

No.

**In The
Supreme Court of the United States**



Rachel Maniscalco, Evelyn Arancio,
Diana Salomon, Corine Lynch,

Petitioners,

v.

New York City Department of Education,
Meisha Porter, In Her Official Capacity As Schools
Chancellor of The New York City Department
of Education, City of New York, Bill De Blasio,
Department of Health And Mental Hygiene,
David Chokshi, In His Official Capacity As
The Commissioner of The Department
of Health and Mental Hygiene,

Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents through an Executive Order demanded COVID-19 vaccinations for all public-school employees, including teachers. Those who did not comply have been suspended without pay for a year and are not allowed to work anywhere else.

Question presented: Does the Executive Order violate the substantive due process rights of New York City public-school teachers whose sole employer is the DOE by preventing them from practicing their given profession?

PARTIES TO THE PROCEEDING

Petitioners are Rachel Maniscalco (“Maniscalco”), Evelyn Arancio (“Arancio”), Diana Salomon (“Salomon”), and Corinna Lynch (“Lynch”).

Respondents who were respondents below are the New York City Department of Education (the “DOE”), Chancellor Meisha Porter (“Porter”), the City of New York (the “City”), Mayor Bill de Blasio (“de Blasio”), the Department of Health and Mental Hygiene (“DOHMH”), and Commissioner David Chokshi (“Chokshi”).

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28 U.S.C. § 1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINION BELOW

The Summary Order of the Second Circuit is reproduced in the appendix hereto at Pet. App. A-1. The decision of the United States District Court for the Eastern District of New York (the “District Court Order”) is also reproduced in the appendix at Pet. App. B-1.

JURISDICTION

The Second Circuit entered a Summary Order on October 15, 2021. This petition is timely filed. The Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The August 23 Order at issue is included in the appendix at Pet. App. D-1.

INTRODUCTION

In a case of first impression, Petitioners, who are public-school teachers, respectfully request the Court identify the right of public-school teachers to practice their profession. Multiple lower courts have recognized the right to practice a profession and Respondents conceded below that public-school teachers have such a right. Nonetheless, Respondents forced hundreds of public-school teachers out of work through an Executive Order (“August 23 Order”)

imposing a COVID-19 vaccine mandate. Workers who didn't get vaccinated by October 1, 2021, were suspended without pay for one year. The harm Respondents have caused is immediate and obvious to Petitioners Rachel Maniscalco, Evelyn Arancio, Diana Salomon, Corinne Lynch, and the Class of hundreds of public-school teachers who didn't assent to the vaccine edict. Because the DOE is the *sole* employer of public-school teachers, Respondents have deprived Petitioners and the hundreds of involuntarily furloughed DOE public-school teachers of their fundamental right to practice their respected professions. Consequently, the year-long unpaid suspension is a violation of their substantive due process rights.

Accordingly, Petitioners respectfully request that the Court overturn the Second Circuit's Summary Order (Pet. App. A-1) and issue a preliminary injunction preventing further enforcement of Respondents' August 23 Order.

STATEMENT OF THE CASE

I. Respondents Designed An Executive Order To Discriminate Against Public-School Teachers

On July 26, 2021, de Blasio announced (the "July 26 Order") that the City would require all municipal workers to receive one dose of the COVID-19 vaccine by the time schools reopened in mid-September. Pet. App. G-8. The July 26 Order allowed municipal workers to opt out of the vaccine mandate if they were tested weekly. Pet. App. G-9. The City announced that the July 26 Order would go into effect on September 13, 2021, the same day the City's public

schools would reopen for the year. *Id.*

On August 23, 2021, a mere 18 days before public schools would open to over a million students throughout the City—de Blasio announced that DOE employees would no longer be able to opt out of the vaccine mandate through weekly testing. *Id.* Instead, the City’s August 23 Order required all DOE employees to provide proof of a first dose of vaccination by September 27, 2021 [delayed to October 1, 2021, because of this litigation]. Mandated DOE employees included 148,000 school-based staff and central staff, as well as DOE contractors who work in school-based settings. *Id.*

Notably, the August 23 Order failed to provide an exception for those who don’t need the vaccine because they have natural immunity to COVID-19—a group including three of the Petitioners. *Id.* As the Fifth Circuit recently noted in staying President Biden’s executive order mandating employee vaccinations for companies with over 100 employees, such mandates “cannot prevent vaccinated employees from spreading the virus in the workplace...” *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 604 n.19 (5th Cir. 2021); see also *The Possibility of COVID-19 after Vaccination; Breakthrough Infections*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthroughcases.html> (last visited Nov. 22, 2021) (“A vaccine breakthrough infection happens when a fully vaccinated person gets infected with COVID-19...[p]eople with vaccine breakthrough infections may spread COVID-19 to others.”).

