

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ONONDAGA

MEDICAL PROFESSIONALS FOR INFORMED CONSENT, individually and on behalf of its members, KRISTEN ROBILLARD, M.D., ZARINA HERNANDEZ-SCHIPPLICK, M.D., MARGARET FLORINI, A.S.C.P., OLESYA GIRICH, RT(R), and ELIZABETH STORELLI, R.N., individually and on behalf of others similarly situated,

VERIFIED HYBRID ARTICLE 78 AND DECLARATORY JUDGMENT PETITION

Index No. _____

Petitioners-Plaintiffs,

- v -

MARY T. BASSETT, in her official capacity as Commissioner of Health for the State of New York, KATHLEEN C. HOCHUL, in her official capacity as Governor of the State of New York, and the NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents-Defendants.

Plaintiffs – Petitioners (“Petitioners”), by and through their undersigned counsel, respectfully allege as follows:

PRELIMINARY STATEMENT

1. Petitioners are Medical Professionals for Informed Consent, along with two named doctors, a scientist, a radiologic technologist, and a nurse who lost or are at imminent risk of losing their jobs because of a vaccine mandate imposed by fiat through the New York State Department of Health (“NYSDOH”).

2. Petitioners bring this hybrid lawsuit seeking urgent preliminary and permanent injunctive relief and a declaratory judgment that the NYSDOH issued this regulation ultra vires.

3. Pursuant to the New York State Constitution, the power to enact new laws is reserved to the legislature, and the executive branch may not usurp this prerogative, whether by agency rulemaking or otherwise. (N.Y. Const., art. III, §1; art. IV, §1).

4. “The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with

performing particular functions... This principle, implied by the separate grants of power to each of the coordinate branches of government, requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 N.Y. 3d 601, 608 (2018).

5. Here, the Defendants-Respondents ("Respondents") from the executive branch violated the separation of powers doctrine by issuing a permanent regulation on June 22, 2022, mandating COVID-19 vaccines for healthcare workers in violation of state law. *See*, N.Y. Comp. Codes R. Regs, tit. 10 ("10 N.Y.C.R.R.") § 2.61, "*Prevention of COVID-19 transmission by covered entities.*" (hereinafter "Mandate" or "§2.61").

6. A copy of the Mandate is attached as Exhibit A as a true and accurate copy of what was enacted, but not for the truth of anything stated by Respondents therein.

7. Milton Friedman famously said, "there is nothing so permanent as a temporary government program." That truism played out here.

8. The first version of the Mandate was adopted in August 2021 as an "emergency" regulation at the urging of the Respondent Governor's office, even though the Legislature long since repealed any enhanced emergency powers authorizing the Governor to make new laws during a state of emergency, and even though the Governor declared the COVID-19 state of emergency to be "over" the month before.

9. After repeatedly extending new "emergency" orders, Respondent Mary T. Basset, Commissioner of Health for the NYSDOH ("Commissioner"), adopted the Mandate as a permanent regulation on June 22, 2022.

10. By June of 2022, scientific consensus had long since acknowledged that vaccination cannot meaningfully stop the spread of COVID-19.

11. Vaccinated people are getting infected and transmitting COVID-19 at the same rates, or according to multiple high powered recent studies, ostensibly at a higher rate than the unvaccinated.

12. Moreover, to the extent that the vaccine provides any protection from infection, the effect wanes rapidly, in a matter of weeks.

13. Last, even CDC finally acknowledged this Spring that natural immunity is just as robust and durable, if not more, than vaccine immunity.

14. According to the CDC, 95% of people now have natural or vaccine derived immunity. All Petitioners have natural immunity.

15. These are not controversial facts, at least among scientists and those reviewing objective data.

16. In promulgating this regulation, the Commissioner ignored these facts, not only acting irrationally, but also usurping the legislative function in gross violation of the separation of powers doctrine, the New York State Constitution, and state law.

