

No. 22A178

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

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ANTHONY MARCIANO,

*Applicant,*

*v.*

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

*Respondents.*

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ON EMERGENCY APPLICATION FOR WRIT OF INJUNCTION TO THE  
HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE  
SUPREME COURT OF THE UNITED STATES

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**MOTION FOR LEAVE TO FILE AND  
BRIEF OF *AMICUS CURIAE* DETECTIVES'  
ENDOWMENT ASSOCIATION, INC. IN  
SUPPORT OF APPLICANT**

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Detectives' Endowment Association, ("Amicus") moves the Court for leave to file an *amicus* brief in support of Applicant's Emergency Application for Writ of Injunction. This amicus motion is unopposed. (Applicant's counsel provided consent; Respondent's counsel stated they take no position.)

In support of this motion, Amicus assert that the District Court ruling: (1) failed to find New York City Vaccine Mandate ("Vaccine Mandate") lacked legal authority; (2) the District Court incorrectly ruled that compliance with the Vaccine Mandate is a new term and condition of employment of municipal employees and was an abuse of the Court's discretion; (3) and the Vaccine Mandate has been applied to municipal workers in an arbitrary and capricious fashion. Amicus request that this motion to file the attached amicus brief be granted.

Amicus further requests to make this motion without ten days' advanced notice to the parties. No counsel for a party authored this motion or the proposed amicus brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to fund the motion or brief.

Dated: September 28, 2022

Respectfully submitted,

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**IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Amicus Curiae is the Detectives' Endowment Association, Inc. ("DEA"), the designated collective bargaining agent for the more than 5,400 active Detectives employed by the New York City Police Department ("NYPD"). The DEA negotiates and advocates on Detectives' behalf with the City of New York, and the NYPD in matters of law, policy, terms and conditions of employment, and all matters relating to Detectives' general welfare. The core function of the DEA is to advocate for, and protect and advance the rights and interests of NYPD Detectives.

Applicant, Anthony Marciano, is a member of the DEA. This brief is submitted pursuant to leave requested by the unopposed accompanying motion. The parties have consented to this request.

**SUMMARY OF ARGUMENT**

Respondents' Vaccine Mandate lacked legal authority and was unlawfully applied to Applicant and other similarly situated New York City Police Department ("NYPD") members of service ("MOS") as well as

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1. In compliance with Supreme Court Rule 37 (6):

No counsel for a party authored this amicus brief in whole or in part, and no person other than the *Amicus*, its members or its counsel made a monetary contribution to fund the brief. Applicant's counsel has provided consent to the making of the motion and the filing of this *Amicus* brief. Respondent's counsel states they take no position to the making of the motion and the filing of this *Amicus* brief.

municipal employees of the City of New York. Neither the Mayor of the City of New York or the New York City Health Commissioner have the lawful authority to adversely impact Applicants' employment status in order to enforce the Vaccine Mandate. On September 23, 2022, a New York State Supreme Court Justice accepted this argument and voided the Vaccine Mandate as it has been applied to Police Benevolent Association ("PBA") members who are also NYPD Police Officers like the Applicant. (*see, Police Benevolent Association of the City of New York, Inc., et al. v. City of New York, et al.* Supreme Court , New York County, Sept. 23, 2022, Frank, J. Index No. 151531/2022) .<sup>2</sup>

Moreover, the Federal District Courts improperly ruled that compliance with the Vaccine Mandate is a new condition of employment for the Applicant and other similarly situated municipal employees. This was an abuse of discretion. The Court in *PBA, et al. v City of New York, et al. supra*, found that the Vaccine Mandate statutorily restricted the New York City Health Commissioner's authority to only imposing a monetary fine if an individual did not comply with a vaccination mandate.

In light of the recent New York State Supreme Court Decision and Order in *PBA, et al. v. City of New York, et*

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2. Respondents have appealed the *PBA, et al. v. City of New York, et al.* Decision and Order. However, by letter dated September 26, 2022 the Respondent's counsel has agreed to voluntarily refrain from placing any uniformed members of service on leave without pay or terminating them due to their non-compliance with the Vaccine Mandate until the Appellate Court decides the appeal. The Respondents are reserving all their rights and defenses and are not moving to reinstate any of the previously terminated municipal employees.



*al. supra*, the Federal District Courts incorrectly ruled the Vaccine Mandate is a new condition of employment. Additionally, given the recent arbitrary variations in the application and enforcement of the various COVID-19 Mandates, it is clear the Applicant and other municipal employees are a small population of New York City residents upon whom the Vaccine Mandate is being imposed in an arbitrary and capricious fashion. Based upon all the current laws and facts the Applicant's Emergency Application for a Writ of Injunction should be granted.

