disclaimed such an intention, which has been corroborated by its subsequent action.

For all these reasons, Plaintiffs have simply failed to show that a live case or controversy still exists as to the State Defendants. When a case becomes moot on appeal, our general practice is "to vacate the unreviewed judgment granted in the court below and remand the case to that court with directions to dismiss it." *Bragger v. Trinity Cap. Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994). The district court should then dismiss the relevant portions of the complaint without prejudice. *See Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 54–55 (2d Cir. 2016).

II. Plaintiffs Failed to State a Claim Against the Private Defendants for Title VII Religious Discrimination

We next turn to whether the district court properly dismissed Plaintiffs' claims against the Private Defendants for religious discrimination in violation of Title VII. To survive a motion to dismiss, a plaintiff asserting a claim of religious

discrimination under Title VII must plausibly allege that "(1) [he or she] held a *bona fide* religious belief conflicting with an employment requirement; (2) [he or she] informed [his or her] employer[] of this belief; and (3) [he or she was] disciplined for failure to comply with the conflicting employment requirement." *Knight v. Conn. Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001). Nonetheless, an employer does not violate Title VII if offering a reasonable accommodation "would cause the employer to suffer an undue hardship." *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002). The Supreme Court has recently clarified that the undue hardship must be more than *de minimis* – it must be "substantial in the overall context of an employer's business." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023). An employer may raise a defense of undue hardship at the motion-to-dismiss stage "if the defense appears on the face of the complaint." *Iowa Pub. Emps.' Ret. Sys. v. MF Glob., Ltd.*, 620 F.3d 137, 145 (2d Cir. 2010) (internal quotation marks omitted).

Even if Plaintiffs plausibly alleged a *prima facie* case of Title VII religious discrimination, the Private Defendants also raised a defense of undue hardship, which the district court properly considered in dismissing Plaintiffs' Title VII claims because this defense appears on the face of Plaintiffs' complaint. *See* J. App'x at 34, 44–46, 54 (alleging that the Private Defendants refused to offer a religious exemption to the vaccination mandate because such an exemption was prohibited by Section 2.61); *id.* at 84–87 (attaching a copy of Section 2.61 as an exhibit to Plaintiffs' complaint). Plaintiffs were all covered

personnel under Section 2.61, which meant that granting their sole request for a religious exemption would have required the Private Defendants to violate the state regulation. This, in turn, would have subjected the Private Defendants to financial penalties or a suspension or revocation of their operating licenses. *See* N.Y. Pub. Health Law § 12 (2008); *id.* § 2806(1)(a) (2010). Even under the heightened standard for undue hardship recently set forth in *Groff*, the risk of these potential penalties more than suffices to demonstrate that the Private Defendants were subject to such hardships here. *See, e.g.*, *D'Cunha v. Northwell Health Sys.*, No. 23-476, 2023 WL 7986441, at *3 (2d Cir. Nov. 17, 2023) (affirming dismissal of a Title VII claim against a healthcare provider that refused to provide a religious vaccination exemption because such an exemption would have violated Section 2.61 and thus constituted an undue burden); *see also Cassano v. Carb*, 436 F.3d 74, 75 (2d Cir. 2006) (adopting the reasoning of the Eighth and Ninth Circuits that a religious accommodation that would violate an employer's legal obligations constitutes an undue burden under Title VII); *cf. Bey v. City of New York*, 999 F.3d 157, 170 (2d Cir. 2021) ("Title VII cannot be used to require employers to depart from binding federal regulations."). We therefore conclude that the district court properly dismissed Plaintiffs' Title VII claims.

* * *

We have considered Plaintiffs' remaining arguments and found them to be without merit. Accordingly, the appeal is **DISMISSED** in part as moot, the judgment entered by the district court is **VACATED** in part and **AFFIRMED** in part, and the case is **REMANDED** to

the district court with instructions to dismiss Plaintiffs' claims against the State Defendants without prejudice.

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

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

JOHN DOES 1-2, JANE DOES 1-3, JACK DOES 1-750, and JOAN DOES 1-750,

Plaintiffs,

Against

KATHY HOCHUL, *in her official capacity as Governor of the State of New York*, *et al.*,

Defendants.

ANN M. DONNELLY, United States District Judge:

On September 10, 2021, the plaintiffs filed this action against the defendants, together with an application for a temporary restraining order ("TRO") and a preliminary injunction, challenging the lawfulness of a New York State regulation that required most healthcare workers to be "fully vaccinated against COVID-19." (ECF No. 1.) *See* N.Y. Comp. Codes R. & Regs., tit. 10, § 2.61 ("Section 2.61"). Before the Court are the defendants' motions to

dismiss. (ECF Nos. 81, 82, 83, 84, 87.) For the reasons that follow, the defendants' motions are granted.

BACKGROUND[1]

[1] The factual recitation is based on the complaint, as well as official public records on which the plaintiffs rely and which are subject to judicial notice under Rule 201 of the Federal Rules of Evidence, including the Emergency Order, the challenged Rule—Section 2.61—and the legislative history. In addition, I take judicial notice of reports and other information from the Centers for Disease Control and Prevention, and other reliable public health authorities. When considering a motion made pursuant to Rule 12(b)(6), the Court may take judicial notice of "documents retrieved from official government websites," *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015), or other "relevant matters of public record," *Giraldo v. Kessler*, 694 F.3d 161, 164 (2d Cir. 2012); *see also Lowe v. Mills*, No. 21-CV-242, 2022 WL 3542187, at *2 (D. Me. Aug. 18, 2022) (taking judicial notice of the rule challenged, the related statute and its legislative history, as well as "information from the official U.S. Centers for Disease Control and Prevention ('CDC') and the Maine CDC government websites "that is not subject to reasonable dispute" (internal quotation marks and citation omitted)); Fed. R. Evid. 201(b) (permitting judicial notice of facts "not subject to reasonable dispute"). Moreover, the Court may take judicial notice of facts regarding COVID-19. *L.T. v. Zucker*, No. 21-CV- 1034, 2021 WL 4775215, at *1 n.3 (N.D.N.Y. Oct. 13, 2021) ("The Court takes judicial notice of facts regarding the spread and lethality of COVID-19 as reported by dependable public health authorities."); *see also Hopkins Hawley LLC v. Cuomo*, No. 20-CV-10932, 2021 WL 1894277, at *2 n.2 (S.D.N.Y. May 11, 2021) ("Under Rule 201 of the Federal Rules of Evidence, the Court may take judicial notice of facts that are 'generally known within the trial court's territorial jurisdiction.' FED. R. EVID. 201. General facts regarding the COVID pandemic indisputably fall within Rule 201's purview.").

The plaintiffs are five individuals identified as John and Jane Does. (ECF No. 1 ¶¶ 10-14.)[2] They bring this lawsuit against Governor Kathy Hochul and Commissioner Howard Zucker of the New York State Department of Health**,** in their official capacities (collectively, the "State Defendants"), as well as three nonprofit corporations that operate healthcare facilities in New York—New York-Presbyterian Healthcare System, Inc. ("NYP"), Trinity Health, Inc. ("Trinity") and Westchester Medical Center Advanced Physician Services ("WMC") (together, the "Private Defendants"). John Doe 2 and Jane Doe 1 were employed by NYP, Jane Doe 2 was employed by WMC and Jane Doe 3 was employed by Trinity.[3] (*Id.* ¶¶ 11-14.) John Doe 1 was the board president of an unnamed private, faith-based senior care facility.[4] (*Id.* ¶ 10.) As explained more fully below, the State issued Section 2.61 to address the spread of COVID-19 in healthcare facilities and nursing homes, because of the risks to patients, the elderly and front-line healthcare workers. The plaintiffs object to taking the vaccine on

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[2] The complaint also named six groups of plaintiffs, each numbering 250, referred to collectively as Jack and Joan Does. (ECF No. 1 ¶¶ 15-20.) However, the plaintiffs have since explained that these groups of plaintiffs were "simply placeholder names," and are "not present in the suit." (Aug. 2, 2022 Tr. at 22:7-22.)

[3] Trinity argues that it was not Jane Doe 3's employer. (ECF No. 83-1 at 5-7.) I do not address the merits of this argument

[4] All of the plaintiffs have since been fired from their jobs. (Aug. 2, 2022 Tr. at 7:10-15.)

religious grounds and argue that requiring them to comply with Section 2.61 violates their rights.

It is the consensus of reliable public health authorities that the COVID-19 vaccine prevents the spread of the virus, and that healthcare professionals who work directly with vulnerable patients should be vaccinated. According to the CDC, "mRNA COVID-19 vaccines are highly effective in preventing SARS-CoV-2 infections in real-world conditions among health care personnel, first responders, and other essential workers. These groups are more likely than the general population to be exposed to the virus because of their occupations."[5] The CDC further advised that, "SARS-CoV-2 transmission between unvaccinated persons is the primary cause of continued spread."[6]

Healthcare societies and organizations have called for "all health care and long-term care employers to require their employees to be vaccinated against COVID-19."[7] In a July 26, 2021 press release,

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[5] Centers for Disease Control and Prevention, CDC Real-World Study Confirms Protective Benefits of mRNA COVID-19 Vaccines (Mar. 29, 2021), https://www.cdc.gov/media/releases/2021/p0329-COVID-19-Vaccines.html

[6] Centers for Disease Control and Prevention, Science Brief: COVID-19 Vaccines and Vaccination (Mar. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html.

[7] American Medical Association, AMA in support of COVID-19 vaccine mandates for health care workers (Jul. 26, 2021), https://www.ama-assn.org/press-center/press-releases/ama-support-covid-19-vaccine-mandates-health-care-workers

the American Medical Association stated, "It is critical that all people in the health care workforce get vaccinated against COVID-19 for the safety of our patients and our colleagues . . . . Increased vaccinations among health care personnel will not only reduce the spread of COVID-19 but also reduce the harmful toll this virus is taking within the health care workforce and those we are striving to serve."[8] The American Association of Critical-Care Nurses called for "all healthcare and long-term care employers to require every member of the healthcare team—employees and all credentialed and contracted providers—to be vaccinated against COVID-19 . . . we believe mandated vaccination is the best path to support the physical safety of patients, nurses, their colleagues, and their families and a means to prevent further trauma and moral injury imposed by the pandemic on our health care workforce."[9] And on July 31, 2021, the American College of Occupational and Environmental Medicine recommended that the "COVID-19 vaccination be mandated for all health care workers (HCWs) . . . . With the recent surge of SARS-CoV-2 infections in the United States (U.S.) due to the Delta variant, it is even more imperative that HCWs be vaccinated. Unvaccinated HCWs put themselves in danger of contracting the disease and pose a risk to potentially transmit the virus to

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[8] *Id.*

[9] American Association of Critical-Care Nurses, AACN Statement on COVID-19 Vaccination, https://www.aacn.org/newsroom/aacn-statement-on-covid-19-vaccination (last visited Sept. 30, 2022).

patients (especially their vulnerable patients), colleagues, and families."[10]

In August 2021, the COVID-19 pandemic was still surging in New York, with daily positive cases up over 1000% over the course of six weeks. (ECF No. 1-7 at 2.) In light of the continuing COVID-19 pandemic, then-Governor Andrew Cuomo announced on August 16, 2021, that "all healthcare workers in New York State" would be required to be vaccinated against COVID-19 by September 27, 2021. (*Id.*) On August 18, 2021, Commissioner Zucker issued a short-term "Order for Summary Action" (the "Emergency Order") under New York Public Health Law § 16, because of "increased challenges and urgency for controlling the spread of [COVID-19]" in healthcare facilities due to vulnerable patient and resident populations, and the "unacceptably high risk" caused by unvaccinated personnel, in both "acquiring COVID-19 and transmitting such virus to colleagues and/or vulnerable patients or residents." (ECF No. 1-8 at 2-3.)[11] Under the Emergency Order, "general hospitals and nursing homes" were required to ensure that their personnel were fully vaccinated against COVID-

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[10] American College of Occupational and Environmental Medicine, ACOEM Supports COVID-19 Vaccine Mandates for Health Care Workers (July 31, 2022), https://acoem.org/Guidance-and-Position-Statements/Guidance-and-Position-Statements/ACOEM-Supports-COVID-19-Vaccine-Mandates-for-Health-Care-Workers.

[11] Section 16 authorizes the Commissioner to issue an order—effective for a maximum of 15 days—in response to a condition that in his opinion constitutes a "danger to the health of the people." N.Y. Pub. Health Law § 16 .

19, with limited exceptions for religious objections or medical contraindications. (*Id.* at 3.) The Emergency Order defined personnel as "All persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose, patients, residents, or personnel working for such entity to the disease." (*Id.* at 3-4.) The Emergency Order included a medical exemption, in the form of a "reasonable accommodation," for those employees for whom vaccination would be "detrimental," based on "a specific pre-existing health condition," as certified by a licensed physician or certified nurse practitioner. (*Id.* at 5.) In addition, the Emergency Order provided a religious exemption for employees with "a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer." (*Id.* at 5-6.) The Emergency Order required Covered Personnel to be "fully vaccinated," and to have received the first dose by September 27, 2021. (*Id.* at 5.) Three of the plaintiffs received religious exemptions: NYP granted Jane Doe 1's request, Trinity granted Jane Doe 3's request and NYP granted John Doe 2's request.[12] (ECF No. 1 ¶¶ 11-14, 81-93.)

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[12] John Doe 1 did not work for any of the Private Defendants, and Jane Doe 2 did not request a religious exemption before Section 2.61 was approved. (ECF No. 1 ¶¶ 13, 88-89.)

On the same day that the Emergency Order was issued, the New York State Department of Health released the results of a first-in-the-nation vaccine effectiveness study, published by the CDC, finding that "unvaccinated New Yorkers were eleven times more likely to be hospitalized and eight times more likely to be diagnosed with COVID-19 than those who were fully vaccinated."[13] In the press release announcing the study, Commissioner Zucker said, "The findings of our research are clear: Vaccines provide the strongest protection for New Yorkers against getting infected or becoming hospitalized due to COVID-19." (*Id.*) Moreover, the Commissioner noted the increase in COVID-19 cases and hospitalization in New York as a result of the Delta variant: "New Yorkers still need to remain vigilant as the Delta variant has led to increases in COVID-19 cases and hospitalizations." (*Id.*) Thereafter, on August 23, 2021, the Food and Drug Administration approved the Pfizer vaccine for adults 16 years old and older; the vaccination had previously been authorized only under "emergency use authorization (EUA)."[14] The FDA stated, "[T]he public can be very

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[13] New York State Department of Health, New York State Department of Health Releases First-In-The-Nation Data and Analysis On Covid-19 Vaccine Effectiveness and Breakthrough Infections (Aug. 18, 2021), https://health.ny.gov/press/releases/2021/2021-08-18_mmwr_vaccine_study.htm.

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

confident that this vaccine meets the high standards for safety, effectiveness, and manufacturing quality the FDA requires of an approved product." (*Id.*) On August 24, 2021, Governor Andrew Cuomo resigned, and Governor Hochul assumed office.[15]

On August 26, 2021, New York's Department of Health adopted emergency regulation 10 N.Y.C.R.R. § 2.61; the State's Public Health and Health Planning Council (the "PHHPC"), charged with issuing regulations "affecting the security of life or health or the preservation and improvement of public health" including those addressing the control of communicable diseases, N.Y. Pub. Health L. § 225(4), (5), issued Section 2.61. The PHHPC issued the following the Regulatory Impact Statement: "Since early July, [COVID-19] cases have risen 10-fold, and 95 percent of the sequenced recent positives in New York State were the Delta variant. Recent New York State data show that unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals. Those who are unvaccinated have over 11 times the risk of being hospitalized with COVID-19. The COVID-19 vaccines are safe and effective. They offer the benefit of helping to reduce the number of COVID-19 infections, including the Delta variant, which is a critical component to protecting public

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

health. Certain settings, such as healthcare facilities and congregate care settings, pose increased challenges and urgency for controlling the spread of this disease because of the vulnerable patient and resident populations that they serve. Unvaccinated personnel in such settings have an unacceptably high risk of both acquiring COVID-19 and transmitting the virus to colleagues and/or vulnerable patients or residents, exacerbating staffing shortages, and causing unacceptably high risk of complications." (ECF No. 1-9 at 10.)