The Fifth Circuit's decision involves a stay of a presidential executive order applying to private companies as opposed to here, a request for a preliminary injunction of a mayor's executive order. Yet, the similarities between President Biden's mandate and De Blasio's are striking.

We next consider the necessity of the Mandate. The Mandate is staggeringly overbroad...the Mandate fails to consider what is perhaps the most salient fact of all: the ongoing threat of COVID-19 is more dangerous to some employees than to other employees. Likewise, a naturally immune unvaccinated worker is presumably at less risk than an unvaccinated worker who has never had the virus. The list goes on, but one constant remains—the Mandate fails almost completely to address, or even respond to, much of this reality and common sense.

BST Holdings, 17 F.4th at *604. Similarly, Respondents created a one-size fits all policy that deprived Petitioners of their right to practice their given profession.

II. The Arbitrator's Decision Made Clear The August 23 Order's Imminent Harm To Public-School Teachers

On September 10, 2021, in the dispute between the DOE and the teachers' unions that predated this litigation, an arbitrator modified the DOE's August 23 Order. Pet App. E-1. The arbitrator adjusted the August 23 Order to include certain medical and religious exemptions. Pet. App. E-9. The arbitrator also set forth the following guidelines for

unvaccinated teachers who did not meet the new exemptions.

- A. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be *placed by the DOE on leave without pay* effective September 28, 2021, or upon denial of appeal, which is later, through November 30, 2021.
- B. Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes.
- C. As with other DOE leaves without pay, *employees are prohibited from engaging in gainful employment during the leave period.*

Pet. App. E-15–16 (emphases added). As a result, those who didn't qualify for a medical or religious exemption, were forced into unpaid leave.

REASONS FOR GRANTING THE PETITION

The Second Circuit erred in denying Petitioners' motion for preliminary injunctive relief because Petitioners satisfied each of the elements necessary for such relief.

I. Petitioners Have Stated A Viable Due Process Claim Because Of Their Inability To Pursue Their Profession

Petitioners have sufficiently shown the likelihood of a violation of a substantive due process claim

because there is a complete or partial inability to pursue their profession. A violation of one's fundamental right to pursue an occupation exists and gives rise to a due process claim where there is less than a complete ability to practice one's profession. *See Valmonte v. Bane*, 18 F. 3d 992, 1001 (2d Cir. 1994) (plaintiff sufficiently stated substantive due process claim by alleging that she would be unable to get a job in the child-care field if her name was listed on a register of child abusers—as required by statute, and even though employers retained the ability to hire plaintiff); *see also San Jacinto Say & Loan v. Kacal*, 928 F. 2d 697, 702 (5th Cir. 1991) (holding that plaintiff had a liberty right to operate a legitimate business, free from arbitrary deprivation by state officials and finding a viable substantive due process claim where state officials' conduct sought to significantly alter plaintiff's liberty interests in her business).

The August 23 Order provides that Petitioners will be “placed on leave by the DOE without pay” [delayed to October 1 because of this litigation] (Pet. App. E-15). The unpaid forced leave gave rise to Petitioners' due process claim. As Petitioners argued in the district court, public-school teaching and private-school teaching are not comparable professions. The DOE in New York City—unlike any private-school employer—is the largest public-school system in the United States, with over 1.1 million students taught in more than 1,800 separate schools. Moreover, New York City has different licensing requirements for public-school and private-school teachers. Critically, unlike private schools which can set their own standards, anyone teaching in a New

York City public-school must possess a New York State teacher certification. *See How to Apply*, NYC DEPT. OF EDUC., <http://teachnyc.net/how-to-apply/application-and-hiring-process> (last visited Nov. 22, 2021).

To be sure, as the district court's Order made clear, there is no right to public employment (Pet. App. B-7). The district court, however, failed to acknowledge Petitioners' *right* to practice a profession and the authority the district court relied on for support is inapposite. *See Martin v. Town of Brattleboro*, No. 07-cv-260, 2008 WL 4416283, at *2 (D. Vt. Sept. 24, 2008) (finding that there is no right to public employment—but silent on whether there is a right to practice a specific occupation).

Here, Petitioners are not seeking employment with a particular employer. Instead, Petitioners are seeking recognition from the Court of their right to work as public-school teachers because the DOE—like many school districts across the country—is the *sole* employer of public-school teachers. Accordingly, forcing them to choose between a job and their job is a violation of their substantive due process rights as it denies them the right to practice their profession.