17. First, no legislation permits the DOH to enact the Mandate.

18. Second, the Mandate was promulgated in blatant violation of the New York State Public Health Law (“PBH”), which specifically reserves the power to make new vaccine mandates to the Legislature. *See, e.g.*, PBH § 206(l); 2164-65; and 613. While the PBH vests the Commissioner with the power to adopt regulations and policies to encourage vaccine uptake and education, the Legislature was clear that the Public Health Law does *not* “authorize mandatory immunization of adults or children” other than as set forth by the Legislature in §2164-65. Thus, the Mandate is preempted.

19. Third, the Mandate fails all four of the *Boreali* factors, articulated by the Court of Appeals in *Boreali v. Axelrod*, 71 N.Y.2d 1, 13 (1987) to examine whether an agency regulation is *ultra vires* and crosses the line from implementation to impermissible executive branch policy making.

20. As further discussed, the NYSDOH exceeded its field of competence by making value judgments entailing difficult and complex choices between broad policy goals to resolve social problems, created a new, comprehensive, and controversial set of rules without benefit of legislative guidance, and ignored direct Legislative guidance prohibiting the Commissioner from authorizing any new vaccine mandates.

21. Predictably, the executive branch’s fiat Mandate resulted in enormous public distress and harm.

22. Because of the Mandate, *thousands* of healthcare professionals, including Petitioners, are unable to work in their field anywhere in New York State.

23. The decision to take thousands of frontline workers out of the field at a time when there was already a labor shortage in the healthcare field has caused tremendous public outcry, even among very pro-vaccine leaders in the healthcare industry.

24. Erie County Medical Center President, Tom Quatroche, said that the Mandate caused an “unprecedented crisis” forcing hospitals to pause ICU transfers and suspend critical patient surgeries. He told the *New York Times*, “For all the right reasons, the vaccine mandate was put in place. But the reality is it is creating a public health crisis in hospitals, with nobody to care for our patients.”¹

25. Governor Hochul admitted that her Mandate was causing a crisis, preemptively declaring a “state of emergency” (and with that invoking emergency powers) the night before it took effect due to the healthcare worker shortage that she and the other Respondents caused. Despite calling in the National Guard, the crisis has only deepened since last year, and the Governor has continuously renewed these “state of emergency” declarations on the grounds that the state faces a staffing crisis in healthcare.

26. Central New York is among regions hardest hit by the staffing crisis. Syracuse’s three hospitals are turning away thousands of patients due to staffing shortages. Many of them are being shipped to hospitals hundreds of miles away.

27. According to recent news coverage, these long-distance ambulance trips are just one symptom of the problem.

28. Syracuse has lost one out of every five hospital beds as a result of the staffing crisis – a 20% decline since the start of the pandemic.² In the last month, only *seven percent* of staffed beds were available at Syracuse’s three hospitals – far less even than the troubling statewide average of twenty one percent.³

29. The lack of nurses and emergency room doctors, and consequently of hospital beds, is wreaking havoc on the local health care system, and putting us all in danger. People must wait hours,

¹ Sharon Otterman and Joseph Goldstein, *New York Hospitals Face Possible Mass Firings as Workers Spurn Vaccines*, The New York Times (October 4, 2021), <https://www.nytimes.com/2021/09/24/nyregion/coronavirus-hospitals-vaccines.html>

² James T. Mulder, *Staffing crisis forces Syracuse hospitals to turn away thousands. An ambulance to Schenectady?*, Syracuse.com (Sept. 30, 2022 12:01 p.m.), <https://www.syracuse.com/health/2022/09/staffing-crisis-forces-syracuse-hospitals-to-turn-away-thousands-an-ambulance-to-schenectady.html>

³ *Id.*

sometimes weeks for care – even urgent care – and emergency rooms are closing their doors to ambulances with alarming frequency.

30. This is also impacting the thousands of patients in outlying hospitals, who would normally come to Syracuse for their care, but are now being shipped to Buffalo, Westchester and even Pennsylvania due to the lack of staffed beds.