The PHHPC also considered alternative approaches—testing protocols and face coverings—both of which it deemed to be less effective than vaccinations. "One alternative would be to require covered entities to test all personnel in their facility before each shift worked." (ECF No. 1-9 at 13.) The PHHPC concluded that testing was "limiting" because it would show a person's status only at the time of the test, would not be completely reliable for some asymptomatic individuals, and because testing every person every day would be impractical, and a "financial burden" on healthcare facilities. (*Id.* at 13-14.) The PHHPC observed that masking alone was "helpful to reduce transmission," but "did not prevent transmission," and that "masking in addition to vaccination will help reduce the numbers of infections in these settings even further." (*Id.*)

Section 2.61 required that covered entities "continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general

hospitals and nursing homes, and by October 7, 2021 for all other covered entities." 10 N.Y.C.R.R. § 2.61; (ECF No. 1-9 at 3.) Section 2.61 defines "personnel" as the Emergency Order did. The Emergency Order covered only "general hospital[s] or nursing[s] home pursuant to section 2801 of the Public Health Law," while Section 2.61 covered additional healthcare entities.[16] The medical exemption in Section 2.61 provided that if "any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health." 10 N.Y.C.R.R. § 2.61; (ECF No. 1-9 at 5.) Unlike the Emergency Order, Rule 2.61 did not include a religious exemption.

Following the promulgation of the Section 2.61, the Private Defendants amended their vaccination

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[16] "Covered entities" include: "(i) any facility or institution included in the definition of "hospital" in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers; (ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies; (iii) hospices as defined in section 4002 of the Public Health Law; and (iv) adult care facility under the Department's regulatory authority, as set forth in Article 7 of the Social Services Law." 10 N.Y.C.R.R. § 2.61(a)(1).

policies to comply with state requirements. (ECF No. 1 ¶¶ 11-14, 81-93; *see also* ECF Nos. 83-1 at 3-4, 85 at 5-6, 87-3 at 5.) On September 8, 2021, NYP revoked John Doe 2's religious exemption, and advised him that "religious exemptions are no longer accepted." (ECF No. 1 ¶¶ 82-83; ECF No. 1-11.) On August 30, 2021, NYP emailed Jane Doe 1 a general update about the terms of its COVID-19 vaccination program (ECF No. 1-13), including an "important update on the exemption process:" "the Council made the determination to exclude religious exemptions as an alternative to receiving the vaccine. The DOH cited examples of measles and other vaccinations, which are required of NY healthcare workers, as also not having a religious exemption. As a healthcare institution in NYS, NYP must follow the NYS DOH requirements as they evolve. This means that NYP can no longer consider any religious exemptions to the COVID vaccination [] even those previously approved." (*Id.*) Accordingly, NYP revoked Jane Doe 1's previously granted religious exemption. On August 26, 2021, Jane Doe 2 requested a religious exemption. (ECF No. 1 ¶¶ 88-89; ECF No. 1-14.) On August 27, 2021, WMC denied that request in an email advising her that "[o]n August 26, hospitals were notified that the New York State Department of Health was removing the option allowing hospitals to offer a religious exemption to health care workers from receiving the COVID-19 vaccination. Accordingly, WMCHealth, in order to comply with DOH Regulations, will no longer accept applications for a religious exemption and those applications

already received will [] not be considered." (ECF No. 1-14.) On September 1, 2021, Trinity revoked Jane Doe 3's religious exemption. (ECF No. 1 ¶¶ 90-93; ECF No. 1-16.)

On September 1, 2021, the plaintiffs' counsel sent a "legal demand" to the State Defendants and the New York Attorney General, asking that they rescind the COVID-19 vaccine requirement by September 7, 2021, and announce that "New York will no longer purport to nullify or override the right of New York citizens to seek religious exemptions from vaccination requirements under federal and state law." (ECF No. 1 ¶¶ 114-17; *see also* ECF No. 1-17.) When they received no reply, the plaintiffs filed this lawsuit on September 10, 2021, against all of the defendants for violations of the Supremacy Clause and federal conspiracy law, against the State Defendants for violations of the Free Exercise Clause and the Equal Protection Clause, and against the Private Defendants for violations of Title VII of the Civil Rights Act. (ECF No. 1 ¶¶ 119-90.) The plaintiffs concede that they did not obtain a "Right to Sue" letter from the Equal Employment Opportunity Commission ("EEOC") before filing the lawsuit. (ECF No. 94 at 31-33.)[17]

The plaintiffs allege that they have sincerely held religious beliefs[18] that "all life is sacred, from the

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[17] The record does not include any information about when the plaintiffs filed a complaint with the EEOC, or against which Private Defendants they filed complaints.

[18] The defendants do not challenge the sincerity of the plaintiffs' religious beliefs.

moment of conception to natural death, and that abortion is a grave sin against God and the murder of an innocent life."[19] (ECF No. 1 ¶ 43.) The plaintiffs claim the "COVID-19 vaccines [were] developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell lines HEK-293 and PER.C6." (ECF No. 1 ¶ 60.) According to the plaintiffs, their religious beliefs "preclude them from accepting or receiving any of the three available COVID-19 vaccines because of the connection between the various COVID-19 vaccines and the cell lines of aborted fetuses." (*Id.* ¶ 42.) They claim that the absence of a religious exemption forces them "to choose between maintaining the ability to feed their families and the free exercise of their sincerely held religious beliefs." (*Id.* ¶ 112.) The plaintiffs seek a blanket exemption from the requirement; they do not seek accommodations, such as assignments that would not include direct contact with vulnerable patients and residents.[20] The plaintiffs state: "**All Plaintiffs seek in this lawsuit is to be able to continue to provide the healthcare they have provided to patients for their entire careers, and to do so under the same protective**

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[19] John Doe 2 states that he is affiliated with the Church of Christ, Scientist. (ECF No. 1 ¶ 67.)

[20] The plaintiffs say that the "accommodation" they would have accepted was to "wear facial coverings, submit to reasonable testing and reporting requirements, monitor symptoms, and otherwise comply with [the] reasonable conditions" with which they had previously complied. (ECF No. 1 ¶¶ 71, 75.) As discussed further below, that is not an "accommodation." It is a blanket exception from Section 2.61.

measures that have sufficed for them to be considered superheroes for the last 18 months." (ECF No. 1 ¶ 8 (emphasis in the original).)

The defendants moved to dismiss on February 17, 2022. (ECF Nos. 81, 82, 83, 84, 87.) All of the defendants argue that the complaint should be dismissed in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted; Trinity also argues for dismissal pursuant to Federal Rule of Civil Procedure 12(b)(3) for improper venue.

I The Plaintiffs' Temporary Restraining Order and Preliminary Injunction Application.

The same day that the plaintiffs filed this action, they moved for a Temporary Restraining Order and a preliminary injunction to bar the defendants from enforcing Section 2.61. (ECF No. 1 at 43-45; ECF No. 2.) On September 12, 2022, the Honorable William Kuntz of this Court denied a similar request in *We The Patriots USA, Inc. et al v. Hochul et al.*, No. 21-CV-4954 (E.D.N.Y. Sept. 12, 2021). Two days later, on September 14, 2021, in *Dr. A v. Hochul*, the Honorable David Hurd in the Northern District of New York granted an application for a TRO, filed by seventeen healthcare workers employed in New York State, that enjoined the State from enforcing Section 2.61. *Dr. A v. Hochul*, No. 21-CV-1009, 2021 WL 4189533 (N.D.N.Y. Sept. 14, 2021). Also on September 14, 2021, the Honorable Eric Komitee of this Court found that the plaintiffs' application for a TRO in this case was moot in view of Judge Hurd's order. (ECF No. 35.) On October 12, 2021, Judge Hurd granted the

plaintiffs' application for a preliminary injunction in *Dr. A v. Hochul,* enjoining enforcement of Section 2.61. *See Dr. A. v. Hochul*, No. 21-CV-1009, 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021). The orders in *We The Patriots* and *Dr. A.* were appealed to the Second Circuit. On October 18, 2021, this Court held the plaintiffs' application for a preliminary injunction in abeyance pending the Second Circuit's decision.

On October 29, 2021, the Second Circuit affirmed Judge Kuntz's denial of the TRO, reversed Judge Hurd's order and vacated the preliminary injunction. The court issued an opinion explaining the basis for its decision on November 4, 2021. *See We The Patriots USA, Inc. v. Hochul* (*We The Patriots I*), 17 F.4th 266 (2d Cir. 2021) (per curiam), concluding that the plaintiffs did not establish a likelihood of success on the merits of their claims. *Id.* at 294. In its review of Section 2.61, the court applied the rational basis standard, and found that the plaintiffs failed to demonstrate that Section 2.61 was not neutral or generally applicable. In the court's view, Section 2.61 was "a reasonable exercise of the State's power to exact rules to protect public health." *Id.* at 290. Moreover, the court found that the plaintiffs were unlikely to succeed on their claim that Section 2.61 is preempted by Title VII because Title VII "does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated," and because "Section 2.61's text does not foreclose all opportunity for Plaintiffs to secure a

reasonable accommodation under Title VII." *Id.* at 292-93.

In a subsequent, clarifying opinion, the Second Circuit explained that its opinion should not be interpreted to hold that employers could "grant religious accommodations that allow employees to continue working, unvaccinated, at positions in which they 'engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease,'" *We The Patriots USA, Inc. v. Hochul* (*We The Patriots II*), 17 F.4th 368, 370 (2d Cir. 2021). Rather, the court explained, "Section 2.61, on its face, does not bar an employer from providing an employee with a reasonable accommodation *that removes the individual from the scope of the Rule*." *Id.* (emphasis in original).[21]

On November 12, 2021, the *Dr A.* plaintiffs filed an emergency application for injunctive relief with the Supreme Court, which denied the application on December 13, 2021. *See Dr. A v.*

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[21] The Second Circuit emphasized that it was not deciding "the ultimate merits of Plaintiffs' legal claims or of the State's defenses," but was making a "limited determination with respect to preliminary relief based on the limited factual record" before it. *We The Patriots I*, 17 F.4th at 273-74. The court reiterated the point in its clarifying opinion: "We caution further that our opinion addressed only the likelihood of success on the merits of Plaintiffs' claims; it did not provide our court's definitive determination of the merits of those claims." *We The Patriots II*, 17 F.4th at 371. Mindful of that distinction, I cite those portions of the opinions in which the court refers to similar record evidence, applies precedent to similar facts or refers to binding precedent in this Circuit.

Hochul, 142 S. Ct. 552 (2021). Separately, on June 30, 2022, the Supreme Court denied the *Dr. A* plaintiffs' petition for a writ of certiorari to review the Second Circuit's decision in *We The Patriots I. Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022). On August 2, 2022, I denied the plaintiffs' motion for a preliminary injunction as moot, in view of the Second Circuit's decision. (August 2, 2022 Order.) The plaintiffs disagreed that the motion was moot but conceded that it was "likely inevitabl[e] [] to be denied under the findings of the Second Circuit." (Aug. 2, 2022 Tr. at 6:5-8.).

LEGAL STANDARD

To avoid dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Matson v. Bd. of Educ., 631 F.3d 57, 63 (2d Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). Although "detailed factual allegations" are not required, a complaint that includes only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. A complaint fails to state a claim "if it tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (internal quotation marks, alterations and citations omitted).

DISCUSSION

I. Free Exercise Claim

In 1905, the Supreme Court upheld the constitutionality of a vaccine mandate in the midst of a smallpox outbreak. Writing for the majority in rejecting the appellant's Fourteenth Amendment challenge, Justice John Harlan observed that "the liberty secured by the Constitution . . . does not import an absolute right in each person to be . . . wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on a rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905). The Court was "not prepared to hold that a minority, residing in any city or town where smallpox is prevalent, and enjoying the general protection afforded by an organized local government, may thus defy the will of its constituted authorities, acting in good faith for all, under the legislative sanction of the state. If such be the privilege of a minority, then like privilege would belong to each individual of the community, and the spectacle would be presented of the welfare and safety of an entire population being subordinated to the notions of a single individual who

chooses to remain a part of that population." *Id.* at 37-38.

In the years since *Jacobson* was decided, the Supreme Court has reaffirmed the principle that governments have the power to enact mandatory vaccination policies to protect the public health in the face of a public health emergency. *See, e.g., Zucht v. King*, 260 U.S. 174, 176 (1922) ("It is within the police power of a state to provide for compulsory vaccination."); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("The right to practice religion freely does not include liberty to expose the community of the child to communicable disease or the latter to ill health or death."). This Circuit has also recognized that mandatory vaccination policies are not unconstitutional. *See, e.g.*, *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) ("[M]andatory vaccination as a condition for admission to school does not violate the Free Exercise Clause"). Other district courts have held the same. *See, e.g.*, *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) ("Given *Jacobson v. Massachusetts*, which holds that a state may require all members of the public to be vaccinated against smallpox, there can't be a constitutional problem with vaccination against SARS-CoV-2."); *Williams v. Brown*, 567 F. Supp. 3d 1213, 1226 (D. Or. 2021) ("The Court joins this growing consensus and concludes that there is no fundamental right under the Constitution to refuse vaccination and that rational basis review applies to Plaintiffs' due process challenge."); *Does 1-6 v. Mills*, 566 F. Supp. 3d 34, 45 n.12 (D. Me. 2021), *aff'd*, 16

F.4th 20 (1st Cir. 2021) ("*Jacobson* has been treated as informative authority both regarding the scope of government power to enact mandatory vaccination requirements to protect public health and for the proposition that the Constitution does not require religious exemptions from state-mandated vaccinations.").

The plaintiffs do not dispute that the COVID-19 pandemic has created a serious health emergency in New York. Nor do they appear to deny that exposure to the virus is especially dangerous to hospital patients and nursing home residents or claim that the State could not enact legislation to protect a particularly vulnerable population from COVID-19. They say, however, that requiring them to get the vaccine interferes with the free exercise of their "sincerely held religious beliefs that Scripture is the infallible, inerrant word of the Lord Jesus Christ, and that they are to follow its teaching," compels them to "change those beliefs or act in contradiction to them," and forces them "to choose between the teachings and requirements of their sincerely held religious beliefs in the commands of Scripture and the State's imposed value system." (ECF No. 1 ¶¶ 121, 124.) Focusing on Section 2.61's exemption for employees with medical conditions for whom vaccination would be dangerous, and on the fact that the earlier Emergency Order included a religious exemption, the plaintiffs argue the State did not act neutrally when it enacted Section 2.61, and that Section 2.61 is not generally applicable because it permits comparable secular conduct—a medical exemption—and because it

provides for a system of individualized exemptions. (ECF No. 94 at 11-17.)

The State Defendants respond that the Second Circuit has already found Section 2.61 to be facially neutral (ECF No. 98 at 3), and that the absence of a religious exemption does not subject Section 2.61 to strict scrutiny; "[t]he Supreme Court explained long ago that mandatory vaccination laws constitute a valid exercise of the States' police powers and do not offend 'any right given or secured by the Constitution,' because the States' police powers allow imposition of 'restraints to which every person is necessarily subject for the common good.'" (*Id.* at 4.)

The First Amendment, applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); U.S. CONST. amend. I. As the Supreme Court has explained, "[t]he free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp. Div. Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). The Free Exercise Clause "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell*, 310 U.S. at 303-04. The Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494

U.S. at 878-79. Indeed, the "right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (1990) (citing *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)). In short, "if prohibiting the exercise of religion . . . is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878.

Accordingly, a "neutral law of general applicability" is subject to rational basis review—whether the classification drawn by the statute is rationally related to a legitimate state interest —even if it incidentally burdens a particular religious practice. *Id.* at 878-79. On the other hand, when a plaintiff shows that the government has burdened his sincere religious practice "pursuant to a policy that is not 'neutral' or 'generally applicable,'" the court will find a constitutional violation unless the government can satisfy the more demanding "strict scrutiny" standard, by demonstrating that "its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421-22 (2022).

The plaintiffs say that Section 2.61 is neither neutral nor generally applicable, because it treats comparable secular activity—which they identify as the limited medical exemption—more favorably than

religious activity, and prohibits religious conduct while permitting secular conduct that undermines the state's asserted interests. (ECF No. 94 at 11-17.) For this reason, the plaintiffs assert that Section 2.61 should be subject to strict scrutiny, a standard that the plaintiffs contend it cannot meet.

a. Neutrality

A law is not neutral if it "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993). A court first determines whether the challenged law is facially neutral, because "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. However, even a facially neutral law can violate the neutrality principle if it "targets religious conduct for distinctive treatment." *Id.* at 534. To determine whether the object or purpose of a law "is the suppression of religion or religious conduct," a court looks to "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id.* at 533, 540 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1977)).