While a temporary interruption of work is not actionable, the mandate here would have a permanent effect. This mandate is open-ended, where if a teacher does not get vaccinated, he or she will never be able to return to work. The district court in its decision failed to address the permanent effect on Petitioners. The only thing temporary is that they will receive health care benefits for a year until September 2022, after which they will lose the health benefits and be fully

separated from the DOE. While the district court's Order identified alternative occupations that Petitioners may pursue—such as adult or continuing education or private tutoring (Pet. App. B-7)—these are fundamentally different occupations than that of a public-school teacher. In oral argument before the district court, Respondents while denying any substantive due process violation admitted that “there is a right to practice your profession.” Pet. App. C-17. Despite this admission, the district court and the Second Circuit with its summary order failed to acknowledge the right to practice one's profession.

Furthermore, substantive due process protection prohibits the government from taking action that “interferes with rights implicit in the concept of ordered liberty” or “shocks the conscience.” *United States v. Salerno*, 481 U.S. 739, 746 (1987).

First, the August 23 Order interferes with Petitioners' deeply rooted liberty interests. Specifically, Respondents have deprived Petitioners the right to work as public-school teachers, their chosen profession.

Second, Respondents' actions shock the conscience in that they have forced Petitioners to choose between an intensely personal medical decision or unpaid leave. And, while on unpaid leave, Petitioners cannot work or earn a livelihood elsewhere.

Third, and even more shocking is that the City and DOE have suspended and will terminate hundreds of employees who, until a few weeks ago, worked throughout the lockdowns both virtually and in-person. Indeed, these public-school teachers, to make

sure their students didn't fall behind, worked remotely during lockdowns in the spring of 2020, in-person in the fall of 2020, and in-person from January through June 2021. Accordingly, Petitioners have stated a viable substantive due process claim.

II. Petitioners Are Irreparably Harmed By The August 23 Order And The Injunction Is In The Public Interest

A. Petitioners Are Irreparably Harmed By The August 23 Order

Petitioners have suffered irreparable harm because of the August 23 Order. To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuous harm which cannot be adequately redressed by final relief on the merits and for which money cannot provide sufficient compensation. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (quoting *N.Y. Pathological & X-Ray Labs., Inc. v. INS*, 523 F.2d 79, 81 (2d Cir. 1975)). Petitioners have established such irreparable harm.

The district court correctly recognized that “[t]here is no doubt DOE employees who refuse the vaccine may be harmed by the mandate.” Pet. App. B-9. Petitioners identified at least three irreparable harms in their Amended Complaint: losing their livelihood (Pet. App. G-5); being unable to pursue their profession (*id.*); and forfeiting their seniority and rank (Pet. App. G-14). The August 23 Order, as it applies to Petitioners, states “[n]o later than September 27, 2021 [amended to October 1 due to this litigation], or prior to beginning employment...DOE staff must provide

proof of vaccination to the DOE.” Moreover, the Arbitrator’s Award provided that unvaccinated employees will be placed on unpaid leave and are prohibited from engaging in gainful employment during the leave period. Pet. App. E-15–16.

While the Arbitrator’s Award carved out certain exceptions to the vaccine mandate, it did not address Petitioners’ grievances with the August 23 Order. Specifically, there is no exception to the vaccine mandate for those who have developed antibodies to COVID-19 and thus have natural immunity, such as three of the Petitioners. Furthermore, all four Petitioners have lost their livelihoods as they are without pay and cannot work anywhere else for a year. Critically, they are currently unable to serve the children of New York City. And lastly, once terminated, they will lose their seniority and rank respective to those who capitulated to the vaccine mandate. The harm is neither remote nor speculative; Petitioners have been irreparably harmed by the City’s August 23 Order.

The teachers are irreparably harmed in almost the same manner as the Fifth Circuit described of the petitioners in *BST Holdings, L.L.C. v. OSHA*.

It is clear that a denial of the petitioners’ proposed stay would do them irreparable harm. For one, the Mandate threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s). For the individual petitioners, the loss of constitutional freedoms “for even minimal periods of time . . .

unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”).

BST Holdings, 17 F.4th at *604.