31. SUNY Upstate, Syracuse's biggest hospital system, turned away 8,500 patients this year, the highest number ever on record. "This is like a slow-moving natural disaster" Dr. William Paolo, Upstate's head of emergency medicine told the press.⁴ A Lewis County hospital had to "stop delivering babies" and shut down essential services such as labor and delivery because of the Mandate.⁵

32. Shannon Monnat, a Syracuse University rural sociologist and population health expert, noted that the rural patients turned away tend to be sicker and more likely to die in long transits. She told the press, "This is a terrifying example of the complete failure of the U.S. health care system."⁶

33. Seventeen percent of registered nurse and employed doctor positions at hospitals across Upstate New York are vacant, according to a recent survey by the Iroquois Healthcare Association, a hospital trade group.

34. Nursing homes are in even worse shape. Willow Point Nursing Home in neighboring Broome County suspended admissions and shut down units with hundreds of beds due to critical staffing shortages. The lack of available nursing homes in the area caused the County to declare its own "state of emergency" because of Willow Brook's staff crisis. According to Broome County Executive Jason Garner, "Health care staffing has been an issue for a number of years before COVID even started. But... certainly the mandates have all played, have really created this massive staffing problem."⁷

35. These closures occurred statewide. On September 13, 2021, New York State Senator Borrello wrote to the Commissioner, stressing the devastation that the Mandate was causing. He noted that

⁴ *Id.*

⁵ Brendan Straub and Diane Rutherford, *Hospital to stop delivering babies as maternity workers resign over vaccine mandate*, wwnytv.com (Sept. 10, 2021, 2:49 p.m.), <https://www.wnnytv.com/2021/09/10/hospital-stop-delivering-babies-maternity-workers-resign-over-vaccine-mandate/>

⁶ *Id.*

⁷ *State of emergency declared at Willow Point Nursing Home over staffing shortage*, spectrumlocalnews.com (Nov. 22, 2021, 4:36 p.m.), <https://spectrumlocalnews.com/nys/binghamton/news/2021/11/22/state-of-emergency-declared-at-willow-point-nursing-home-over-staffing>

the impacts of the Mandate were already showing up. For example, a large assisted living facility in Fredonia, NY had to make discharge plans for half of their residents after a third of the staff notified the facility that they would not be able to get vaccinated. He also included a plea from the owner of the Tanglewood Group, which operates multiple assisted living and memory care facilities in New York, who described the crisis in stark terms, stressing that hundreds of vulnerable residents with no one else to care for them were being discharged because of the Mandate and nursing homes “are refusing to accept admissions.” Senator Borello pointed out that the region is already designated a Medically Underserved Area due to the severe shortage of health care and skilled nursing facilities. “Simply put, we cannot afford to lose any of our already-scarce health care capacity because of a vaccine mandate.” He called on the NYSDOH to offer testing as an alternative. A true and accurate copy of the letter is attached as Exhibit B and incorporated herein.

36. Meanwhile, Petitioners and thousands of similar qualified, dedicated, and experienced doctors, nurses and other medical professionals are prohibited from caring for patients in hospitals and nursing homes and other covered entities because of the Mandate.

37. A central issue is that many of these frontline workers have religious objections to the COVID-19 vaccine, which the Mandate is preventing employers from reasonably accommodating, as required by law.

38. Among other statutes, the New York State Human Rights Law (“NYSHRL”) requires employers to reasonably accommodate employees’ sincere religious objections to vaccines unless the accommodation would pose a significant expense or difficulty, or unless the religious practice makes them a direct threat to the community. *See, e.g.*, N.Y. Exec. Law § 296 (McKinney).

39. The safety analysis cannot be speculative. Rather, “the employer must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective information, to ascertain: the nature, duration, and severity of risk; the probability that the potential injury will actually occur; and whether reasonable accommodations, such as modification of policies, practices or procedures will mitigate risk.” 9 CRR-NY 466.11(g)(2).

40. Employers cannot establish direct threat here. It is well-established at this point that COVID-19 vaccines cannot meaningfully stop transmission, and even the CDC has advised that employers

stop differentiating between vaccinated and unvaccinated employees when assessing prevention and mitigation measures.