## ARGUMENT

### **A. Respondents Vaccine Mandate lacks legal authority and has been unlawfully applied to the Applicant and other similarly situated New York City municipal employees.**

The Applicant has argued that the New York City Vaccination Mandate<sup>3</sup> ("Vaccine Mandate") that went

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3. The "Vaccine Mandate" was an Order issued by the then Health Commissioner Chokshi on October 20, 2021. This Order was issued pursuant to his prior declaration of a public health emergency. The Order required COVID-19 vaccinations for City employees. The Order set 5:00PM on October 29, 2021 by which time City employees must provide proof to the agency they work or office where they work that either: (1) they have been fully vaccinated against COVID-19; or (2) they have received a single dose of the vaccine; or (3) they have received the final dose of a two-dose COVID-19 vaccine. City employees who were not in compliance with submitting the above proof would be excluded from their assigned work location beginning November 1, 2021, unless they had requested a reasonable accommodation to be excluded from the COVID-19 vaccination requirements for either

into effect on October 20, 2021 and that is exclusively only applied to all New York City municipal employees is *void ad initio*. As argued on Applicant's brief the Vaccine Mandate violates the separation of powers under the New York State Constitution, preemption by state law and federal law, substantive and procedural due process violations pursuant to 42 U.S.C. § 1983.

Here two Federal District Courts found that the New York City Vaccine Mandate was not only lawful, but was a new term and condition of employment for all New York City municipal employees like Applicant. However, the Federal District Court's line of reasoning is completely flawed in its interpretation of New York State and New York City law.

In both *Marciano v. de Blasio*, 2022 WL 678779 (SDNY), the case at bar, and *Garland v. New York City Fire Department*, 574 F. Supp. 3d 120 (2021 EDNY), the District Courts both incorrectly found that a city employee's failure to comply with the Vaccine Mandate was the substantive equivalent of that employee's failure to comply with the residency requirements as an essential condition of continuing employment with the City of New York. It was these two Federal District Courts that found compliance with the Vaccine Mandate was in fact a new condition of employment and that the New York City Mayor and his Health Commissioner could enforce this non-compliance with the Vaccine Mandate by terminating a tenured Civil Service employees' employment.

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religious or medical reasons. (*see*, Appendix 7 of the related Emergency Application for Writ of Injunction, Anthony Marciano, Applicant/Petitioner)

Respondents argued to the District Courts that the New York City Health Commissioner had the authority to declare a health emergency, or to establish a condition to be admitted to school, that requires vaccination against certain virus' was a legitimate exercise of the commissioner's authority since 1904. (*see, Marciano v. de Blasio, supra*, citing *Garcia v. NYC Dept. of Health and Mental Hygiene*, 31 N.Y. 3d 601 (N.Y. 2018); *C.F. v. NYC Dept. of Health and Mental Hygiene*, 191 A.D. 3d 52 (2020)). However, the case law presented set out the history of the Commissioner and the Board of Health's authority to mandate vaccination for specific health reasons and emergencies. These prior vaccination mandates did not violate any liberty interest secured by the Fourteenth Amendment of the United States or the New York State Constitution (*see, Viemister v. White*, 179 N.Y. 235, 240 (1904); *Jacobson v. Massachusetts*, 179 US 11 (1905)). But, both courts failed to acknowledge that the prior case law applied to the vaccination mandates for only minor children.

Both District Court decisions in *Marciano v. de Blasio, supra*, and *Garland v. NYC Fire Department, supra*, incorrectly extended the vaccine mandate to adult employees of the City of New York.

The *Marciano* and the *Garland* courts compounded their error in applying the vaccine mandate to adult municipal employees by then finding that the compliance with the vaccine mandate was a new term of employment. The District Courts incorrectly accepted the Respondents argument that the vaccine mandate was the substantive equivalent of an employee failing to comply with the residency requirement an essential condition of continuing

employment to live within a statutory defined geographic area either with the confines of the city of New York or nearby counties in the State of New York.

The residency requirement for tenured Civil Service employees generally requires that the employee live within a certain geographic area, such as the five boroughs of the City and certain counties contiguous to the City of New York. Potential employees are aware of this term and condition of employment before they accept the offer of employment. The same cannot be said about having to be vaccinated against COVID-19 at this time. Under New York City, N.Y., Administrative Code § 12-120 the employee must be afforded due process to refute the allegation before his dismissal from employment. The decision also clearly states that the employee, prior to accepting employment, was placed on notice of the terms and conditions of the “Residency Requirement” and that his failure to comply would be a forfeiture of employment. The employee was provided written notice of the “Residency Requirement,” which he signed and notarized. Respondent cannot show any similar notice, term or condition of employment that makes the Mandate applicable to tenured Civil Service employees.