The plaintiffs argue that the mandate is not neutral because it includes a medical exemption, and thus "treats religious exemptions less favorably than *some* nonreligious exemptions;" in the plaintiffs'

words, this "double standard is not a neutral standard." (ECF No. 94 at 11-12, 16) (emphasis in original).

Section 2.61 is neutral on its face. It does not refer to religion at all, and applies to "all persons employed or affiliated with a covered entity" who could "potentially expose other covered personnel, patients or residents to" COVID-19; the only exception is for employees with medical conditions that qualify for a medical exemption. 10 N.Y.C.R.R. § 2.61(a)(2), (d); *see also We The Patriots I*, 17 F.4th at 281 ("Section 2.61 is facially neutral because it does not single out employees who decline vaccination on religious grounds. It applies to all 'personnel,' as carefully defined in the Rule, aside from those who qualify for the narrowly framed medical exemption."). Nor does Section 2.61 carve out a category specifically for religious employees or subject them to harsher treatment. Rather, it provides exemptions for employees whose medical conditions make vaccination "detrimental to [their] health." 10 N.Y.C.R.R. § 2.61(d).

It is true, of course, that the plaintiffs need only plead facts that give rise to a "'slight suspicion' of religious animosity," *New Hope Family Servs., Inc. v. Poole,* 966 F.3d 145, 165 (2d Cir. 2020), but they have not done so. They cite no evidence to suggest that the State's purpose in enacting Section 2.61 was to suppress or discriminate against the exercise of

religion, such as comments by officials demonstrating bias against religious beliefs or practices.[22]

Rather, in an effort to demonstrate religious animus, the plaintiffs cite the inclusion in the Emergency Order of both a religious exemption and a medical exemption. The fact that Section 2.61 did not also include a religious exemption, the plaintiffs say, demonstrates that the regulation is not neutral. (ECF No. 94 at 11-12.) But as the Second Circuit pointed out in *We the Patriots I*, the plaintiffs "misconstrue the connection" between the two actions by characterizing Section 2.61 as simply a revision of the Emergency Order. *We The Patriots I,* 17 F.4th at 282. Section 2.61 did not amend the Emergency Order. On the contrary, the two actions were governed by different statutory authority, and involved different governmental entities and different processes. Commissioner Zucker issued the Emergency Order, pursuant to New York Public Health Law § 16, as an emergency measure for a finite period—a maximum of 15 days— with no provision for renewal. *Id*. at 275.

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[22] The plaintiffs maintain that "whether Plaintiffs are similarly situated to other healthcare workers receiving nonreligious exemptions is a fact question inappropriate for resolution on a motion to dismiss," and that they "have plausibly alleged that they were treated worse than similarly situated individuals, and State Defendants' factual contentions to the contrary are not grounds for dismissal." (ECF No. 94 at 23.) They do not, however, argue that discovery or additional factual development is necessary to establish whether the State was motivated by religious animosity in promulgating Section 2.61. As explained further below, whether the plaintiffs are similarly situated to employees with medical conditions is a question that can be decided on the law, based on the existing record.

The PHHPC, comprised of 25 members, issued Section 2.61 pursuant to New York's emergency rulemaking process, which as the Second Circuit also pointed out, involved "more process, public input, and support." *Id.* at 282. After "an extensive process" that included the development of "specific findings and a regulatory impact statement," the Council issued Section 2.61, which covered more entities than the Emergency Order, was in effect for 90 days, and included a renewal provision. *Id.* In addition, during the period between the issuance of the Emergency Order and the adoption of Section 2.61, the FDA approved a vaccine for people 16 years and older, the Delta variant continued to spread throughout New York, and a new governor assumed office. *Id.* at 283. The PHHPC's decision not to include a religious exemption in Section 2.61 comports with multiple New York State vaccine regulations that require all employees of hospitals, nursing homes, diagnostic and treatment centers, home health agencies and programs, assisted living residences, and hospices to be vaccinated against measles and rubella, and that do not include religious exemptions.[23] Similarly, N.Y.

[23] *See* 10 N.Y.C.R.R. § 405.3 (requiring hospital personnel to be vaccinated against rubella, allowing for medical exemptions but not religious exemptions); *id.* § 415.26 (requiring nursing home personnel to be vaccinates against measles and rubella, allowing for medical exemptions but not religious exemptions); *id.* § 751.6 (requiring employees of diagnostic and treatment centers to be vaccinated against measles and rubella, allowing for medical exemptions but not religious exemptions); *id.* § 763.13 (requiring personnel of certified home health agencies, long term home healthcare programs and AIDS home care programs to be vaccinated against measles and rubella, allowing for medical

Pub. Health Law § 2164 requires that children be immunized from certain diseases, including measles, before they can attend any public or private school or childcare facility, and also does not include a religious exemption. *See Phillips*, 775 F.3d at 543 (religious exemptions to vaccine mandates are not constitutionally required); *see also Prince*, 321 U.S. at 166-67 (holding that a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

The plaintiffs have not alleged any facts demonstrating the State was motivated by anything other than the concerns that motivated the State to enact these earlier vaccination requirements: protecting the public—in this case healthcare workers, hospital patients and elderly residents of nursing homes—from exposure to a highly contagious and potentially fatal infection.

b. General Applicability

The plaintiffs' claim that the mandate is not generally applicable is premised on the same

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exemptions but not religious exemptions); *id.* § 766.11 (requiring personnel of licensed home care services agencies to be vaccinated against measles and rubella, allowing for medical exemptions but not religious exemptions); 10 NYCRR § 794.3 (requiring hospice personnel to be vaccinated against measles and rubella, allowing for medical exemptions but not religious exemptions); *id.* § 1001.11 (requiring assisted living personnel to be vaccinated against measles and rubella, allowing for medical exemptions but not religious exemptions).

grounds—the inclusion of the medical exemption and the absence of a religious exemption, which was included in the Emergency Order.

A law may not be "generally applicable" if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," or "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *We The Patriots I*, 17 F.4th at 284 (citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021)).

i. "Comparable" Secular Conduct

A law is not generally applicable if it "is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it." *Cent. Rabbinical Cong. of U.S. & Canada v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 196-97 (2d Cir. 2014) (citing *Lukumi*, 508 U.S. at 535-38). "Whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue . . . . Comparability is concerned with the risks various activities pose." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (citation omitted).

The first question is whether the religious and secular interests are comparable; if they are, the Court must determine whether "the less favorable treatment of religious interests results from a

constitutionally impermissible value judgment." *Lowe*, 2022 WL 3542187, at *12. The plaintiffs say that the "State Defendants treat nonreligious, medically exempt workers more favorably (by not firing them) than the religious objectors (who have all been fired)." (ECF No. 94 at 14.) In addition, the plaintiffs argue that "allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones." (ECF No. 94 at 14 (citing *Dr. A*, 142 S. Ct. at 556 (Gorsuch, J., dissenting)).) According to the plaintiffs, an unvaccinated worker can contract and spread COVID-19 whether the worker is unvaccinated for religious or medical reasons, and therefore, all unvaccinated workers pose the same threat to patients and other healthcare workers. The plaintiffs misunderstand the extent of the government interest at issue.

As explained above, determining "the asserted government interest that justifies the regulation at issue" is an essential part of the comparability analysis. *Tandon*, 141 S. Ct. at 1296. The State identified its objectives in adopting Section 2.61 in the Regulatory Impact Statement: to prevent the spread of COVID 19 in healthcare facilities among employees, residents and patients, and to protect healthcare workers so that they can continue working, which in turn avoids staffing shortages, thus protecting patients and residents "even beyond a COVID-19 infection." *We the Patriots I*, 17 F.4th at 285; (*see also* ECF No. 82 at 14 (identifying the State's

interest as protecting "public health and safety by reducing the incidence of COVID-19"); ECF No. 82 at 4-6 ("reducing the number of unvaccinated personnel who can expose vulnerable patients to a potentially deadly disease in a healthcare setting," "reduc[ing] burdens on healthcare workers," and "prevent[ing] harm to front line workers.").)

It is self-evident that requiring an employee to be vaccinated even if the employee has a documented medical condition that makes vaccination unsafe would not promote the State's interest in protecting healthcare workers. In addition, "applying the vaccine to individuals in the face of certain contraindications, depending on their nature, could run counter to the State's 'interest in protecting the integrity and ethics of the medical profession.'" *We the Patriots I*, 17 F.4th at 285 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)). Nor would it promote the State's interest in avoiding staffing shortages, which pose additional risks to patients, since the healthcare worker made ill by the vaccination could very well need to be absent from work. On the other hand, requiring someone with a religious objection to be vaccinated does not endanger that person's health, but clearly protects that employee, patients and elderly residents, as well as other employees from infection. *See W.D. v. Rockland County*, 521 F. Supp. 3d 358, 403 (S.D.N.Y. 2021) (concluding that New York's emergency declaration mandating vaccinations against measles, which provided a medical exemption but not a religious exemption, met the requirement of general applicability by

"encouraging vaccination of all those for whom it was medically possible, while protecting those who could not be inoculated for medical reasons").

It is also significant that medical exemptions are limited in time and available "only until such immunization is found no longer to be detrimental to such personnel member's health." 10 N.Y.C.R.R. § 2.61(d)(1). A religious exemption, on the other hand, would probably last indefinitely, absent the development of vaccines that do not conflict with sincerely held religious beliefs. *We the Patriots I*, 17 F.4th at 286.

The plaintiff relies on *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), but that case does not compel a different result. The Newark Police Department enforced a "no beard" policy to further its interest in projecting "a monolithic, highly disciplined force," and because "uniformity" benefitted the officers and "offer[ed] the public a sense of security in having readily identifiable and trusted public servants." *Id.* at 366. The policy did not apply to undercover officers, and there was a medical exemption for officers with certain skin conditions. *Id.* at 360. There was, however, no religious exemption for officers whose religion required them to grow beards. *Id.*

The Third Circuit concluded that the exception for undercover officers was not subject to strict scrutiny; exempting undercover officers did "not undermine the Department's interest in uniformity" because undercover officers are not meant to be "readily identifiable" as police officers. *Id.* at 366. The

inclusion of a medical exemption while not permitting a religious exemption, however, undermined the Department's stated goals. The court pointed out that uniformed officers were "readily identifiable" whether they had beards or not. *Id.* The court also rejected the Department's "suggestion" that "the presence of officers who wear beards for religious reasons would undermine public confidence in the force" or the force's "morale and esprit de corps," but the same would not be true for officers who wore beards for medical reasons. *Id.* at 366-67. Under these circumstances, the court was "at a loss to understand why religious exemptions threaten important city interests but medical exemptions do not." *Id.* There is no similar contradiction in this case.[24]

Nor is this case comparable to the occupancy limits cases recently decided by the Supreme Court. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court struck down occupancy limits that applied to religious services, but not to secular businesses, finding that the limits "single[d] out houses of worship for especially harsh treatment." 141 S. Ct. 63, 66 (2020). In *Tandon v. Newsom*, the Court invalidated a prohibition against indoor gatherings of more than three households that had the effect of restricting at-home religious gatherings while allowing groups of more than three households to gather in public settings, like hair salons, retail

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[24] For the same reason, the plaintiff's reliance on *Litzman v. N.Y. City Police Dep't*, No. 12-CV-4681, 2013 WL 6049066, at *3 (S.D.N.Y. Nov. 15, 2013), which involved a similar police department policy, is unavailing.

stores, and restaurants. 141 S. Ct. at 1296-97 (rejecting the Ninth Circuit's finding that secular activities posed less risk of transmission than the religious gatherings). In both cases, the Court found that the restrictions limited religious activity while permitting comparable secular activity, even though the secular activity posed the same risks.

The rule at issue in this case involves no "singling out" of religious employees. Indeed, Section 2.61 applies equally to all employees who can be vaccinated safely, regardless of their religious beliefs or practices, whether they have political objections to the vaccine, or question their efficacy or safety, or any of the many other reasons that people choose not to get vaccinated. *See Lowe*, 2022 WL 3542187, at *13 ("In the context of the COVID-19 vaccine mandate, the medical exemption is rightly viewed as an essential facet of the vaccine's core purpose of protecting the health of patients and healthcare workers, including those who, for bona fide medical reasons, cannot be safely vaccinated. In addition, the vaccine mandate places an equal burden on all secular beliefs unrelated to protecting public health—for example, philosophical or politically-based objections to state-mandated vaccination requirements—to the same extent that it burdens religious beliefs."). Accordingly, the plaintiffs have not demonstrated that Section 2.61's medical exemption and the religious exemption they seek are comparable.

ii. Individualized Exemptions

"General applicability may be absent when a law provides 'a mechanism for individualized exemptions,' because it creates the risk that administrators will use their discretion to exempt individuals from complying with the law for secular reasons, but not religious reasons." *We the Patriots I*, 17 F.4th at 288 (quoting *Smith*, 494 U.S. at 884). While a mechanism for individualized exemptions might mean that the law is not "generally applicable," the "'mere existence of an exemption procedure,' absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny." *Id.* at 288-89 (citing *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 276 (3d Cir. 2007)).

The plaintiffs allege that Section 2.61 "creates a system of individualized exemptions for preferred exemption requests while discriminating against requests for exemption and accommodation based on sincerely held religious beliefs" (ECF No. 1 ¶ 129), which is "sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny." (ECF No. 94 at 15 (quoting *City of Newark*, 170 F.3d at 365).)[25] This argument is not persuasive. The medical exemption in Section 2.61 does not permit the State or the private employers to "decide which reasons for

[25] As explained above, the plaintiff's reliance on *City of Newark* is misplaced, because the policy at issue there undermined the Department's stated objectives and targeted a religious practice. Section 2.61 does not.

not complying with the policy are worthy of solicitude," or give them the discretion to "exempt individuals from complying with the law for secular reasons, but not religious reasons." *We the Patriots I*, 17 F.4th at 288-89. Rather, it requires the application of objective standards to a clearly defined group of employees: those who "present a certification from a physician or certified nurse practitioner attesting that they have a pre-existing health condition that renders the vaccination detrimental to their health, in accordance with generally accepted medical standards, such as those published by ACIP, for the period during which the vaccination remains detrimental to their health." *We the Patriots I*, 17 F.4th at 289.

c. Rational Basis Review

Under the rational basis standard, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 54 (2d Cir. 2007) (citing *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)). "This form of review is highly deferential." *Winston v. City of Syracuse*, 887 F.3d 553, 560 (2d Cir. 2018).

Section 2.61 easily meets this standard. It serves the legitimate government purpose of protecting public health and safety by reducing the incidence of COVID-19 in nursing homes and hospitals, thus protecting patients, residents and employees. "Faced with an especially contagious variant of the virus in the midst of a pandemic that

has now claimed the lives of over 750,000 in the United States and some 55,000 in New York, the State decided as an emergency measure to require vaccination for all employees at healthcare facilities who might become infected and expose others to the virus, to the extent they can be safely vaccinated. This was a reasonable exercise of the State's power to enact rules to protect the public health." *We the Patriots I*, 17 F.4th at 290; *see also Kane v. De Blasio*, 19 F.4th 152, 166 (2d Cir. 2021) (finding that rational basis review applied to an order issued by the Commissioner requiring all Department of Education employees be vaccinated against COVID-19, a standard that the order "plainly satisifie[d]" as a "reasonable exercise of the State's power to act to protect the public health"); *Maniscalco v. N.Y.C. Dep't of Educ.*, 563 F. Supp. 3d 33, 39 (E.D.N.Y. Sept. 23, 2021) (finding the requirement that all Department of Education employees be vaccinated against COVID-19 "a rational policy decision surrounding how best to protect children during a global pandemic").[26]

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[26] At the August 2, 2022 hearing, counsel argued that discovery could show that unvaccinated healthcare workers were not more likely to transmit COVID-19 than vaccinated workers, and that firing employees who refused to get vaccinated hurt the "availability" of staff more than granting the exemptions would have. (Aug. 2, 2022 Tr. at 27:8-25, 31:23-32:12.) In deciding that Section 2.61 was a necessary measure to reduce the transmission of COVID-19 in healthcare facilities, the State relied on the PHHPC's finding that "unvaccinated individuals are approximately 5 times as likely to be diagnosed with COVID-19 compared to vaccinated individuals . . . [and] unvaccinated [individuals] have over 11 times the risk of being hospitalized

Accordingly, Section 2.61 is rationally related to a legitimate governmental interest. For that reason, the plaintiffs' free exercise claim is dismissed.

II. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. It therefore "requires that the government treat all similarly situated people alike." *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (citing *City of Cleburne*, 473 U.S. at 439). A plaintiff claiming an equal protection violation must "show adverse treatment of individuals compared with other similarly situated individuals and that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or

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with COVID-19." 10 N.Y.C.R.R. § 2.61; (ECF No. 1-9 at 10.) This was reasonable. Nor was the State obligated to adopt the plaintiffs' additional theories and approaches—that "masking and testing protocols remain sufficient to prevent the spread of COVID-19 among healthcare workers, and constitute a reasonable alternative to vaccination as an accommodation of sincerely held religious beliefs" (ECF No. 1 ¶ 75), and that granting religious exemptions and allowing staff to take off from work only when they are sick with COVID-19 better serves the State's interest in maintaining adequate staffing needs. The PHHPC considered and rejected these options as inferior to vaccination, and that was a rational decision. It was reasonable for the State to conclude that the measures the plaintiffs suggest would not have been as effective as vaccines, and that because unvaccinated employees are more likely to contract and spread COVID-19, allowing them to work in proximity to vulnerable patients and other employees was an unacceptable risk.

malicious or bad faith intent to injure a person." *Miner v. Clinton County*, 541 F.3d 464, 474 (2d Cir. 2008) (internal quotation marks and citation omitted). "Unless a statute or state action provokes 'strict judicial scrutiny because it interferes with a fundamental right or discriminates against a suspect class, it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.'" *Maniscalco*, 563 F. Supp. 3d at 41 (quoting *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988)).

The plaintiffs' equal protection claim is related to their First Amendment free exercise claim; they maintain that the State treats them as religious objectors—differently than so-called similarly situated "nonreligious objectors"—those employees whose medical conditions make vaccination unsafe. As explained above, the plaintiffs and employees with medical conditions are not similarly situated. Employees with medical conditions cannot be vaccinated because it endangers their health; the plaintiffs have no medical condition, and thus can be vaccinated safely.

In any event, the equal protection claim fails because the free exercise challenge fails. "Where a law subject to an equal protection challenge 'does not violate [a plaintiff's] right of free exercise of religion,' courts do not 'apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.'" *W.D. v. Rockland County.*, 521 F. Supp. 3d 358, 410 (S.D.N.Y. 2021) (quoting *A.M. ex*

rel. Messineo v. French, 431 F. Supp. 3d 432, 447 (D. Vt. 2019)); *see also Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) ("[S]ince we hold in Part III, *infra*, that the Act does not violate appellee's right of free exercise of religion, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test.").

As explained above, Section 2.61 does not violate the plaintiffs' First Amendment rights, because it serves legitimate purposes of stemming the spread of COVID-19 in hospitals and nursing homes and protecting patients and healthcare workers. Accordingly, the equal protection claim is dismissed.

III. Title VII of the Civil Rights Act of 1964

Title VII makes it unlawful for an employer "to discharge . . . or otherwise to discriminate against any individual" in his or her employment "because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1). The statute also requires employers to offer reasonable religious accommodations that do not cause undue hardship. *We the Patriots I*, 17 F.4th at 292 ("To avoid Title VII liability for religious discrimination . . . an employer must offer a *reasonable* accommodation that does not cause the employer an undue hardship. Once any reasonable accommodation is provided, the statutory inquiry ends." (emphasis in original)). The plaintiffs assert that the Private Defendants violated Title VII because they did not give the plaintiffs a religious "accommodation" exempting them from the vaccine mandate. (ECF No. 1 ¶¶ 168-70.) The Private Defendants respond that the plaintiffs have not

exhausted their administrative remedies, and that in any event, Title VII does not require employers to "accommodate religious beliefs or practice when doing so would pose an undue hardship on the employer." (ECF No. 83 at 11; *see also* ECF No. 85 at 11-12; ECF No. 87-3 at 16.) The Private Defendants assert that exempting the plaintiffs from the vaccination requirement while permitting them to continue to work in hospital and nursing home facilities would create undue hardship by putting patients and staff at risk (ECF No. 87-3 at 18), and by forcing the Private Defendants to violate the law. (*Id.* at 17; ECF No. 85 at 11-12; ECF No. 83 at 11-12.) A plaintiff must exhaust administrative remedies before filing a Title VII claim in federal court. *Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir. 2003) ("As a precondition to filing a Title VII claim in federal court, a plaintiff must first pursue available administrative remedies and file a timely complaint with the EEOC."); *Fowlkes v. Ironworkers Loc. 40*, 790 F.3d 378, 384 (2d Cir. 2015) ("It is well established that Title VII requires a plaintiff to exhaust administrative remedies before filing suit in federal court."); *Hernandez v. Premium Merch. Funding One, LLC*, No. 19-CV-1727, 2020 WL 3962108, at *3 (S.D.N.Y. July 13, 2020) ("It is axiomatic that a plaintiff must exhaust her administrative remedies before filing a Title VII claim."). "To exhaust, a plaintiff must file a written description of the unlawful employment practice with the EEOC or relevant state or local agency within 300 days of its occurrence . . . Regardless of whether the EEOC acts on a charge, the EEOC must issue a right-

to-sue notice 180 days after the filing of that charge." *Hernandez*, 2020 WL 3962108, at *3. "A complainant then has 90 days to bring suit against the employer." *Id.* If the plaintiff has not exhausted her administrative remedies, the claim must be dismissed. *See Doe v. Hochul*, No. 21-CV-1078, 2022 WL 446332, at *6-8 (N.D.N.Y. Feb. 14, 2022) (dismissing healthcare worker's Title VII claim for failure to exhaust administrative remedies). The purpose of the exhaustion requirement "is to give the administrative agency the opportunity to investigate, mediate, and take remedial action." *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 712 (2d Cir. 1998).

The plaintiffs concede that they have not received right-to-sue letters.[27] (ECF No. 94 at 31-33; Aug. 2, 2022 Tr. at 7:10-15 ("[W]e still await right to sue letters from the EEOC for Title VII claims for all the plaintiffs.").) Nevertheless, the plaintiffs urge the Court to exercise "incidental equity jurisdiction" while they satisfy the exhaustion requirement. (ECF No. 94 at 33.) They rely on Sheehan v. Purolator Courier Corp., 676 F.2d 877 (2d Cir. 1981), in which the Second Circuit ruled that it had "jurisdiction to entertain a motion for temporary injunctive relief against [the employer] while the charge is pending before the EEOC and before the EEOC has issued a right to sue letter." Id. at 887. The plaintiffs' request for injunctive relief was denied, so Sheehan does not apply. The plaintiffs cite no other compelling reason

[27] The plaintiffs do not specify the date on which they filed complaints with the EEOC, or whether they filed complaints against all three Private Defendants

to ignore the exhaustion requirement. Their Title VII claims could be dismissed on this basis alone.

In any event, the plaintiffs' Title VII claim fails on the merits. The plaintiffs argue that whether the religious exemption is an undue burden is "a question of fact not suitable for determination on a motion to dismiss" (ECF No. 94 at 28), but do not suggest what further factual development is necessary. In fact, like the plaintiffs' other challenges to Section 2.61, resolving this challenge at the motion to dismiss stage is appropriate. The sole "accommodation" the plaintiffs seek—a religious exemption from the vaccine requirement—would impose an undue hardship on the Private Defendants because it would require them to violate state law. See Lowman v. NVI LLC, 821 F. App'x 29, 32 (2d Cir. 2020) (upholding the lower court's dismissal of a Title VII claim where an employer could not have granted an employee's accommodation request without violating federal law); Cassano v. Carb, 436 F.3d 74, 75 (2d Cir. 2006) ("Plaintiff's reliance on anti-discrimination statutes is misplaced because defendants' policy of requiring SSNs applied equally to all employees and was also a necessary consequence of defendants' obligations under federal law."); see generally Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 830 (9th Cir. 1999) ("[C]ourts agree that an employer is not liable under Title VII when accommodating an employee's religious beliefs would require the employer to violate federal or state law.").

In addition, the Private Defendants persuasively argue that in addition to requiring the

defendants to violate the law, exempting the plaintiffs from the vaccine requirement would expose vulnerable patients and nursing home residents, as well as other healthcare workers, to the COVID-19 virus, which is obviously a significant hardship.[28] Accordingly, the plaintiffs' Title VII claim is dismissed.

IV. Supremacy Clause

The plaintiffs allege that Section 2.61 violates the Supremacy Clause. In particular, the plaintiffs maintain that "[the defendants] have purported to remove the availability of religious exemptions and accommodations within the State of New York, have ignored Title VII's commands that employers provide reasonable accommodations to individuals with sincerely held religious beliefs, and have claimed that the Governor's COVID-19 Vaccine Mandate prohibits employers in New York from even considering a religious exemption or accommodation request." (ECF

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[28] Aside from the obvious hardship associated with an increase in infections and its deleterious effect on staff and patients, the Private Defendants could also face legal liability if a patient or resident treated by an unvaccinated employee were to contract COVID-19. The number of lawsuits filed in this District based on COVID-19 deaths in nursing homes demonstrates that this is more than just a theoretical possibility. *See, e.g., Gavin v. Jackson Heights Care Ctr., LLC*, No. 22-CV-5006 (E.D.N.Y. Aug. 24, 2022); *Gonzalez v. Parker Jewish Inst. for Health Care & Rehab. et al.*, No. 22-CV-5199 (E.D.N.Y. Aug. 81, 2022); *Esposito v. Parker Jewish Inst. for Healthcare & Rehab.*, No. 22-CV-5012 (E.D.N.Y. Aug. 24, 2022); *Thompson v. Ditmas Park Rehab. & Care Center, LLC et al.*, No. 22-CV-4555 (E.D.N.Y. Aug. 3, 2022); *Weppler v. Highfield Gardens Care Ctr. of Great Neck*, No. 22-CV-2905 (E.D.N.Y. May 18, 2022).

No. 1 ¶ 145.) They also say that the "State Defendants have abolished the entire accommodation process under Title VII for religious objectors to their employee vaccine mandate," despite being required to "provide at least a process for an employee to seek a accommodation of the employee's sincerely held religious beliefs." (ECF No. 94 at 22, 27.) All the defendants respond by arguing that the Supremacy Clause does not create a cause of action. (ECF Nos. 83-1 at 7; 82 at 17; 85 at 17; 87-3 at 8-9.) Additionally, they argue that there is no conflict between Section 2.61 and Title VII, and therefore, the plaintiffs' preemption claim should be dismissed. (ECF Nos. 83-1 at 8-9; 82 at 18-21; 85 at 17-18; 87-3 at 9-13.)

The Supremacy Clause "is not the 'source of any federal rights,' and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (citation omitted); *see also Davis v. Shah*, 821 F.3d 231, 245 (2d Cir. 2016) (rejecting a claim that rested "entirely on an implied right of action arising out of the Supremacy Clause"). Accordingly, to the extent the plaintiffs make a claim solely under the Supremacy Clause, the claim is dismissed.

To the extent the plaintiffs mean to make a Supremacy Clause preemption claim,[29] that claim must also be dismissed. There are three categories of preemption: "(1) express preemption, where Congress has expressly preempted local law; (2) field

[29] In *We the Patriots I*, the Second Circuit evaluated a similar claim as a preemption challenge. 17 F.4th at 290-93.

preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). The plaintiffs' claim that the defendants have "ignored Title VII" and "abolished the entire accommodation process under Title VII for religious objectors to their employee vaccine mandate" falls into the third category—conflict preemption. (ECF No. 1 ¶ 145; ECF No. 94 at 27.)

To succeed on this theory, the plaintiffs must show that Section 2.61 "conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *Town of Clarkstown*, 612 F.3d at 104. In other words, the plaintiffs must show that is impossible for employers to comply with Title VII and Section 2.61, or that Section Title VII is an "obstacle to the achievement of federal objectives" as expressed in Title VII. *Id.*

As relevant here, Title VII makes it unlawful for employers "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § 2000e(2)(a)(1). "Religion" includes "all aspects of religious observance and practice, as well as belief,

unless an employer demonstrates that he is unable to reasonably accommodate . . . an employee's . . . religious observance without undue hardship on his business." *Id.* § 2000e(j); *see also We the Patriots I*, 17 F.4th at 291.

The plaintiffs claim that absence of a religious exemption in Section 2.61 is the equivalent of denying them a religious accommodation under Title VII. In making this claim, as discussed above, the plaintiffs conflate exemption with accommodation, and use the terms interchangeably throughout their submissions. But the plaintiffs do not allege that they have sought anything other than a complete exemption—which they characterize as an accommodation—while continuing to work directly with patients, elderly people and co- workers. They have not, for example, asked for reassignment to a position in which they would be not interact directly with patients, elderly nursing home residents or other healthcare workers.

The defendants are not required to give the plaintiffs the accommodation they demand—exempting them from the vaccination requirement while still permitting them to work directly with vulnerable patients and senior citizens. Indeed, to avoid Title VII liability, an employer is not required to "offer the accommodation the employee prefers." *We the Patriots I*, 17 F.4th at 292 (citing *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002)). Title VII requires an employer to offer a reasonable

accommodation that does not cause the employer "undue hardship."[30]

As the Second Circuit observed, Section 2.61 "does not require employers to violate Title VII because although it bars an employer from granting a religious *exemption* from the vaccination requirement, it does not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." *We the Patriots I*, 17 F.4th at 292 (emphasis in original). Because the vaccination requirement "does not foreclose all opportunity for Plaintiffs to secure a reasonable accommodation under Title VII," *id.*, it is not impossible for employers to comply with both Section 2.61 and Title VII. The plaintiffs' preemption claim is dismissed.

V. Conspiracy to Violate Civil Rights in Violation of 42 U.S.C. § 1985

The plaintiffs allege that the defendants conspired to deprive them of their civil rights when—in the plaintiffs' words, they "reached an agreement . . . to deprive all healthcare workers in New York [without] any exemption or accommodation for the exercise of their sincerely held religious beliefs" (ECF No. 1 ¶ 181), by agreeing to enforce Section 2.61 and

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[30] Accommodations could include "assignments—such as telemedicine—where [employees unvaccinated for religious reasons] would not pose a risk of infection to other personnel, patients, or residents," which would "remove[] the individual from the scope of the Rule." *We the Patriots I,* 17 F.4th at 292.

by denying the plaintiffs' requests for religious exemptions. (ECF No. 94 at 35-36.)

To state a § 1985(3) conspiracy claim, a plaintiff must allege "(1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws, or the equal privileges and immunities under the laws; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff's person or property, or a deprivation of a right or privilege of a citizen of the United States." *Porter v. City of New York*, No. 03-CV-6463, 2004 WL 7332338, at *5 (E.D.N.Y. Mar. 15, 2004) (quoting *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999)). "In order to maintain an action under Section 1985, a plaintiff must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Webb v. Goord*, 340 F.3d 105, 110 (2d Cir. 2003) (internal quotation marks and citations omitted). "A complaint containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights must be dismissed." *Porter*, 2004 WL 7332338, at *5 (internal quotation marks omitted).

Additionally, "a § 1985(3) 'conspiracy must also be motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action.'" *Cine SK8, Inc. v. Town of Henrietta*, 791 (2d Cir.2007) (citing *Thomas*, 165 F.3d at 146). Further, "Section 1985(3) provides no substantive rights itself; rather, it merely provides a remedy for violation of the rights it designates. As a

result, to maintain a claim pursuant to § 1985(3), there must be some predicate constitutional right which the alleged conspiracy violates." *Friends of Falun Gong v. Pac. Cultural Enter., Inc.*, 288 F. Supp. 2d 273, 279 (E.D.N.Y. 2003) (internal quotation marks and citations omitted). The plaintiffs' conspiracy claim fails The simple answer to the plaintiffs' claim is that, as discussed above, they have not alleged a violation of the law. Accordingly, there can be no conspiracy. *Nasca v. County of Suffolk*, No. 05-CV-1717, 2008 WL 53247, at *8 n.8 (E.D.N.Y. Jan. 2, 2008) ("Plaintiff's conspiracy claim under 42 U.S.C. § 1985 must also fail because there is no underlying Section 1983 violation."); *Cater v. New York*, No. 17-CV-9032, 2019 WL 763538, at *6 (S.D.N.Y. Feb. 4, 2019) ("[B]road and conclusory allegations of conspiracy . . . comprise precisely the sort of § 1985 claim courts have dismissed as implausible."). The § 1985 claim is dismissed.