41. Yet, the Commissioner made the brazen (and preempted) choice to allow medical exemptions but remove the option of religious exemption, which was in a previous version of the emergency vaccine mandate promulgated earlier in August, thus prohibiting employers to allow healthcare workers to come to work in person even if the employer *can* reasonably accommodate their workers without significant expense or difficult as required under the NYSHRL.

42. This is another basis for preemption, but also shows the Commissioner's foray into matters that exceed the competence of the NYSDOH. Weighing the importance of religious rights against public health is not within the scope of this agency's expertise.

43. But this Court need not pass judgment on Respondents' reasoning, or on any of the scientific issues, at all. Even if Respondents' decisions were rationally made in good faith, this Mandate was issued in excess of the Respondents' jurisdiction and authority and must be declared null and void and unenforceable. To the extent that the Legislature believes additional legislation is necessary beyond the requirements imposed on most healthcare facilities through federal law, they can act.

PARTIES

44. Petitioner Medical Professionals for Informed Consent ("MPIC") is an unincorporated New York State voluntary not-for-profit membership association, duly authorized to sue and be sued pursuant to N.Y. Gen. Ass'ns Law § 12 (McKinney).

45. MPIC functions as an advocacy organization dedicated to advancing the protection of informed consent. Challenging regulations that infringe this basic human right, for the public at large or for specific groups, such as healthcare workers, deprived of the right, is germane to MPIC's core mission and purpose. This Mandate attacks MPIC's core mission, and impacts all members, causing the organization to divert substantial time, effort, and their limited financial resources to fighting the Mandate and mitigating harm to the community therefrom which could be spent on education and outreach.

46. Additionally, as a membership association made up of doctors, nurses, scientists, and other medical professionals who come together to advocate for the fundamental right to informed consent,

all MPIC's members were directly impacted by this Mandate, whether they were vaccinated or not, since the mission of the organization is to protect informed choice, which the Mandates do not offer. Members resided or worked in Onondaga County, Broome County, and other locations across New York State when material events giving rise to this lawsuit occurred. Rather than require each to bring their own lawsuit, the association is better suited to bring suit on their behalf. This is doubly so here, where the issues involve private medical information that many members do not feel comfortable sharing in public lawsuits.

47. Petitioner Kristen Robillard, M.D., lives in Vestal, New York. For the past 26 years, she worked as a family medicine physician at Lourdes-Ascension Hospital. Since 1995, she also worked as a Clinical Associate Professor of medicine in the Binghamton Clinical Campus of SUNY Upstate Medical. SUNY Upstate is a not-for-profit headquartered in Syracuse, NY. She applied for a religious exemption at each place of employment and was denied and ultimately terminated or forced to resign due to the Mandate. She, like the other named Petitioners, has sincere religious objections to the vaccines, poses no risk to anyone based on her vaccine status, has had COVID-19, and is harmed by the Mandate's ongoing impact on her ability to practice her profession at any covered entity in the State.

48. Petitioner Zarina Hernandez-Schipplick, M.D., lives in Apalachin, New York and has worked as a physician pathologist in Binghamton, New York for over twenty-two years. She was denied religious accommodation from the Mandate after Governor Hochul directed the NYSDOH to remove it last fall. But, importantly, her employer acknowledges she can be safely accommodated and she is still working in person under a medical exemption due to her participation in a trial. When the trial ends, Dr. Hernandez-Schipplick will be fired or forced to violate her religious faith because of the Mandate. She faces imminent irreparable harm.

49. Petitioner Elizabeth Storelli, R.N., currently resides in Manhattan, N.Y. She works for a Chicago based healthcare company, providing infusions in the greater New York City area. When the Mandate took effect, her employer informed her that they believed that the Mandate was unlawful, in that it would force them to violate their responsibilities to reasonably accommodate religious employees. They continued to allow her to test weekly in lieu of vaccination as a religious

accommodation. On September 2, 2022, the employer informed nurse Storelli that the NYSDOH was “cracking down” on nurses with religious exemptions, and they were instructed that they were only allowed to provide medical exemptions but not religious pursuant to the Mandate. She was removed from seeing patients in person and was informed she will be fired on or about October 24, 2022, unless she violates her sincerely held religious beliefs and gets vaccinated. She faces imminent and irreparable harm unless this Court grants relief before October 24, 2022.

