

No. 22A178

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY MARCIANO,
Applicant,

v.

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

On Emergency Application for Writ of Injunction
to the Honorable Clarence Thomas

**MOTION FOR LEAVE TO FILE
AND BRIEF OF *AMICUS CURIAE*
UNIFORMED FIREFIGHTERS ASSOCIATION**

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**Motion for Leave to File
Amicus Curiae Brief**

Uniformed Firefighters Association (“UFA”) moves this Court for leave to file the enclosed *amicus curiae* brief in support of Applicant Anthony Marciano’s emergency application for writ of injunction.

As the enclosed brief shows, UFA’s members face the same injury that Detective Marciano alleges. Furthermore, Detective Marciano’s arguments, supported by the other *amici* in this application, apply with equal force to UFA members. Additionally, UFA members who have been denied reasonable accommodation (“RA”) for religious objections to the vaccine face a denial of their rights to free exercise of religion.

Amicus further requests to make this motion without ten days’ advance notice to the parties.¹

¹ Per Rule 37.6: No party’s counsel authored this brief in whole or in part, neither has such counsel nor any party made a monetary contribution intended to fund the preparation or submission of this brief.

Interest of *Amicus Curiae*

UFA is the labor union representing all Fire Department of New York (“FDNY”) firefighters below the rank of Lieutenant as well as all FDNY fire marshals, marine pilots, marine engineers, and wipers.

UFA is not a party to Detective Marciano’s action, but its members have an equal stake in the outcome of his application. They are equally subject to Respondent City of New York’s COVID-19 vaccine mandate for public employees. They too face the choice of accepting the vaccine or losing their livelihood, but also face the denial of their right to free exercise of religion in Respondents’ summary denials of reasonable accommodation.

Summary of Argument

Detective Marciano's arguments apply with equal vigor to the Vaccine Mandate as unlawfully applied to UFA members. As citizens and public employees like Detective Marciano, UFA's members face no less a violation of their rights than does Detective Marciano from enforcement of the Vaccine Mandate.

UFA members face the same injury as Detective Marciano if this Court does not stay enforcement of the Vaccine Mandate. Where, as here, allegations of due process and constitutional violations are made, irreparable harm has been found to exist.

It is also clear that UFA members will suffer additional irreparable harm if this Court does not stay enforcement of the Vaccine Mandate, in the denial of their free exercise rights by refusing them reasonable accommodation.

Should a stay be denied and all of these members terminated, it will affect the safety and well-being of the other members who remain on the job—as well as the citizens who count on FDNY in emergencies. Respondents would face no substantial injury from a stay because they have already rolled back their vaccine mandates for virtually everyone else in New York City. The public interest also favors the stay, because it will

protect UFA members' free exercise rights pending a resolution of the action.

Argument**I. Detective Marciano's arguments apply with equal vigor to the Vaccine Mandate as unlawfully applied to UFA members**

UFA adopts Detective Marciano's arguments for staying enforcement of the Vaccine Mandate. UFA also adopts the arguments of *amici curiae* Detective's Endowment Association and Physicians for Informed Consent, put forth in their respective briefs.

As citizens and public employees like Detective Marciano, UFA's members face no less a violation of their rights than does Detective Marciano from enforcement of the Vaccine Mandate. The mounting evidence against the COVID-19 vaccines' efficacy at reducing the spread of the disease makes enforcement of the Vaccine Mandate arbitrary and capricious as to every municipal employee, including UFA's members.

II. Detective Marciano has shown entitlement to a stay of enforcement of the Vaccine Mandate

Under the traditional standard for a stay pending judicial review, a court considers four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 425–26 (2009). As shown below, all four factors militate in favor of the relief sought by Detective Marciano—and all the *amici*.

A. Detective Marciano is likely to succeed on the merits of his claim

Detective Marciano’s application shows that he is likely to succeed in enjoining enforcement of the Vaccine Mandate. In Section I.A. of his argument, he showed that any authority that Respondents may have had to compel vaccination is preempted by Federal law. In Section I.B., he showed that the mandate is arbitrary and capricious in targeting municipal employees with the millions of other inhabitants of New York City face no such burden. In Section I.C, he shows that the mandate violates

due process by failing to meet the burden imposed by the Fourteenth Amendment as well as New York law, particularly Public Health Law § 2120(3).

The brief of *amicus curiae* Physicians for Informed Consent further shows the merits of Detective Marciano's claim. Setting forth the considerable empirical evidence gathered in the past year, they show that the Vaccine Mandate is not reasonably related to its stated goal of reducing transmission of COVID-19.

The brief of *amicus curiae* Detectives' Endowment Association, Inc. shows that the course of concurrent challenges to the Vaccine Mandate augurs for Detective Marciano's eventual success. As DEA notes in Section B of their Argument, at least one New York Supreme Court justice has already ruled that the Vaccine Mandate is invalid.

B. UFA members face irreparable harm if this Court does not stay enforcement of the Vaccine Mandate

As shown below, UFA members and all other municipal employees who refuse the vaccine face the irreparable harm of termination of their employment. Perhaps more significant, however, is that forcing municipal employees to receive the

COVID-19 vaccine over their religious beliefs is an irreparable denial of their rights of free exercise.

1. Loss of employment

Where, as here, allegations of due process and constitutional violations are made, irreparable harm has been found to exist for the purposes of the preliminary injunction.