CONCLUSION

For the reasons stated above, the defendants' motions to dismiss are granted.31 The complaint is dismissed for failure to state a claim upon which relief may be granted.

SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOHN DOE 1, JANE DOES 1–3, JACK DOES 1–1750, JOAN DOES 1–750,

Plaintiffs,
v.

KATHY HOCHUL, in her official capacity as Governor of the State of New York, HOWARD A. ZUCKER, in his official capacity as Commissioner of the New York State Department of Health, TRINITY HEALTH, INC., NEW YORK PRESBYTERIAN HEALTHCARE SYSTEM, INC., WESTCHESTER MEDICAL CENTER ADVANCED PHYSICIAN SERVICES, P.C.,

Defendants.

VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, DECLARATORY RELIEF AND DAMAGES

For their VERIFIED COMPLAINT against Defendants, KATHY HOCHUL, in her official capacity as Governor of the State of New York, HOWARD A. ZUCKER, in his official capacity as Commissioner of the New York State Department of Health, TRINITY HEALTH, INC., NEW YORK-PRESBYTERIAN HEALTHCARE SYSTEM, INC., and WESTCHESTER MEDICAL CENTER

ADVANCED PHYSICIAN SERVICES, P.C. ("WMC Health"), Plaintiffs, JOHN DOE 1–2, JANE DOES 1–3, JACK DOES 1–750, and JOAN DOES 1–750, allege and aver as follows:

URGENCIES JUSTIFYING EMERGENCY RELIEF

1. The seminal issue before this Court can be boiled down to a simple question: Does federal law apply in New York? Though the question borders on the absurd, so does Defendants' answer to it. Defendants have explicitly claimed to healthcare workers in New York, including Plaintiffs, that federal law does not apply, and neither should they. Defendants have informed Plaintiffs, who have sincerely held religious objections to the Governor's mandate that all healthcare workers in New York must be fully vaccinated against COVID-19 by September 27, 2021 (the "**COVID-19 Vaccine Mandate**"), that no protections or considerations are given to religious beliefs in New York. Indeed, Defendants' answer has been an explicit claim that federal law does not provide protections to New York's healthcare workers. When presented with requests from Plaintiffs for exemption and accommodation for their sincerely held religious beliefs, Defendants have responded in the following ways:

- "**Religious exemptions are no longer accepted" in New York**. (*See infra* **¶ 83.)**
- "As a health care institution in NYS, **NYP must follow the NYS DOH requirements as they evolve. This means that NYP can no longer consider any religious exemptions to the COVID vaccination - even those previously approved**." (*See infra* ¶ 86.)

- "**WMC Health, in order to comply with DOH Regulations, will no longer accept applications for a religious exemption and those applications already received will be not be considered**." (*See infra* ¶ 89.)
- "**Under the emergency regulations the NYS DOH will not permit exemptions or deferrals for: Sincerely held religious beliefs We are required to comply with state law**." (*See infra* ¶¶ 92–93.)

2. The answer to the question before this Court is clear: **federal law and the United States Constitution are supreme over any New York statute or edict, and New York cannot override, nullify, or violate federal law**. *See* U.S. Const. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). "**[The Supreme] Court has long made clear that federal law is as much the law of the several States as are the laws passed by their legislatures**." *Haywood v. Drown*, 556 U.S. 729, 734 (2009) (emphasis added). Indeed, "**[i]t is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause . . . state law is nullified to the extent that it actually**

conflicts with federal law." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985) (emphasis added) (cleaned up).

3. Thus, there can be no dispute that **New York is required to abide by federal law and provide protections to employees who have sincerely held religious objections to the COVID-19 vaccines**. And, here, the federal law is clear: There can be no dispute that Title VII of the Civil Rights Act prohibits Defendants from discriminating against Plaintiffs on the basis of their sincerely held religious beliefs. 42 U.S.C. §2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion."). And, Defendants have a duty under Title VII to provide religious exemptions and accommodations to those with sincerely held religious objections to the COVID-19 Vaccine Mandate. In direct contrast to this unquestionable principle of black letter law, however, every Defendant in this suit has seen fit to claim to its healthcare workers that the converse is true, and that New York law is supreme over federal law; has engaged in a conspiracy and scheme to discourage employees with religious objections to the mandatory vaccines from even seeking religious exemptions from such a policy; has informed Plaintiffs that their requests for an exemption and accommodation from the mandate cannot even be evaluated or considered; and has flatly denied all requests for religious exemption and accommodation from the mandate

that all healthcare workers receive a COVID-19 vaccine. Employers bent on discrimination "usually don't post help wanted signs reading 'blacks need not apply.'" *Lewis v. City of Unity City*, 918 F.3d 1213, 1261 (11th Cir. 2019) (Rosenbaum, J., concurring in part). But New York and its healthcare employers have no problem being direct: "**religious misbelievers need not apply**."

4. The dispute in this case is not about what accommodations are available to Plaintiffs or whether accommodation of Plaintiffs' sincerely held religious objections can be conditioned on compliance with certain reasonable requirements. Plaintiffs have already acknowledged to Defendants that they are willing to comply with reasonable health and safety requirements that were deemed sufficient a few, short weeks ago and have been sufficient to consider them heroes for the last eighteen months. **The dispute is about whether Defendants are required to even consider a request for reasonable accommodation of Plaintiffs' sincerely held religious beliefs**. The answer is clear: **yes**. And this Court should require Defendants to acknowledge and accept that federal law mandates accommodation for Plaintiffs' sincerely held religious beliefs and order that Defendants extend such protections.

5. **Plaintiffs have been given a deadline to become vaccinated by September 27, 2021 for hospital employees and October 7, 2021 for other facilities, forcing them to accept a vaccine injection by various arbitrary deadlines set by the employers, including September 13 at the latest for many Plaintiffs. If Plaintiffs do not comply with the vaccine**

mandate, they will be terminated and deprived of their ability to feed their families. No American should be faced with this unconscionable choice, especially the healthcare heroes who have served us admirably for the entire duration of COVID-19. A TRO is needed now to ensure that Defendants are enjoined from their continued efforts to deny that federal law even applies in New York and to compel Defendants to extend the protections that federal law demands of them. Plaintiffs will suffer (and some have already suffered) irreparable harm by being forced to choose between their jobs and their sincerely held religious beliefs. Despite the Governor's mandate only requiring full vaccination by September 27, Plaintiff Jane Doe 3 was told her deadline to comply with the mandate was September 3, and she has already suffered de facto termination as a result of the Governor's mandate. Relief from this unconscionable and unlawful deprivation of Plaintiffs' liberties cannot wait another day.

6. Earlier this year, the then-Governor of New York rightfully declared that New York's healthcare workers were "the true heroes in this crisis." *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Calls on Federal Government to Provide Hazard Pay to Essential Public Workers* (Apr. 20, 2020), https://www.governor.ny.gov/news/amid-ongoing-COVID-19- pandemic-governor-cuomo-calls-federal-government-provide-hazard-pay. Every word of that statement is equally as true today as it was the day the Governor uttered it. **Yet, on August 16,**

2021, those same heroes have now been cast as evil villains for requesting exemption and accommodation from the Governor's edict for their sincerely held religious beliefs.

7. Neither the Governor nor any of the Defendant employers is permitted to blatantly ignore federal protections under the First Amendment and Title VII, and that is precisely why emergency relief is needed in the instant action: Plaintiffs need **an order mandating that Defendants follow federal protections for religious objectors to the COVID-19 Vaccine Mandate.**

8. Plaintiffs are all healthcare workers in New York who have sincerely held religious beliefs that preclude them from accepting any of the COVID-19 vaccines because of the vaccines' connections to aborted fetal cell lines and for other religious reasons that have been articulated to Defendants. John Doe 2 has sincerely held religious beliefs that compel him to abstain from all vaccines, and he has followed that religious conviction his entire life. Since COVID-19 first arrived in New York, Plaintiffs have risen every morning, donned their personal protective equipment, and fearlessly marched into hospitals, doctor's offices, senior living facilities, emergency rooms, operating rooms, and examination rooms with one goal: to provide quality healthcare to those suffering from COVID-19 and every other illness or medical need that confronted them. They did it bravely and with honor. They answered the call of duty to provide healthcare to the folks who needed it the most and worked tirelessly to ensure that those ravaged by the pandemic were given appropriate care. **All Plaintiffs seek in this lawsuit is to be able to**

continue to provide the healthcare they have provided to patients for their entire careers, and to do so under the same protective measures that have sufficed for them to be considered superheroes for the last 18 months. Defendants shamelessly seek to throw these healthcare workers out into the cold and ostracize them from the very medical facilities for which they have sacrificed so much solely because of Plaintiffs' desire to continue to provide quality healthcare while still exercising their sincerely held religious beliefs.

9. The law mandates that Defendants permit them to do both. Regardless of whether New York sees fit to extend protections to religious objectors under its own statutory framework, **federal law demands that these Plaintiffs and all employees in New York receive protections for their sincerely held religious beliefs**. This Court should hold New York to the bargain it made with its citizens when it joined the union and ensure that New York extends the required protections that federal law demands. As the Supreme Court held just last year, "**even in a pandemic, the Constitution cannot be put away and forgotten**." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2021) (emphasis added). When we have demanded so much of our healthcare heroes, we owe them nothing less than the full measure of our own commitment to constitutional principles. Anything less would be desecrating the sacrifice these medical heroes made for untold numbers of people—including Defendants—when the call of duty demanded it of them. As the former Governor once stated, "Thanks is nice, but recognition of their efforts and their sacrifice

is appropriate. . . . They're the ones carrying us through this crisis." Chris Sommerfeldt, *Cuomo proposes hazard pay for coronavirus frontline workers*, NY Daily News (Apr. 20, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-cuomo-briefing-20200420-joov5nje2va6jairdx45ctteei-story.html. Unfortunately, Defendants have neither thanked nor recognized Plaintiffs' extraordinary efforts. This Court should.

PARTIES

10. Plaintiff John Doe 1 is a citizen of New York and the President of the Board of a private, faith-based senior care facility in New York with employees who have sincerely held religious objections to the Governor's COVID-19 Vaccine Mandate. John Doe 1 has sincerely held religious objections to accepting or receiving the COVID-19 vaccines (*see infra*) and has sincerely held religious beliefs that he is to honor the sincerely held religious beliefs of his employees who object to the COVID-19 vaccines. John Doe 1 will have only 1 employee in his entire facility as of October 7 if the Governor's mandate is not enjoined. John Doe 1 has been threatened with the loss of his facility and daily fines for failure to reject the request for religious objections from his employees.

11. John Doe 2 is a citizen of New York and is a healthcare worker employed by Defendant New York-Presbyterian at one of its hospital facilities in New York. John Doe 2 submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon his sincerely held religious beliefs against all vaccines, including

COVID-19 vaccines, but New York-Presbyterian denied the exemption because of the Governor's mandate. New York-Presbyterian previously granted John Doe 2 exemptions from the flu vaccine and previously granted an exemption from the COVID-19 vaccine. After the Governor issued the mandate and Defendant Zucker removed religious accommodations from New York's public health regulations, New York-Presbyterian revoked John Doe 2's religious exemption.

12. Jane Doe 1 is a citizen of the State of New York and is a healthcare worker employed by New York-Presbyterian at Brooklyn Methodist Hospital. Jane Doe 1 submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon her sincerely held religious beliefs against vaccines, including COVID-19 vaccines, but New York-Presbyterian denied the exemption because of the Governor's mandate. New York-Presbyterian previously granted Jane Doe 1 exemptions from the flu vaccine and previously granted an exemption from the COVID-19 vaccine. After the Governor issued the mandate and Defendant Zucker removed religious accommodations from New York's public health regulations, New York-Presbyterian revoked Jane Doe 1's religious exemption.

13. Jane Doe 2 is a citizen of the State of New York and is a doctor employed by Defendant WMC Health. Jane Doe 2 submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon her sincerely held religious beliefs against vaccines, including COVID-19 vaccines, but WMC Health

denied the exemption because of the Governor's mandate.

14. Jane Doe 3 is a citizen of the State of New York and is a registered nurse employed by Defendant Trinity Health at its St. Joseph's Health Hospital in New York. Jane Doe 3 submitted a written request for an exemption and accommodation from the Governor's COVID-19 Vaccine Mandate based upon her sincerely held religious beliefs against vaccines, including COVID-19 vaccines, but Trinity Health denied the exemption because of the Governor's mandate. Trinity Health previously granted Jane Doe 3 exemptions from the flu vaccine and previously granted an exemption from the COVID-19 vaccine. After the Governor issued the mandate and Defendant Zucker removed religious accommodations from New York's public health regulations, Trinity Health revoked Jane Doe 3's religious exemption.

15. Plaintiffs Jack Does 1–250 are citizens of the State of New York and are healthcare workers employed by Trinity Health at its healthcare facilities in New York. Jack Does 1–250 seek exemption or accommodation from the Governor's COVID-19 Vaccine Mandate based upon their sincerely held religious beliefs, but Trinity Health either denied their exemption requests or told them not to submit exemption requests because the Governor does not allow Trinity Health to grant or even consider religious exemption or accommodation requests.

16. Plaintiffs Joan Does 1–250 are citizens of the State of New York and are healthcare workers employed by Trinity Health at its healthcare facilities in New York. Joan Does 1–250 seek exemption or

accommodation from the Governor's COVID-19 Vaccine Mandate based upon their sincerely held religious beliefs, but Trinity Health either denied their exemption requests or told them not to even submit exemption requests because the Governor does not allow Trinity Health to grant or even consider religious exemption or accommodation requests.

17. Plaintiffs Jack Does 251–500 are citizens of the State of New York and are healthcare workers employed by Defendant WMC Health at its healthcare facilities in New York. Jack Does 251–500 seek exemption or accommodation from the Governor's COVID-19 Vaccine Mandate based upon their sincerely held religious beliefs, but WMC Health either denied their exemption requests or told them not to even submit exemption requests because the Governor does not allow WMC Health to grant or even consider religious exemption or accommodation requests.

18. Plaintiffs Joan Does 251–500 are citizens of the State of New York and are healthcare workers employed by WMC Health at its healthcare facilities in New York. Joan Does 251–500 seek exemption or accommodation from the Governor's COVID-19 Vaccine Mandate based upon their sincerely held religious beliefs, but WMC Health either denied their exemption requests or told them not to even submit exemption requests because the Governor does not allow WMC Health to grant or even consider religious exemption or accommodation requests.

19. Plaintiffs Jack Does 501–750 are citizens of the State of New York and are healthcare

workers employed by Defendant New York-Presbyterian at its healthcare facilities in New York. Jack Does 501–750 seek exemption or accommodation from the Governor's COVID-19 Vaccine Mandate based upon their sincerely held religious beliefs, but New York- Presbyterian either denied their exemption requests or told them not to even submit exemption requests because the Governor does not allow New York-Presbyterian to grant or even consider religious exemption or accommodation requests.

20. Plaintiffs Joan Does 501–750 are citizens of the State of New York and are healthcare workers employed by New York-Presbyterian at its healthcare facilities in New York. Joan Does 501–750 seek exemption or accommodation from the Governor's COVID-19 Vaccine Mandate based upon their sincerely held religious beliefs, but New York-Presbyterian either denied their exemption requests or told them not to even submit exemption requests because the Governor does not allow New York-Presbyterian to grant or even consider religious exemption or accommodation requests.

21. Defendant Kathy Hochul, in her official capacity as Governor of the State of New York (the "Governor"), is responsible for enacting the COVID-19 Vaccine Mandate. Governor Hochul is sued in her official capacity.

22. Defendant Howard A. Zucker, in his official capacity as Commissioner of the New York State Department of Health, is responsible for overseeing the healthcare industry in New York and is responsible for implementing the Governor's COVID-19 Vaccine Mandate and enforcing the

provisions of threatened loss of licensure for those healthcare providers who refuse to mandate the COVID-19 vaccine. Defendant Zucker is sued in his official capacity.