The wrongly decided and incorrect extension of the Vaccine Mandate to adult municipal employees by two United States District Court Judges makes the compliance with the Vaccine Mandate a condition of employment. New York City Civil Service Law protected employees who cannot be subject to summary termination for failure to comply with the Vaccine Mandate. While the Health Commissioner and the Board may have legitimate legal authority and powers to require vaccination during health

emergencies, or to require vaccinations for attending school, absent some legislative authority to displace the Civil Service Laws, the Vaccine Mandate cannot be found to be a new legal term or condition of employment or apply to adults. The authority of the Commissioner and Board cannot be found to extend to a tenured, and competent adult Civil Service municipal employees of New York City.

The absence of any legal authority for the Vaccine Mandate is evident by former Mayor deBlasio's Executive Order No. 75, where for the first time it required all new city employees to be vaccinated against COVID-19, effective August 16, 2021. The Mayor's subsequent use of Executive Order 78 to extend the Vaccine Mandate to tenured Civil Service employees, based upon the Health Commissioner's and the Board of Health's Vaccination Order, is illegal and is insufficient legal vehicle to displace the long-established Civil Service Laws.<sup>4</sup>

Both Courts in *Marciano* and *Garland* abused their discretion, they should not have found the Vaccine Mandate applied to adults and they should not have found the Vaccine Mandate created a new term of employment that all New York City municipal employees must comply with or face termination or forced resignation or retirement.

**B. New York State Supreme Court Justice Lyle Frank rules the Vaccine Mandate is invalid.**

The PBA challenged the Respondents' authority to use adverse employment consequences to enforce the

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4. <https://www1.nyc.gov/assets/home/downloads/pdf/executive-orders/2021/eo-75.pdf>

Vaccine Mandate.<sup>5</sup> The PBA also challenged the line of case law that incorrectly originated in the United States District Court rulings of *Marciano* and *Garland*, that the Vaccine Mandate created a new term and condition of employment for New York City municipal employees, and they could now be terminated for failure to get a COVID-19 vaccination.

Justice Frank for the first time looked behind the curtains of the arguments Respondents made to the Federal District Court Judges. Justice Frank found that while the New York City Health Commissioner had the legal authority to issue a Vaccine Mandate, the Commissioner's enforcement authority was limited to the issuance of a monetary fine, pursuant to New York City Health Code §3.01 (d); 3.11 (a). The Commissioner's enforcement of the Vaccine Mandate did not extend beyond the issuance of a fine. Respondents failed to present or establish a legal basis or lawful authority for the Commissioner to exclude employees from the workplace and impose any other adverse employment action as an appropriate enforcement mechanism of the Vaccine Mandate.”

Justice Frank, unlike his Federal counterparts, was not persuaded by the Respondent's argument that the Vaccine Mandate created a new condition of employment similar to the residency requirement for New York City municipal employees pursuant to NYC Administrative Code 12-120 or in New York Public Officers Law § 3(1).

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5. The Detectives' Endowment Association, Inc. has also challenged the legality of the enforcement of the Vaccine Mandate, *see, DEA, et al. v. City of New York, et al.* New York State Supreme Court, New York County, Index No. 154609/2022

Justice Frank ruled the Vaccine Mandate did not create a new condition of employment. He found the argument by Respondents also lacked statutory authority, the Commissioner's alleged powers were not supported by any statute, rule or regulation.

Justice Frank ordered the Vaccine Mandate invalid as it could not impose a new condition of employment upon PBA members. Justice Frank's decision held; The Vaccine Mandate is invalid to the extent it sought an enforcement beyond a monetary sanction; in that PBA members were caused to be wrongfully terminated and/or placed on leave without pay as a result of non-compliance with the unlawful new condition of employment. He also directed that PBA members to be reinstated to the status they were at the date of the wrongful action. (*see, PBA, et al. v. City of New York, et al, supra, \*4*)

The fact that Respondents have immediately filed a Notice of Appeal to the intermediate appellate court in New York does not diminish the importance of Justice Frank's Decision and Order. He has found that the Vaccine Mandate does not have any legal authority supporting it. Justice Frank is like the little boy who in, The Emperor's New Clothes called out, "The Emperor has no clothes on!" Justice Frank's Decision and Order that the Health Commissioner has no legal authority to impact the employment status of members of the NYPD, like Applicant, and other municipal employees is significant. Prior to his decision the only case law to support this were the two incorrectly decided United States District Court decisions in *Marciano* and *Garland*.

It is respectfully requested that this Court should grant Applicants Emergency Application for a Writ of Injunction.