50. Petitioner Margaret Florini, A.S.C.P., lives in Vestal, NY and worked as a Medical Laboratory Specialist for five years in Binghamton, NY. She applied for a religious exemption but was denied and subsequently terminated because the NY state mandate does not allow any realistic religious accommodation to healthcare workers. She is now unable to work in her field anywhere in the state without violating her deeply held and sincere religious beliefs. Petitioner Florini is attempting to find work to support herself and her family, but unless she violates her religious beliefs or moves out of state, she is precluded by the Mandate from working in her field. Petitioner Florini is the President of MPIC and is duly authorized to bring this suit individually and on behalf of MPIC. She and the association face imminent and ongoing irreparable harm.

51. Petitioner Olesya Girich, RT(R), resides in Lansing, NY and worked at Upstate Medical University in Syracuse, NY for 12 years, both as a Radiologic Technologist and CT Technologist in the emergency room before the Mandate took effect. She applied for a religious exemption with support from her pastor and was duly denied by her employer due to the Mandate’s inflexible rules. While on medical leave recovering from COVID at the end of November 2021, she was notified via email that she was suspended without pay. She requested a medical exemption, since she had a high-risk pregnancy, but was told that no medical exemptions could be given based on pregnancy, high risk or not. Petitioner Girich has been able to retain her health insurance while suspended without pay. She was informed that she will be officially terminated next month unless she takes the vaccine, even though she is still nursing her baby, and has religious objections that preclude her from taking it. Petitioner, her husband and their four children will lose their health insurance, among other harms, including the ongoing harm of being precluded from earning income in her field anywhere in the State.

52. Respondent Mary T. Bassett, M.D., is the acting Commissioner of Health for the New York State Department of Health. As Commissioner, she is responsible for approving and promulgating any new regulations, including the vaccine mandate. Her principal office place is located at Corning Tower, Empire State Plaza, Albany, New York 12237.

53. Respondent Kathleen C. Hochul is the acting Governor of the State of New York who, as the State's chief executive, is responsible for the execution of its laws and regulations, including the challenged vaccine mandate. The Governor's principal place of business is located at the State Capitol Building in Albany, NY, 12224.

54. Respondent the New York State Department of Health is an agency which is part of the Executive Branch of the New York State government, with its principal office place located at Corning Tower, Empire State Plaza, Albany, New York 12237. The vaccine mandate was promulgated through the NYSDOH at the direction of Respondents Bassett and Hochul.

JURISDICTION AND VENUE

55. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803 because the rule adopted by Defendants-Respondents is a final determination made in violation of a lawful procedure, affected by an error of law, and is arbitrary and capricious. This Court also has jurisdiction to render a declaratory judgment pursuant to CPLR § 3001, and injunctive relief pursuant to CPLR § 63.

56. This Court has personal jurisdiction over Respondents pursuant to CPLR §302(a)(1).

57. Venue lies in Onondaga County pursuant to CPLR §506(b) and §7804(b) because it is one of the jurisdictions where material events giving rise to this lawsuit took place.

BACKGROUND

A. Petitioners were Harmed

58. Petitioners each lost their job or are at imminent risk of losing their job because of the Mandate. Moreover, they are not just suffering the harm from losing their old jobs but are actively still prevented from seeking work anywhere else in the State at comparable positions without violating their faith because of the Mandate.

59. Petitioners and members of MPIC suffered financially, emotionally, and spiritually because of this Mandate. Many already lost their homes, or are at imminent risk of losing their homes, many were forced to move out of state, and some were even forced to violate their sincerely held religious beliefs to survive.