23. Defendant Trinity Health, Inc. is a nonprofit corporation incorporated under the laws of the State of New York, employs a number of Plaintiffs in this action, has refused to even consider requests for religious accommodation, has revoked exemptions previously offered to Plaintiffs in this action, and has threatened to terminate Plaintiffs for their refusals to accept a vaccine that violates their sincerely held religious beliefs.

24. Defendant New York-Presbyterian Healthcare System, Inc. is a nonprofit corporation incorporated under the laws of the State of New York, employs a number of Plaintiffs in this action, has refused to even consider requests for religious accommodation, has revoked exemptions previously offered to Plaintiffs in this action, and has threatened to terminate Plaintiffs for their refusals to accept a vaccine that violates their sincerely held religious beliefs.

25. Defendant Westchester Medical Center Advanced Physician Services, P.C. ("WMC Health") is a nonprofit corporation incorporated under the laws of the State of New York, employs a number of Plaintiffs in this action, has refused to even consider requests for religious accommodation, has revoked exemptions previously offered to Plaintiffs in this action, and has threatened to terminate Plaintiffs for their refusals to accept a vaccine that violates their sincerely held religious beliefs.

JURISDICTION AND VENUE

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

27. This Court has jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 1331 and 1343.

28. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

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

30. This Court is authorized to grant Plaintiffs' prayer for a temporary restraining order and preliminary and permanent injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

31. This Court is authorized to grant Plaintiffs' prayer for relief regarding damages under 42 U.S.C. § 2000e-5.

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

GENERAL ALLEGATIONS

A. THE GOVERNOR'S COVID-19 VACINE MANDATE FOR HEALTHCARE WORKERS IN NEW YORK.

33. On August 16, 2021 the Governor announced that "all healthcare workers in New York State, including staff at hospitals and long-term care facilities (LTCF), including nursinghomes, adult care, and other congregate care settings, will be required to be vaccinated against COVID-19 by Monday, September 27." (A true and correct copy of the Governor's Mandatory COVID-19 Vaccine Policy is attached hereto as **EXHIBIT A** and incorporated herein.)

34. On August 18, 2021 the New York State Department of Health issued an Order for Summary Action requiring all "Covered entities" to "continuously require all covered personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021." (A true and correct copy of the Department of Health's Order for Summary Action is attached hereto as **EXHIBIT B** and incorporated herein.)

35. "Covered entity" was defined to include "a general hospital or nursing home pursuant to section 2801 of the Public Health Law." (Exhibit B at 3.)

36. "Covered Personnel," who are those employees required to be fully vaccinated under the Governor's Mandate, include

All persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose patients, residents, or personnel working for such entity to the disease.

(Exhibit B at 3-4.)

37. In its Order for Summary Action on August 18, the State Department of Health included a religious exemption for those with sincerely held religious beliefs against receipt of one of the COVID-19 vaccines. (Exhibit B at 5.) Specifically, it stated: "Religious Exemption. Covered entities shall grant a religious exemption for COVID-19 vaccination for covered personnel if they hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer." (Exhibit B at 5–6.)

38. Additionally, the Order for Summary Action provided for a medical exemption of those personnel for whom it was recommended by a physician or certified nurse practitioner and provided that reasonable accommodations should be provided for those employees as well. (Exhibit B at 5.)

39. On August 26, the State Department of Health issued the amended rule concerning mandatory COVID-19 vaccines ("Section 2.61 Rule Change") finalizing the scope of the Governor's COVID-19 Vaccination Mandate. (A true and correct copy of the Section 2.61 Rule Change is attached hereto as **EXHIBIT C** and incorporated herein.)

40. In the Section 2.61 Rule Change, New York completely removed religious exemptions and accommodations, precluding any healthcare worker in New York from requesting or obtaining a reasonable accommodation and exemption for their sincerely held religious beliefs. (Exhibit C at 3.)

41. The Section 2.61 Rule Change retained the medical exemptions from the COVID-19 Vaccination Mandate, but specifically stripped

religious objections from any accommodation or exemption process in New York.

B. PLAINTIFFS' SINCERELY HELD RELIGIOUS OBJECTIONS TO COVID-19 VACCINE MANDATE.

42. Plaintiffs all have sincerely held religious beliefs that preclude them from accepting or receiving any of the three available COVID-19 vaccines because of the connection between the various COVID-19 vaccines and the cell lines of aborted fetuses, whether in the vaccines' origination, production, development, testing, or other inputs.

43. A fundamental component of Plaintiffs' sincerely held religious beliefs is that all life is sacred, from the moment of conception to natural death, and that abortion is a grave sin against God and the murder of an innocent life.

44. Plaintiffs' sincerely held religious beliefs are rooted in Scripture's teachings that "[a]ll Scripture is given by inspiration of God, and is profitable for doctrine, for reproof, for correction, [and] for instruction in righteousness." *2 Timothy* 3:16 (KJV).

45. Because of that sincerely held religious belief, Plaintiffs believe that they must conform their lives, including their decisions relating to medical care, to the commands and teaching of Scripture.

46. Plaintiffs have sincerely held religious beliefs that God forms children in the womb and knows them prior to their birth, and that because of this, life is sacred from the moment of conception. *See Psalms* 139:13–14 (ESV) ("For you formed my inward parts; you knitted me together in my mother's womb. I praise you, for I am fearfully and wonderfully

made."); *Psalms* 139:16 (ESV) ("Your eyes saw my unformed substance; in your book were written, every one of them, the days that were formed for me, when as yet there was none of them."); *Isaiah* 44:2 (KJV) ("the LORD that made thee, and formed thee from the womb"); *Isaiah* 44:24 (KJV) ("Thus saith the LORD, thy redeemer, and he that formed thee from the womb, I am the LORD that maketh all things."); *Isaiah* 49:1 (KJV) ("The LORD hath called my from the womb; from the bowels of my mother hath he made mention of my name."); *Isaiah* 49:5 (KJV) ("the LORD that formed me from the womb to be his servant"); *Jeremiah* 1:5 (KJV) ("Before I formed thee in the belly I knew thee; and before thou camest forth out of the womb I sanctified thee, and I ordained thee.").

47. Plaintiffs also have sincerely held religious beliefs that every child's life is sacred because children are made in the image of God. *See Genesis* 1:26–27 (KJV) ("Let us make man in our image, after our likeness. . . . So God created man in his own image; in the image of God created he him; male and female created he them.").

48. Plaintiffs also have sincerely held religious beliefs that because life is sacred from the moment of conception, the killing of that innocent life is the murder of an innocent human in violation of Scripture. *See, e.g.*, *Exodus* 20:13 (KJV) ("Though shalt not kill."); *Exodus* 21:22–23 (setting the penalty as death for even the accidental killing of an unborn child); *Exodus* 23:7 (KJV) ("the innocent and righteous slay thou not, for I will not justify the wicked"); *Genesis* 9:6 (KJV) ("Whoso sheddeth a man's blood, by man shall his blood by shed: for in the image

of God made he man."); *Deuteronomy* 27:25 (KJV) ("Cursed be he that taketh reward to slay an innocent person."); *Proverbs* 6:16–17 (KJV) ("These six things doth the LORD hate: yea, seven are an abomination to him . . . hands that shed innocent blood.").

49. Plaintiffs also have the sincerely held religious belief that it would be better to tie a millstone around their necks and be drowned in the sea than bring harm to an innocent child. *See Matthew* 18:6; *Luke* 17:2.

50. Plaintiffs have sincerely held religious beliefs, rooted in the Scriptures listed above, that anything that condones, supports, justifies, or benefits from the taking of innocent human life via abortion is sinful, contrary to the Scriptures, and must be denounced, condemned, and avoided altogether.

51. Plaintiffs have sincerely held religious beliefs, rooted in the Scriptures listed above, that it is an affront to Scripture's teaching that all life is sacred when any believer uses a product derived from or connected in any way with abortion.

52. Plaintiffs' sincerely held religious beliefs, rooted in the above Scriptures, preclude them from accepting any one of the three currently available COVID-19 vaccines derived from, produced or manufactured by, tested on, developed with, or otherwise connected to aborted fetal cell lines.

53. Plaintiffs have sincerely held religious objections to the Johnson & Johnson (Janssen Pharmaceuticals) vaccine because it unquestionably used aborted fetal cells lines to produce and manufacture the vaccine.

54. As reported by the North Dakota Department of Health, in its handout literature for

those considering one of the COVID-19 vaccines, "[t]he non-replicating viral vector vaccine produced by Johnson & Johnson **did require the use of fetal cell cultures, specifically PER.C6, in order to produce and manufacture the vaccine**." *See* North Dakota Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), *available at* https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf (last visited Sept. 8, 2021) (bold emphasis original).

55. The Louisiana Department of Health likewise confirms that the Johnson & Johnson COVID-19 vaccine, which used the PER.C6 fetal cell line, "is a retinal cell line that was **isolated from a terminated fetus in 1985**." Louisiana Department of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 12, 2020), https://ldh.la.gov/assets/oph/Center-PHCH/CenterPH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf (last visited Sept. 8, 2021) (emphasis added).

56. Scientists at the American Association for the Advancement of Science have likewise published research showing that the Johnson & Johnson vaccine used aborted fetal cell lines in the development and production phases of the vaccine. *Meredith Wadman*, *Vaccines that use human fetal cells draw fire*, Science (June 12, 2020), *available at* https://science.sciencemag.org/content/368/6496/1170.full (last visited Sept. 8, 2021).

57. Plaintiffs have sincerely held religious objections to the Moderna and Pfizer/BioNTech COVID-19 vaccines because both of these vaccines,

too, have their origins in research on aborted fetal cells lines.

58. As reported by the North Dakota Department of Health, in its handout literature for those considering one of the COVID-19 vaccines, the Moderna and Pfizer mRNA vaccines are ultimately derived from research and testing on aborted fetal cell lines. In fact, "[e]arly in the development of mRNA vaccine technology, **fetal cells were used for 'proof of concept' (to demonstrate how a cell could take up mRNA and produce the SARS-CoV-2 spike protein) or to characterize the SARS-CoV-2 spike protein**." *See* North Dakota Health, *COVID-19 Vaccines & Fetal Cell Lines* (Apr. 20, 2021), *available at* https://www.health.nd.gov/sites/www/files/documents/COVID%20Vaccine%20Page/COVID-19_Vaccine_Fetal_Cell_Handout.pdf (last visited Sept. 8, 2021) (emphasis added).

59. The Louisiana Department of Health's publications again confirm that aborted fetal cells lines were used in the "proof of concept" phase of the development of their COVID-19 mRNA vaccines. Louisiana Department of Public Health, *You Have Questions, We Have Answers: COVID-19 Vaccine FAQ* (Dec. 12, 2020), *available at* https://ldh.la.gov/assets/oph/Center-PHCH/Center-PH/immunizations/You_Have_Qs_COVID-19_Vaccine_FAQ.pdf (last visited Sept. 8, 2021).

60. Because all three of the currently available COVID-19 vaccines are developed and produced from, tested with, researched on, or otherwise connected with the aborted fetal cell lines HEK-293 and PER.C6, Plaintiffs' sincerely held

religious beliefs compel them to abstain from obtaining or injecting any of these products into their body, regardless of the perceived benefit or rationale.

61. Plaintiffs have sincerely held religious beliefs that their bodies are temples of the Holy Spirit, and that to inject medical products that have any connection whatsoever to aborted fetal cell lines would be defiling the temple of the Holy Spirit. (*See 1 Corinthians* 6:15-20 (KJV) ("Know ye not that your bodies are the members of Christ? shall I then take the members of Christ and make them members of an harlot? God forbid. What? Know ye not that your body is the temple of the Holy Ghost which is in you, which have of God, and ye are not your own? For ye are bought with a price: therefore glorify God in your body, and in your spirit, which are God's.").

62. In addition to their sincerely held religious beliefs that compel them to abstain from any connection to the grave sin of abortion, Plaintiffs have sincerely held religious beliefs that the Holy Spirit—through prayer and the revelation of Scripture—guide them in all decisions they make in life.

63. Plaintiffs have sincerely held religious beliefs that Jesus Christ came to this earth, died on the cross for their sins, and was resurrected three days later, and that when He ascended to Heaven, He sent the Holy Spirit to indwell His believers and to guide them in all aspects of their lives. *See John* 16:7 (KJV) ("Nevertheless I tell you the truth, It is expedient for you that I go away: for if I go not away, the Comforter will not come unto you; but if I depart, I will send him unto you."); *John* 14:26 (KJV) ("But the Comforter, which is the Holy Ghost, whom the Father will send in my name, he shall teach you all

things, and bring all things to your remembrance, whatsoever I have said unto you.").

64. Plaintiffs have sincerely held religious beliefs that the Holy Spirit was given to them by God to reprove them of righteousness and sin and to guide them into all truth. *See John* 16:8, 13 (KJV) ("And when he is come, he will reprove the world of sin, and of righteousness, and of judgment [W]hen he, the Spirit of truth, is come, he will guide you into all truth: for he shall not speak of himself; but whatsoever he shall hear, that shall he speak: and he will shew you things to come.").

65. Plaintiffs also have sincerely held religious beliefs that they shall receive all answers to their questions through prayer and supplication, including for decisions governing their medical health. *See James* 1:5 (KJV) ("If any of you lack wisdom, let him ask of God, that giveth to all men liberally, and upbraideth not; and it shall be given him."); *Mark* 11:24 (KJV) ("Therefore I say unto you, What things soever ye desire, when ye pray, believe that ye receive them, and ye shall have them."); *Philippians* 4:6–7 (KJV) ("Be careful for nothing, but in everything by prayer and supplication with thanksgiving let your request be made known to God. And the peace of God, which passeth all understanding, shall keep your hearts and minds through Christ Jesus."); *1 John* 4:14–15 (KJV) ("And this is the confidence we have in him, that, if we ask anything according to his will, he heareth us. And if we know that he hear us, whatsoever we ask, we know that we have the petitions that we desired of him.").

66. Through much prayer and reflection, Plaintiffs have sought wisdom, understanding, and

guidance on the proper decision to make concerning these COVID-19 vaccines, and Plaintiffs have been convicted by the Holy Spirit in their beliefs that accepting any of the three currently available vaccines is against the teachings of Scripture and would be a sin.

67. Plaintiff John Doe 2 is a member of the Church of Christ, Scientist, and has a sincerely held religious objection to all vaccines. John Doe 2's Christian Scientist religious beliefs compel him to believe that healing comes through prayer.

68. John Doe 2's sincerely held religious beliefs compel him to focus on prayer and Bible-based approaches when dealing with all health-related issues, and his convictions compel Him to believe what the book of *Psalms* states, which is that God "healeth all thy diseases." *Psalms* 103:3.

69. John Doe 2's sincerely held religious beliefs compel him to abstain from receiving all vaccines, and he has followed that religious practice his entire life.

C. PLAINTIFFS' WILLINGNESS TO COMPLY WITH ALTERNATIVE SAFETY MEASURES.

70. Plaintiffs have offered, and are ready, willing, and able to comply with all reasonable health and safety requirements to facilitate their religious exemption and accommodation from the COVID-19 Vaccine Mandate.

71. Plaintiffs have all informed their respective employers that they are willing to wear facial coverings, submit to reasonable testing and reporting requirements, monitor symptoms, and otherwise comply with reasonable conditions that were good enough to permit them to do their jobs for

the last 18 months with no questions asked.

72. In fact, last year the State said Plaintiffs were heroes because of their willingness to abide by the same conditions and requirements that Plaintiffs are willing to abide by now. *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Calls on Federal Government to Provide Hazard Pay to Essential Public Workers* (Apr. 20, 2020), https://www.governor.ny.gov/news/amid-ongoing COVID-19-pandemic-governor-cuomo-calls-federal government-provide-hazard-pay.

73. In fact, New York still recommends that vaccinated individuals wear a mask in public settings. *See* Karen Matthews & Michael Hillap, *Masks encouraged in New York but no city or state mandate*, AP (Aug. 2, 2021), https://apnews.com/article/lifestyle-business-health-coronavirus-pandemic 97863fa563eadaad177e0ccba8000cb4.