“Plaintiffs’ argument and the State’s counterarguments in favor of upholding the statute’s validity involve aspects of constitutional law too weighty to have been briefed adequately in the short time available to the parties...This is precisely the situation in which a preliminary injunction should be granted to hold the parties in *status quo* while the legal issues are determined in a deliberate and judicious manner...” *Tucker v. Toia*, 54 A.D.2d 322, 326 (1976) (citations omitted).

In addition to the Constitutional claims, it is clear that the UFA and firefighters, individually, will suffer additional irreparable harm if this Court does not stay enforcement of the Vaccine Mandate. To satisfy the irreparable harm requirement, Plaintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied “if

a court waits until the end of trial to resolve the harm. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005).

Should a stay be denied and unvaccinated UFA members be removed, it will affect the safety and well-being of the other members who remain on the job. There will be understaffed fire companies responding to emergencies, putting UFA members and at risk—as well as all those who rely on FDNY in emergencies.

Moreover, the firefighters themselves will suffer irreparable harm in losing their jobs with FDNY. *See Whelan v. Colgan*, 602 F.2d 1060, 1062 (2d Cir. 1979). Firefighters collectively bargain for their rights and are protected by New York’s Civil Service Law. The maximum suspension permissible is thirty days without pay. After such a penalty, FDNY would be required to go through the disciplinary process pursuant to the Collective Bargain Agreement.

As New York Supreme Court Justice Lyle E. Frank recently held in a similar action: “respondents [have not] established a legal basis or lawful authority for the DOH to exclude employees from the workplace and impose any other adverse employment action as an appropriate enforcement mechanism of the vaccine mandate.” *Police Benevolent Assn. v. City of New York*, No.

151531/2022, 2022 WL 4398685, *2 (Sup.Ct., N.Y. Co. Sept. 23, 2022).

Respondents have acknowledged their intent to disregard the Contract and the rights of firefighters and push those without the vaccine into this new category indefinitely—in violation of the agreements and law. Thus, the announced intention to violate the UFA contract and the Civil Service Law constitutes irreparable harm.

2. Violation of free exercise rights

UFA has an ongoing lawsuit in New York Supreme Court challenging Respondents' handling of applications for reasonable accommodation ("RA") of employees' religious practices in rejecting the covid vaccine. *See Matter of Ansbro*, No. 150230/2022 (Sup.Ct., N.Y. Co.).

For the reasons previously stated, Detective Marciano's application should be granted on its merits. Additionally, while Detective Marciano may not have ever sought an RA, many others have filed for RA as a result of their religious beliefs. Indeed, many UFA members have had these RA requests denied without any without any meaningful review or reasoning through Respondents' summary, boilerplate letter rejections blatantly violating applicants' free exercise of

religion and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

As such, UFA members are being forced to confront the unnecessary circumstance of choosing between compromising their faith and their employment. To that end, the UFA has challenged Respondents' handling of RA applications of religious grounds for rejecting the COVID-19 vaccine. If this Court grants Detective Marciano's application, it would also protect all those presently who made religious RA requests while these cases are pending.

This Court has consistently held, as Justice Gorsuch stated in a concurring opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo*, __U.S.__, 141 S.Ct. 63, 69 (2020):

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

C. Issuance of the stay will not substantially injure any other interested parties

The very science that makes the Vaccine Mandate an arbitrary and capricious measure also shows that Respondents face no substantial injury from Detective Marciano's requested stay.

As the Physicians for Informed Consent's brief sets forth in Section A of its Argument, there is no evidence that vaccination reduces transmission of COVID-19—the premise upon which the Vaccine Mandate was promulgated. Furthermore, previous infection is more effective than vaccination at preventing subsequent infection, as the Physicians laid out in Section C of their Argument. Lastly, In Section D the Physicians show that vaccination has not even had an appreciable effect on the COVID-19 mortality rate.

In sum, the absence of any demonstrable benefit from the Vaccine Mandate proves that Respondents will suffer no substantial injury were the Vaccine Mandate to be stayed.

As *amicus* Detectives' Endowment Association shows in Section C of his Argument, Respondents' haphazard rollback of its vaccine mandates for students, public venues, resident professional athletes, private-sector employees, and student athletes. As DEA also points out, State employees

were permitted to work in New York City with weekly testing.

As UFA has explained elsewhere, FDNY allowed those who timely sought an accommodation from the Vaccine Mandate to work unvaccinated with weekly testing. *See Matter of Ansbrosi*, 531749/2021, Petitioners' Reply Memorandum of Law at 6–7 (Sup.Ct., Kings Co. Feb. 25, 2022), The more New Yorkers allowed to live, work, and play freely without regard for vaccination status, the less Respondents can claim any substantial injury from staying enforcement of the Vaccine Mandate.

D. The public interest favors staying enforcement of the Vaccine Mandate

As Detective Marciano has set forth, the public interest favors a stay of the Vaccine Mandate pending the outcome of his suit. All that a stay does is preserve the status quo, In this case, therefore, New York City will not be left with fewer police and firefighters on-hand during the pendency of this litigation.

The public interest is also furthered by the protection of free exercise rights. In *Cuomo*, 141 S.Ct. at 68, this Court enjoined restrictions on religious services during the COVID-19 pandemic, and stated:

[E]ven in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

Conclusion

Wherefore, this Court should grant UFA leave to file this brief as *amicus curiae* in this application.

Garden City, New York
October 6, 2022

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