B. The Injunction Is In The Public Interest

The requested injunction is in the public interest because it would allow Petitioners to continue to serve the City and DOE as educators and maintain their employment, benefits, and ranking. “[T]he court must ensure that the ‘public interest would not be disserved’ by the issuance of a preliminary injunction.” *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

As Respondents have acknowledged, unvaccinated DOE workers have been “immediate[ly] suspen[ded].” Pet. App. C-30. While COVID-19 posed a public health crisis, nevertheless, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). Moreover, before the August 23 Order, schools in New York City were open, in-person, full time or virtually full time, throughout the prior school year without any reported so-called super spreader events or even reports of high infection rates. (Pet. App. G-5.) By July 15, 2021, the State of New York, which includes New York City, had even

lifted almost all COVID-19 related mandates and had a fireworks celebration over the Hudson River in lower Manhattan. Then-Governor Andrew Cuomo stated the following.

472 days ago, it was impossible to fathom that 70 percent of New York's adults would have received their first COVID vaccination by this point. What felt years away has been accomplished in less than one. As we celebrate lifting restrictions and resuming our reimagined normal, we also reflect on the hard work of New York State's essential workers and we remember those we lost. New Yorkers have always been tough, but this last year has proven just how tough they are. Congratulations, New Yorkers, on all that your hard work has accomplished.

13 State Landmarks to be Lit Blue and Gold, NEW YORK STATE, <https://www.governor.ny.gov/news/governor-cuomo-announces-state-landmarks-be-lit-blue-and-gold-and-firework-displays-across> (last visited Nov. 22, 2021).

Yet, just over a month later, with the August 23 Order, Respondents turned back the clock as if it were March and April 2020 when schools and society were shut down. The vaccine mandate was and is unnecessary because New York City never returned or has come close to going back to the terrible conditions of March and April 2020. At that time, the City led the country in COVID-19 hospitalizations and deaths—the

vast majority of which were suffered by elderly in nursing homes, not schoolchildren or schoolteachers. As noted above, before widespread vaccine distribution in April 2021, these teachers worked remotely during lockdowns in 2020, in-person in the fall of 2020, and in-person from January through June 2021. And there were no so-called super spreader episodes forcing any system-wide school shutdown. Instead of rewarding Petitioners and other public-school employees for their diligence, courage, and hard work in helping the City overcome the harm inflicted upon children by the school shutdowns, Respondents shockingly chose instead to deny Petitioners their right to practice their profession.

For similar reasons, a stay is firmly in the public interest. From economic uncertainty to workplace strife, the mere specter of the Mandate has contributed to untold economic upheaval in recent months. Of course, the principles at stake when it comes to the Mandate are not reducible to dollars and cents. The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions—even, or perhaps particularly, when those decisions frustrate government officials.

BST Holdings, 17 F.4th at *604.

In a glaring omission, the district court did not take into account the harm the August 23 Order has

caused the public-education system. Indeed, staff shortages have created more problems for public-school children. Melissa Klein, *NYC Students Go Without Mandated Services Because of Staffing Shortage*, NEW YORK POST, <https://nypost.com/2021/10/09/staffing-shortages-cause-create-chaos-for-some-nyc-kids/> (last visited Nov. 22, 2021).

Therefore, after nearly two years of a continued emergency state, this Court should grant the injunction to prevent Respondents, who run the largest public-school system in the country, from further disrupting the education of hundreds of thousands of students who desperately need in-person teachers. And the Court should grant the injunction to protect our constitutional structure and the liberty of individuals to make intensely personal decisions according to their own convictions, and not have to decide between a job and the right to practice their profession. Petitioners' injunction, therefore, is in the public interest.

III. The Issues Raised By This Petition Are Of National Significance

This case presents the Court with the opportunity to address a critical constitutional issue—whether public-school teachers have a fundamental right to practice their profession. Furthermore, the Court can provide needed guidance to the lower courts regarding the flood of COVID-19 vaccine mandate-related cases already pending and expected. These cases involve the historically unique, but now sadly ubiquitous situation where City officials, as here, claim the authority to compel vaccinations based upon a

claimed precedent that is over a century old and inapposite to today. *See Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The public needs to have all qualified teachers who are available to teach in public-schools—as those teachers are the backbone to the economic and cultural success of the United States. The Court can provide support to public-school teachers employed by a *sole* employer in their respected cities—by finding that they have a fundamental right to practice their profession. The Court can provide this needed guidance by granting certiorari. As Respondents’ August 23 Order violates the substantive due process rights of public-school teachers, and since Respondents have conceded there is a fundamental right to teach in public schools, the substantive due process violation is plain.

CONCLUSION

For the foregoing reasons, Petitioners' petition for a writ of certiorari should be granted and judgment below reversed.

Respectfully submitted,

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