**C. The Vaccine Mandate has been applied to Applicant and other similarly situated New York City municipal employees in an arbitrary and capricious fashion.**

Prior to the development and distribution of various COVID-19 vaccines, New York City municipal employees, including DEA members such as Applicant Marciano did the best they could to avoid the deadly virus. DEA members had limited access to personal protective equipment. DEA members were told to report for duty unless they were showing symptoms of COVID-19. They could not work remotely.

On or about August 31, 2021, as the availability of vaccines became more wide-spread, the City instituted the Test or Vax policy. DEA members along with other City municipal employees were given the option of either getting vaccinated or submitting proof of a weekly negative test for COVID-19.

However the Test or Vax policy came to an end on October 20, 2021, when the mandatory vaccination policy came into force.

To date, approximately 1,750 City municipal employees have been terminated for failure to comply with the Vaccine Mandate. There have been numerous divergences from the Vaccine Mandate; the Mask Mandate, and proof of negative testing.



The continuation of the Mandate by the City as it applies to City municipal employees is arbitrary and capricious as it lacks a rational basis in light of the roll backs on the health and safety policies that became the norm during the COVID-19 Pandemic.

Examples of the City's COVID-19 health and safety roll backs:

- On or about March 7, 2022 the Mask Mandate for NYC school students over 5 years old was lifted (later in June 2022, the mask requirement was lifted for students between 2 and 5 years old);
- In the same March 7, 2022 Order, the mask requirement was lifted for gyms, indoor dining, and entertainment venues. Moreover the Proof of Vaccination to enter these locations and other venues was also lifted;
- On March 27, 2022, by Executive Order the Mayor exempted all New York resident professional athletes and performers from being vaccinated to work in New York City. This exemption treated multimillionaire professional athletes in the National Basketball Association (“NBA”), Major League Baseball (“MLB”), and National Hockey League (“NHL”) who are not vaccinated differently from every other employee in the public and private sector.
- On May 10, 2022, the City lifted the Vaccination Mandate for NYC High School students to allow unvaccinated students to attend their Prom or another school's event.

- On September 20, 2022, the City rescinded the Vaccine Mandate for private employees who worked in the City of New York effective November 1, 2022. Ending the Vaccine Mandate was essentially confirming the fact that since Mayor Adams took office on January 1, 2022, the City stopped inspections of private workplaces for compliance with this Vaccine Mandate and there was virtually no enforcements actions since January 2022.<sup>6</sup>
- Additionally, New York City student athletes would no longer have to show proof of vaccination to participate in organized sports. This new City policy is contrary to the Centers for Disease Control and Prevention (“CDC”) guidance which still considers contact sports to carry a high risk of getting and spreading the (COVID-19) virus.<sup>7</sup>
- However, there was no rollback of the Vaccine Mandate for DEA members or other New York City municipal workers.
- From October 21, 2021, when the Vaccine Mandate was announced there has been inconsistent treatment of government employees in the City of New York. New York State employees, including those who operate the mass transit system within the City, had been permitted to use the weekly test

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6. <https://www1.nyc.gov/office-of-the-mayor/news/686-22/mayor-adams-launches-covid-19-booster-campaign-additional-flexibility-nyc#/0>

7. <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-childcare-guidance.html>

for COVID-19 in lieu of vaccination, and as of June 7, 2022 that requirement has been lifted. Federal employees across the country have no Vaccine Mandate requirements as that Mandate has not been enforced since January 2022.

- On August 11, 2022, the CDC issued updated guidance relaxing COVID-19 recommendations. People who are exposed to the virus no longer need to quarantine at home regardless of their vaccination status.

The City's variation of how and when it shall apply the Vaccine Mandate on its face shows the arbitrary and capricious nature of all these mandates. However, such variations also demonstrate that there are multiple ways to find a balance between health and safety. The City's position offers no explanation why DEA members cannot be permitted to test regularly (weekly or more frequently). If NBA Brooklyn Nets star Kyrie Irving can be exempt from being vaccinated and not wear a mask in a stadium of close to 20,000, there is no rational or logical reason why a DEA member could not show a negative COVID-19 test result weekly and continue to work in her/his position. It is clear, Respondents are only mandating COVID-19 vaccinations for a small population, DEA members and other New York City municipal workers, while permitting the overwhelming majority of others to live and work without any vaccination requirements.

Moreover, in light of the September 23, 2022 Decision and Order of Justice Frank and the City of New York's decision to appeal his Decision and Order cries out for this Court to grant the Emergency Application for a Writ

of Injunction and return this matter to the Courts of the State of New York for adjudication.

### CONCLUSION

For the reasons stated herein, Applicant-Petitioner NYPD Detective Marciano's Emergency Application for Writ of Injunction should be granted, pending the outcome of his Appeal in the Second Circuit and as a result of the Decision and Order in the *PBA, et al. v. City of New York, et al.* decided on September 23, 2022.

Dated: New York, New York  
September 28, 2022

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