74. And the reason for this is simple,

> A preliminary study has shown that in the case of a breakthrough infection, the Delta variant is able to grow in the noses of vaccinated people **to the same degree as if they were not vaccinated at all**. The virus that grows is just as infectious as that in unvaccinated people, meaning vaccinated people can transmit the virus and infect others.

Sanjay Mishra, *Evidence mounts that people with breakthrough infections can spread Delta easily*, National Geographic (Aug. 20, 2021), https://www.nationalgeographic.com/science/article/ evidence-mounts-that-people-with-breakthrough-

infections-can-spread-delta-easily (emphasis added).

75. Masking and testing protocols remain sufficient to prevent the spread of COVID-19 among healthcare workers, and constitute a reasonable alternative to vaccination as an accommodation of sincerely held religious beliefs.

76. In fact, the United States District Court for the Western District of Louisiana just issued a temporary restraining order against a medical school for the school's failure to grant religious exemptions when reasonable accommodations were available (such as masking, testing, etc.) and mandatory vaccination was not the least restrictive means of achieving the school's interest in protecting the school's student body. *See Magliulo v. Edward Via College of Osteopathic Medicine*, No. 3:21-CV-2304, 2021 WL 36799227 (W.D. La. Aug. 17, 2021).

77. And the United States District Court for the Western District of Michigan issued a temporary restraining order against a school for its failure to allow students with religious exemptions and accommodations to participate in athletics and other extracurricular activities when masking and testing was available as a reasonable accommodation for such religious beliefs. *See Dahl v. Bd. of Trustees of W. Mich. Univ.*, No. 1:21-cv-757, 2021 WL 3891620, *2 (W.D. Mich. Aug. 31, 2021).

D. PLAINTIFFS' DESIRE FOR AN ACCOMMODATION AND DEFENDANTS' RESPONSES CLAIMING FEDERAL LAW IS IRRELEVANT IN NEW YORK.

78. Consistent with his sincerely held religious beliefs, John Doe 1 and his facility desires to

obtain a religious exemption and accommodation from the Governor's COVID-19 Vaccination Mandate, so that he may offer his employees with sincerely held religious objections to the vaccine an accommodation from the mandate.

79. The Governor and State Department of Health, by removing religious exemptions from the COVID-19 Vaccine Mandate, have precluded John Doe 1 from offering religious exemptions to his employees and violated his sincerely held religious beliefs and those of his facility.

80. John Doe 1 has spoken with state officials that are responsible for regulating his facility, and he has been informed that offering religious exemptions and accommodation to his employees will result in daily fines and a potential closure of his facility.

81. John Doe 2, for the last 10 years of his employment with New York-Presbyterian, has received an exemption from mandatory vaccines in his employment. In fact, on July 28, 2021 Defendant New York-Presbyterian approved John Doe 2 for an exemption and accommodation from the COVID-19 vaccine. (A true and correct copy of John Doe 2's accommodation acceptance is attached hereto as **EXHIBIT D** and incorporated herein.)

82. After an announcement from his employer that the Governor's mandate precluded New York-Presbyterian from offering or accepting religious exemptions and accommodations, John Doe 2 communicated with his superiors to inquire whether his previously granted religious exemption and accommodation would be honored. (A true and correct copy of John Doe 2's email communications

with his superiors is attached hereto as **EXHIBIT E** and incorporated herein.)

83. New York-Presbyterian responded to John Doe 2, stating: "**Religious exemptions are no longer accepted**." (Exhibit E at 1 (emphasis added).)

84. Jane Doe 1 has also requested and received religious accommodations from New York-Presbyterian and Brooklyn Methodist Hospital in the past, and on August 24, 2021 was granted a religious accommodation from the Governor's COVID-19 Vaccine Mandate. (A true and correct copy of Jane Doe 1's religious exemption and accommodation is attached hereto as **EXHIBIT F** and incorporated herein.)

85. However, on August 30, New York-Presbyterian and Brooklyn Methodist Hospital informed Jane Doe 1 that her previously accepted religious exemption and accommodation had been revoked. (A true and correct copy of New York-Presbyterian's revocation of Jane Doe 1's religious exemption is attached hereto as **EXHIBIT G** and incorporated herein.)

86. Specifically, New York-Presbyterian stated:

> Late last week, the Public Health and Health Planning Council of the NYS Department of Health formally approved and adopted the state*s COVID-19 vaccination requirement for health care workers. **In addition, the Council made the determination to exclude religious exemptions as an alternative to receiving the vaccine.** The DOH cited examples of measles and other vaccinations, which are required of NY health

> care workers, as also not having a religious exemption. As a health care institution in NYS, **NYP must follow the NYS DOH requirements as they evolve. This means that NYP can no longer consider any religious exemptions to the COVID vaccination – even those previously approved.**

(Exhibit G at 2.)

87. Thus, Jane Doe 1 was initially given a religious accommodation, but had it revoked because New York-Presbyterian stated religious accommodations were no longer available in the State of New York.

88. On August 26, 2021 Jane Doe 2 submitted a request for a religious exemption and accommodation to Defendant WMC Health outlining her religious beliefs against receipt of the COVID-19 Vaccine. However, on August 27, the very next day, WMC Health responded to Jane Doe 2 informing her that because of the Governor's mandate, WMC Health was not even considering and reviewing, much less granting, requests for religious exemption or accommodation. (A true and correct copy of WMC Health's response to Jane Doe 2 is attached hereto as **EXHIBIT H** and incorporated herein.)

89. Specifically, WMC Health stated:

> On August 26, hospitals were notified that the New York State Department of Health was removing the option allowing hospitals to offer a religious exemption to health care workers from receiving the COVID-19 vaccination. Accordingly, **WMC Health, in order to comply with DOH Regulations, will no**

> **longer accept applications for a religious exemption and those applications already received will be not be considered**.

(Exhibit H at 1 (emphasis added).)

90. Jane Doe 3 also submitted a request for a religious accommodation and exemption from Defendant Trinity Health, and was initially approved for the religious exemption. (A true and correct copy of Trinity Health's approval of Jane Doe 3's religious exemption and accommodation is attached hereto as **EXHIBIT I** and incorporated herein.)

91. On September 1, Trinity Health sent a communication to Jane Doe 3 informing her that her religious exemption had been revoked. (A true and correct copy of Trinity Health's communication revoking Jane Doe 3's religious exemption is attached hereto as **EXHIBIT J** and incorporated herein.)

92. Specifically, Trinity Health stated that "**[u]nder the emergency regulations the NYS DOH will not permit exemptions or deferrals for: Sincerely held religious beliefs, Pregnancy, Planning to become pregnant**." (Exhibit J at 1 (emphasis added).)

93. Trinity Health continued by noting: "We are required to comply with **state law**. Therefore, any colleague who was previously approved for one of the above-exemptions/deferrals will be required to provide proof of (1) first dose of a 2-dose series (mRNA) or (2) a single dose vaccine (Johnson & Johnson) no later than September 21, 2021." (Exhibit J at 1 (emphasis added).) **However, Trinity Health has granted numerous exemptions and accommodations for its employees with religious beliefs at its facilities in other states,**

including *inter alia*, Michigan, Idaho, Florida and others. Thus, Defendant knows that accommodations and exemptions are available but has refused to provide them.

94. Thus, what Defendants hath given in accordance with federal law, Defendants hath taken away in violation federal law. Defendants have purported to remove the protection of federal law from all healthcare workers in New York and are forcing Plaintiffs to choose between their religious convictions and their abilities to feed their families.

E. DEFENDANTS ADMIT THAT OTHER, NON-RELIGIOUS EXEMPTIONS ARE AVAILABLE.

95. The Governor's mandate, the State Department of Health's rules, and Defendants' responses to Plaintiffs' requests for exemption and accommodation for their sincerely held religious beliefs all confirm that New York is, indeed, willing to grant other exemptions from the Governor's COVID-19 Vaccine Mandate but have relegated religious exemption requests to constitutional orphan status.

96. On August 26, in its Section 2.61 rule change, Defendant Zucker's officials stripped out protections that were previously available under the Governor's mandate and have informed Plaintiffs and all healthcare workers in New York that their religious beliefs will not be honored in the workplace or in the State.

97. In its response to John Doe 2, Defendant New York-Presbyterian has indicated it is perfectly willing to accept and grant medical exemptions but will not allow religious exemptions. Specifically, it told John Doe 2: "Religious

exemptions are no longer accepted. **This does not impact an approved or submitted Medical exemption request**." (Exhibit E at 1 (emphasis added).)

98. Thus, while New York-Presbyterian says it will consider and grant the preferred medical exemptions, **it will not even consider the constitutionally orphaned religious exemption requests**.

99. Jane Doe 1 was similarly informed that though religious exemptions had been removed, the preferred medical exemption requests would still be honored and considered. (Exhibit G at 1 ("Staff must receive the first dose of the vaccine or have an approved medical exemption by no later than September 15, 2021.").)

100. And New York-Presbyterian further noted to Jane Doe 1 that while religious exemption request were previously available, only medical exemption requests would now be considered or honored. (Exhibit G at 2.)

101. The Governor, through the COVID-19 Vaccine Mandate, has created a two-tiered system of exemptions, and placed religious beliefs and those who hold them in a class less favorable than other exemptions that Defendants are perfectly willing to accept.

102. Under the Governor's scheme of creating a disfavored class of religious exemptions, Defendants are not even willing to consider religious exemptions, much less grant them to those who have sincerely held religious objections to the COVID-19 vaccines.

F. IRREPARABLE HARM SUFFERED BY

PLAINTIFFS.

103. Because of the Governor's COVID-19 Vaccine Mandate, John Doe 1 faces the unconscionable choice of violating his own sincerely held religious beliefs by demanding he require his employees to accept the Governor's mandatory vaccine or potentially having to close his facility for failure to adhere to the Governor's requirements.

104. **As of October 8, absent injunctive relief protecting his sincerely held religious convictions and those of his faith-based senior care facility, John Doe 1 will face daily fines and the potential closure of his facility for the mere act of exercising his religious beliefs**.

105. Because of the Governor's COVID-19 Vaccine Mandate, John Doe 1 also faces the unconscionable choice of refusing to grant his employees' requests for exemption and accommodation from the Governor's COVID-19 Vaccine Mandate or facing significant daily fines and the closure of his facility.

106. Because John Doe 2's request for an exemption and accommodation of his sincerely held religious beliefs has been denied by New York-Presbyterian, John Doe 2 faces the unconscionable choice of accepting a vaccine that conflicts with his religious beliefs or losing his job. Unless John Doe 2 immediately violates his conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, he will be terminated from his employment.

107. Because Jane Doe 1's request for an exemption and accommodation of her sincerely held religious beliefs has been denied by New York-

Presbyterian, Jane Doe 1 faces the unconscionable choice of accepting a vaccine that conflicts with her religious beliefs or losing her job. Unless Jane Doe 1 immediately violates her conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, she will be terminated from her employment.

108. Additionally, **because Jane Doe 1 has merely requested an accommodation for her sincerely held religious beliefs, she has already been placed on unpaid leave and has been told she will be terminated if she does not violate her beliefs and comply with the Governor's mandate by September 10.**

109. Because Jane Doe 2's request for an exemption and accommodation of her sincerely held religious beliefs has been denied by WMC Health, Jane Doe 2 faces the unconscionable choice of accepting a vaccine that conflicts with her religious beliefs or losing her job. Unless Jane Doe 2 immediately violates her conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, she will be terminated from her employment.

110. Because Jane Doe 3's request for an exemption and accommodation of her sincerely held religious beliefs has been denied by Trinity Health, Jane Doe 3 faces the unconscionable choice of accepting a vaccine that conflicts with her religious beliefs or losing her job. Unless Jane Doe 3 immediately violates her conscience and sincere religious beliefs by beginning the Governor's mandatory COVID-19 vaccine process, she will be terminated from her employment

111. As a result of the Governor's COVID-19 Vaccine Mandate, Plaintiffs have suffered and are suffering irreparable injury by being prohibited from engaging in their constitutionally and statutorily protected rights to the free exercise of their sincerely held religious beliefs.

112. As a result of the Governor's COVID-19 Vaccine Mandate, Plaintiffs have suffered and are suffering irreparable injury by being forced to choose between maintaining the ability to feed their families and the free exercise of their sincerely held religious beliefs.

113. As a result of the Governor's COVID-19 Vaccine Mandate, Plaintiffs have suffered and are suffering irreparable injury by being stripped of their rights to equal protection of the law and being subjected to disfavored class status in New York.

G. PLAINTIFFS' ATTEMPTS TO SECURE RELIEF PRIOR TO SEEKING A TRO AND PRELIMINARY INJUNCTION.

114. On September 1, 2021, Plaintiffs' counsel sent the Governor, Commissioner Zucker, and New York Attorney General Letitia James a letter informing them that the COVID-19 Vaccine Mandate, both on its own and in its interpretation and application by others, deprives Plaintiffs of their rights to request an accommodation of their sincerely held religious beliefs under federal law. (A true and correct copy of the Letter sent to the Governor, Commissioner, and Attorney General is attached hereto as **EXHIBIT K** and incorporated herein.)

115. Plaintiffs requested that the Governor withdraw her unlawful directives and publicly announce that any interpretation of her mandate to

deprive Plaintiffs and all healthcare workers in New York of their rights to request and receive an exemption and accommodation for their sincerely held religious objections to the mandatory COVID-19 vaccine was unlawful and impermissible.

116. Plaintiffs requested the response and the public announcement from the Governor prior to September 7, 2021.

117. Plaintiffs' counsel requested a response informing counsel that the Governor would permit Plaintiffs and other healthcare workers with sincere religious objections to the vaccine to request and receive reasonable accommodation from the mandate.

118. Neither Governor Hochul, Commissioner Zucker, nor Attorney General James responded to Plaintiffs' counsel, nor announced that federal law would continue to apply in New York, nor provided any information to healthcare employers in New York that federal law required Defendants to accept and permit their healthcare employees to request and receive religious exemption and accommodation from the COVID-19 Vaccine Mandate.

COUNT I—VIOLATION OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.
(All Plaintiffs v. Government Defendants)

119. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1–118 above as if fully set forth herein.

120. The Free Exercise Clause of the First Amendment to the United States Constitution, as

applied to the states by the Fourteenth Amendment, prohibits the State from abridging Plaintiffs' rights to free exercise of religion.

121. Plaintiffs have sincerely held religious beliefs that Scripture is the infallible, inerrant word of the Lord Jesus Christ, and that they are to follow its teachings.

122. Plaintiffs reallege the discussion of their sincerely held religious beliefs (*supra* Section B) as if fully set forth herein.

123. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, targets Plaintiffs' sincerely held religious beliefs by prohibiting Plaintiffs from seeking and receiving exemption and accommodation for their sincerely held religious beliefs against the COVID-19 vaccine.

124. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, impermissibly burdens Plaintiffs' sincerely held religious beliefs, compels Plaintiffs to either change those beliefs or act in contradiction to them, and forces Plaintiffs to choose between the teachings and requirements of their sincerely held religious beliefs in the commands of Scripture and the State's imposed value system.

125. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, places Plaintiffs in an irresolvable conflict between compliance with the mandate and their sincerely held religious beliefs.

126. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, puts substantial pressure on Plaintiffs to violate their sincerely held religious beliefs or face loss of their ability to feed their families.

127. The Governor's COVID-19 Vaccine

Mandate, on its face and as applied, is neither neutral nor generally applicable.

128. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, specifically targets Plaintiffs' religious beliefs for disparate and discriminatory treatment.

129. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, creates a system of individualized exemptions for preferred exemption requests while discriminating against requests for exemption and accommodation based on sincerely held religious beliefs.

130. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, constitutes a religious gerrymander by unconstitutionally orphaning exemption and accommodation requests based solely on sincerely held religious beliefs of healthcare workers in New York while permitting the more favored medical exemptions to be granted.

131. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, constitutes a substantial burden on Plaintiffs' exercise of their sincerely held religious beliefs.

132. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, fails to accommodate Plaintiffs' sincerely held religious beliefs.

133. There is no legitimate, rational, or compelling interest in the Governor's COVID-19 Vaccine Mandate's exclusion of exemptions and accommodations for sincerely held religious beliefs.

134. The Governor's COVID-19 Vaccine Mandate is not the least restrictive means of achieving an otherwise permissible government

interest.

135. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

136. Plaintiffs have no adequate remedy at law to protect the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT II—DEFENDANTS' WILLFUL DISREGARD OF FEDERAL PROTECTIONS VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION BY ATTEMPTING TO MAKE NEW YORK LAW SUPERSEDE FEDERAL LAW
(All Plaintiffs v. All Defendants)

137. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1–118 above as if fully set forth herein.

138. The Supremacy Clause provides:

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

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

139. "**When federal law forbids an action that state law requires, the state law is without effect**." *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 486 (2013) (emphasis added).

140. Simply put, "**It is a familiar and well-established principle that the Supremacy Clause . . . invalidates state laws that interfere with, or are contrary to, federal law. Under the Supremacy Clause . . . state law is nullified to the extent that it actually conflicts with federal law**." *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712-13 (1985) (emphasis added) (cleaned up).

141. By claiming that the protections of Title VII are inapplicable in the State of New York, which all Defendants have either explicitly or tacitly stated, Defendants are running roughshod over the Supremacy Clause and appointing themselves independent of the protections of federal law.

142. As demonstrated by Defendant New York-Presbyterian's response to John Doe 2, New York-Presbyterian believes that "**religious accommodations are no longer accepted**" in New York (Exhibit E at 1 (emphasis added).)

143. More specifically, in response to Jane Doe 1's request for an accommodation for her sincerely held religious beliefs, New York-Presbyterian stated that because New York "made the determination to exclude religious exemptions . . . **NYP must follow the NYS DOH requirement [and] can no longer consider any religious exemptions.**" (Exhibit G at 2.)

144. Similarly, in its response to Jane Doe 3,

Trinity Health explicitly stated that "[w]e are required to comply with **state law**," and **state law "will not permit exemptions or deferrals for . . . Sincerely held religious beliefs**." (Exhibit J at 1 (emphasis added).)

145. Thus, all Defendants have purported to remove the availability of religious exemptions and accommodations within the State of New York, have ignored Title VII's commands that employers provide reasonable accommodations to individuals with sincerely held religious beliefs, and have claimed that the Governor's COVID-19 Vaccine Mandate prohibits employers in New York from even considering a religious exemption or accommodation request.

146. By purporting to place itself outside of the protections of Title VII and the First Amendment, New York and each individual Defendant have violated the most basic premise that "**federal law is as much the law of the several States as are the laws passed by their legislatures**." *Haywood v. Drown*, 556 U.S. 729, 734 (2009) (emphasis added).

147. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

148. Plaintiffs have no adequate remedy at law for the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT III—VIOLATION OF THE EQUAL

PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION
(All Plaintiffs v. Government Defendants)

149. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1–118 above as if fully set forth herein.

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

151. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, is an unconstitutional abridgment of Plaintiffs' right to equal protection under the law, is not neutral, and specifically targets Plaintiffs' sincerely held religious beliefs for discriminatory and unequal treatment.

152. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, is an unconstitutional abridgement of Plaintiffs' right to equal protection because it permits the State to treat Plaintiffs differently from other similarly situated healthcare workers on the basis of Plaintiffs' sincerely held religious beliefs.

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

154. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, is intended to inhibit and punish the exercise of Plaintiffs sincerely held religious beliefs and objections to the COVID-19 vaccines.

155. The Governor's COVID-19 Vaccine

Mandate, on its face and as applied, creates a system of classes and categories that permit the Governor to accommodate the exemptions of some healthcare workers while denying consideration of those individuals requesting religious exemptions to the COVID-19 Vaccine Mandate.

156. By removing statutorily required religious accommodations from consideration in New York, the Governor has created and singled out for disparate treatment a specific class of healthcare employees (*i.e.*, religious objectors to COVID-19 vaccinations) as compared to other similarly situated healthcare workers (*i.e.*, those with medical exemption requests).

157. There is no rational, legitimate, or compelling interest in the Governor's COVID-19 Vaccine Mandate's application of different standards to the similarly situated field of healthcare workers.

158. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, discriminates between religion and nonreligion by allowing certain, nonreligious exemptions to the COVID-19 Vaccine Mandate while prohibiting religious exemptions to the same mandate for the same similarly situated field of healthcare workers.

159. The Governor's COVID-19 Vaccine Mandate and New York's removal of religious exemptions for healthcare workers in New York, on their face and as applied, are each a "status-based enactment divorced from any factual context" and "a classification of persons undertaken for its own sake," which "the Equal Protection Clause does not permit." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

160. The Governor's COVID-19 Vaccine

Mandate, on its face and as applied, "identifies persons by a single trait [religious beliefs] and then denies them protections across the board." *Id.* at 633.

161. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, along with the State Department of Health's removal of religious exemptions from immunizations—while keeping medical exemptions as perfectly acceptable in the healthcare field—results in a "disqualification of a class of persons from the right to seek specific protection [for their religious beliefs]." *Id.*

162. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek [an exemption from the COVID-19 Vaccine Mandate] is itself a denial of equal protection of the laws in the most literal sense." *Id.* The Governor's COVID-19 Vaccine Mandate, on its face and as applied, and the State Department Of Health's removal of religious exemptions for healthcare workers, are each such a law.

163. The Governor's COVID-19 Vaccine Mandate, on its face and as applied, has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

164. Plaintiffs have no adequate remedy at law to protect the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT IV—VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964,

42 U.S.C. § 2000e, *et seq*.
(All Plaintiffs v. Private Employer Defendants)

165. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1–118 above as if fully set forth herein.

166. Title VII prohibits discrimination against employees on the basis of their religion. 42 U.S.C. §2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin ").

167. Title VII defines the protected category of religion to include "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). Moreover, as the EEOC has made clear, Title VII's protections also extend nonreligious beliefs if related to morality, ultimate ideas about life, purpose, and death. *See EEOC*, *Questions and Answers: Religious Discrimination in the Workplace* (June 7, 2008), https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace ("Title VII's protections also extend to those who are discriminated against or need accommodation because they profess no religious beliefs."); (*Id.* ("Religious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.' Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely

because they are strongly held. Rather, religion typically concerns 'ultimate ideas' about 'life, purpose, and death.'").)

168. Each of Defendants New York-Presbyterian, WMC Health, and Trinity Health is an employer within the meaning of Title VII and employs more than 15 employees.

169. By refusing to even consider, much less grant, any religious accommodation or exemption to the Governor's COVID-19 Vaccine Mandate, Defendants have discriminated against Plaintiffs' sincerely held religious beliefs with respect to the terms, conditions, and privileges of employment.

170. By threatening to fire Plaintiffs unless they violate their sincerely held religious beliefs and comply with the Governor's COVID-19 Vaccine Mandate, Defendants have unlawfully discriminated against Plaintiffs by discharging them or constructively discharging them for the exercise of their religious beliefs.

171. Each Plaintiff has a bona fide and sincerely held religious belief against the COVID-19 vaccines, as outlined above.

172. Plaintiffs' sincerely held religious beliefs conflict with Defendants' policies in collusion with the Governor to impose the Governor's COVID-19 Vaccine Mandate and to withhold from Plaintiffs any consideration of sincerely held religious objections.

173. Plaintiffs have all raised their sincerely held religious beliefs with their respective Defendant employers, have brought their objections and their desire for a religious accommodation and exemption to the respective Defendants' attention, and have

requested a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

174. Employer Defendants' termination, threatened termination, denial of benefits, and other adverse employment actions against Plaintiffs are the result of Plaintiffs' exercise of their sincerely held religious beliefs.

175. Employer Defendants' refusal to consider or grant Plaintiffs' requests for accommodation and exemption from the Governor's COVID-19 Vaccine Mandate has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

176. Plaintiffs have no adequate remedy at law for the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

COUNT V—DEFENDANTS HAVE ENGAGED IN AN UNLAWFUL CONSPIRACY TO VIOLATE PLAINTIFFS' CIVIL RIGHTS IN VIOLATION OF 42 U.S.C. § 1985
(All Plaintiffs v. All Defendants)

177. Plaintiffs hereby reallege and adopt each and every allegation in paragraphs 1–118 above as if fully set forth herein.

178. Section 1985 provides a cause of action against public and private defendants who unlawfully conspire to deprive an individual of his constitutionally protected liberties. 42 U.S.C. § 1985(3) ("If two or more persons in any State or

Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws").

179. The elements of the claim of conspiracy to violate civil rights under § 1985 include (1) a conspiracy, (2) a conspiratorial purpose to deprive the plaintiff of the equal protection of the laws or of a constitutionally protected liberty, (3) an overt act in furtherance of the conspiracy, and (4) a deprivation of a constitutionally protected right. *See Mian v. Donaldson, Lukin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993).

180. The Governor's COVID-19 Vaccine Mandate, combined with the Defendant employers' agreements to enforce its provisions and revoke any potential for a religious exemption for healthcare workers in New York, constitutes a conspiracy to violate Plaintiffs' civil and constitutional rights.

181. The Governor and Commissioner Zucker have both reached an agreement with the Defendant employers to deprive all healthcare workers in New York with any exemption or accommodation for the exercise of their sincerely held religious beliefs.

182. The Governor and Defendant employers have reached an express or tacit agreement to mandate COVID-19 vaccines for their employees while explicitly agreeing to deprive them of their right to request and receive an accommodation and exemption for their sincerely held religious beliefs.

183. The purpose behind the Governor's COVID-19 Vaccine Mandate, the State Department of Health's removal of the option for a religious

exemption in the State of New York, and all Defendants' agreement to blatantly ignore federal law's requirement that employees be provided with a religious exemption and accommodation for sincerely held religious beliefs is based upon a conspiratorial purpose to deprive Plaintiffs of their rights to the exercise of their religious beliefs and equal protection.

184. Defendants' conspiratorial agreement has been made express by their stating that no religious exemptions would be permitted and by informing Plaintiff employees of the legally ridiculous positions that Title VII does not apply in New York and that federal law does not supersede New York law when it comes to the Governor's COVID-19 Vaccine Mandate.

185. The Governor has engaged in an overt act in furtherance of the conspiracy to deprive Plaintiffs of their civil rights by mandating that all healthcare workers receive a mandatory COVID-19 vaccine and by failing to recognize that federal law provides each of these employees with the option to request and receive a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

186. Defendant employers have each engaged in an overt act in furtherance of the conspiracy to deprive Plaintiffs of their civil rights by refusing to consider, evaluate, or accept any Plaintiff's request for a religious exemption and accommodation from the COVID-19 Vaccine Mandate.

187. By denying Plaintiffs their requested religious exemption and accommodation and threatening termination and discharge from employment because of the exercise of their sincerely

held religious beliefs, Defendants' conspiracy has resulted in a deprivation of Plaintiffs' constitutionally protected rights to free exercise of religion.

188. By denying Plaintiffs their requested religious exemption and accommodation and threatening termination and discharge from employment because of the exercise of their sincerely held religious beliefs while at the same time granting and accepting the preferred category and class of medical exemptions for similarly situated healthcare workers, Defendants' conspiracy has resulted in a deprivation of Plaintiffs' constitutionally protected rights to equal protection of the laws under the Fourteenth Amendment.

189. Defendants' refusal to consider or grant Plaintiffs' requests for accommodation and exemption from the Governor's COVID-19 Vaccine Mandate has caused, is causing, and will continue to cause irreparable harm and actual and undue hardship on Plaintiffs' sincerely held religious beliefs.

190. Plaintiffs have no adequate remedy at law for the continuing deprivation of their most cherished constitutional liberties and sincerely held religious beliefs.

WHEREFORE, Plaintiffs respectfully pray for relief against Defendants as hereinafter set forth in their prayer for relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for relief as follows:

A. That the Court issue a temporary restraining order restraining and enjoining Defendants, all of their officers, agents, employees, and attorneys, and all other persons in active concert

or participation with them, from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with the Governor's COVID-19 Vaccine Mandate such that:

i. Defendant Governor Hochul will not enforce her unconstitutional mandate that John Doe 1 require his employees to receive a COVID-19 vaccine and refuse to provide a religious exemption or accommodation for such employees in violation of John Doe 1's and his employees' sincerely held religious beliefs;

ii. Defendants immediately cease in their refusal to consider, evaluate, or accept Plaintiffs' requests for exemption and accommodation for their sincerely held religious beliefs;

iii. Defendants will immediately grant Plaintiffs' requests for religious exemption and accommodation from the Governor's COVID-19 Vaccine Mandate, provided that Plaintiffs agree to abide by reasonable accommodation provisions such as masking, testing, symptom monitoring, and reporting;

iv. Defendants will immediately cease threatening to discharge and terminate Plaintiffs from their employment for failure to accept a COVID-19 vaccine that violates their sincerely held religious beliefs; and

v. Defendants will immediately cease proclaiming that federal law does not apply in New York or otherwise declining Plaintiffs' requests for religious exemption on the basis that Title VII does not apply in the State of New York;

B. That the Court issue a preliminary injunction pending trial, and a permanent injunction

upon judgment, restraining and enjoining Defendants, all of their officers, agents, employees, and attorneys, and all other persons in active concert or participation with them, from enforcing, threatening to enforce, attempting to enforce, or otherwise requiring compliance with the Governor's COVID-19 Vaccine Mandate such that:

i. Defendant Governor Hochul will not enforce her unconstitutional mandate that John Doe 1 require his employees to receive a COVID-19 vaccine and refuse to provide a religious exemption or accommodation for such employees in violation of John Doe 1's and his employees' sincerely held religious beliefs;

ii. Defendants immediately cease in their refusal to consider, evaluate, or accept Plaintiffs' requests for exemption and accommodation for their sincerely held religious beliefs;

iii. Defendants will immediately grant Plaintiffs' requests for religious exemption and accommodation from the Governor's COVID-19 Vaccine Mandate, provided that Plaintiffs agree to abide by reasonable accommodation provisions such as masking, testing, symptom monitoring, and reporting;

iv. Defendants will immediately cease threatening to discharge and terminate Plaintiffs from their employment for failure to accept a COVID-19 vaccine that violates their sincerely held religious beliefs; and

v. Defendants will immediately cease proclaiming that federal law does not apply in New York or otherwise declining Plaintiffs' requests for religious exemption on the basis that Title VII

does not apply in the State of New York;

C. That this Court render a declaratory judgment declaring that the Governor's COVID-19 Vaccine Mandate, both on its face and as applied by Defendants is illegal and unlawful in that it purports to remove federal civil rights and constitutional protections from healthcare workers in New York, and further declaring that

i. in imposing a mandatory COVID-19 vaccine without any provision for exemption or accommodation for sincerely held religious beliefs, the Governor has violated the First Amendment to the United States Constitution by imposing a substantial burden on Plaintiffs' sincerely held religious beliefs while granting exemptions to similarly situated healthcare workers with medical exemptions to the COVID-19 Vaccine Mandate;

ii. by refusing to consider or evaluate Plaintiffs' requests for religious exemption and accommodation, Defendants have violated Title VII and other federal protections for Plaintiffs in New York and have blatantly ignored the Supremacy Clause's mandate that federal protections for religious objectors in New York supersede and apply with full force in New York;

iii. by terminating, threatening to terminate, or otherwise taking adverse employment action against Plaintiffs on the basis of their sincerely held religious beliefs, Defendants have violated Title VII of the Civil Rights Act of 1964;

iv. that by creating a class system in which religious objectors in New York are disparately and discriminatorily denied the option of receiving an exemption or accommodation while simultaneously

allowing and granting exemptions for other nonreligious reasons, Defendant Governor Hochul has violated Plaintiffs' rights to equal protection of the law; and

v. that by entering into an agreement to unlawfully deprive Plaintiffs of their right to request and receive a religious exemption and accommodation from the Governor's COVID-19 Vaccine Mandate, Defendants have conspired to violate Plaintiffs' civil rights to free exercise of religious beliefs and equal protection of the law;

D. That this Court award Plaintiffs damages in an amount to be proven at trial, including damages for adverse employment action resulting in lost wages and other compensatory damages, and further including nominal damages in the absence of proof of damages;

E. That this Court adjudge, decree, and declare the rights and other legal obligations and relations within the subject matter here in controversy so that such declaration shall have the full force and effect of final judgment;

F. That this Court retain jurisdiction over the matter for the purposes of enforcing the Court's order;

G. That this Court award Plaintiffs the reasonable costs and expenses of this action, including a reasonable attorney's fee, in accordance with 42 U.S.C. § 1988; and

H. That this Court grant such other and further relief as the Court deems equitable and just under the circumstances.