60. Petitioners are also harmed because they cannot hold any of their elected representatives in the New York State Legislature accountable for the Mandate since none of them voted “yes” or “no” for this autocratic edict. They are deeply disturbed that their democratic rights are being violated.

61. Petitioners each suffer further ongoing, irreparable harm because the Mandate forces them to choose between their job and their faith each day.

B. The Mandate is Pre-empted by State Law.

62. The Legislature in New York clearly reserved to itself the power to decide which vaccines would be mandated (or not), and what exemptions are available under that scheme.

63. Since 1966, the New York Legislature has maintained a list of diseases for which it requires vaccination among some populations. *See*, Credits to PBH §§2164, 2165.

64. All valid statewide vaccine mandates are enumerated by the Legislature in §§2164 and 2165, and even for vaccines recommended by various federal, state, or local healthcare bodies, the Legislature has many times declined to add certain recommended vaccines to this list. Other times, they do add newly recommended vaccines through the vote of elected representatives in the Legislature. Either way, they have clearly indicated that it is their choice to decide.

65. One way that they articulate this is through the Public Health Law. The Legislature defines the Commissioner’s powers in PBH § 206. In 2004, to increase vaccination rates, they added PBH § 206(l), which gives the Commissioner the power to “establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect public health” and to “promulgate such regulations” as are necessary for the implementation of these powers. But in this same subsection, they also clearly stated that: “nothing in this paragraph shall authorize mandatory immunization of adults or children, except as provided in sections [2164] and [2165]. PBH § 206(l). Every time either provision has been amended, the same instruction remains,

clarifying that while the Commissioner can adopt any number of regulations to achieve the goal of encouraging and providing education about vaccination, she cannot authorize any Mandates through the NYSDOH.

66. Similarly, in 1986, the State Legislature passed legislation codified in PBH §613, directing the Commissioner of Health and the DOH to “develop and supervise the execution of a program of immunization...to raise to the highest reasonable level the immunity of children of this state against communicable diseases.” (1986 N.Y. Laws 3439). But, in 2004, PBH § 613 was amended, expressly clarifying, as PBH § 206 does that: “Nothing in this subdivision shall authorize immunization of adults or children, except as provided in sections [2164] and [2165] of this chapter.” (2004 N.Y. Laws 2900).

67. The Legislature’s clear policy is to give the DOH the power to encourage, but not mandate, any recommended vaccines that are not included in §§2164 and 2165 by the Legislature.

68. §§2164 and 2165 set forth mandatory vaccinations that are preconditions to enrolment in school and in institutions of higher education. Those statutes include exemptions (medical for children under eighteen, and medical and religious for people over eighteen), incorporate an appeal process, and explain the procedures to be followed when a student cannot afford vaccinations.

69. In 2018, in *Garcia*, 31 N.Y. 3d, the Court of Appeals acknowledged that the plain language of the PBH prohibits the Commissioner and the NYSDOH from enacting new vaccine mandates, even though it held that the same prohibition did not necessarily preclude new mandates by “*local municipalities to which the authority to regulate had been delegated.*” *Id.* at 620. (Emphasis added). Specifically, the Court stated: “...the legislature intended to grant NYSDOH authority to oversee voluntary adult immunization programs, while ensuring that its grant of authority would not be construed as extending to the adoption of mandatory adult immunizations (*see* Letter from Richard N. Gottfried, Chair, Assembly Comm on Health, to Richard Platkin, Counsel to Governor, July 16, 2004, Bill Jacket, L 2004, ch 207 at 5, 2004 NY Legis Ann at 179). Indeed, by their plain language, these provisions simply make clear that the particular statutory subdivisions at issue do not authorize NYSDOH to adopt additional mandatory immunizations...” *Id.*

70. Thus, while local departments of health might have authority to enact new mandates, New York's highest Court already clarified that the PBH precludes the Commissioner from issuing new vaccine mandates through the NYSDOH.

C. NYSDOH Adopted a New Vaccine Mandate Despite Clear Legislative Preemption

71. Despite clear instructions to the contrary, the NYSDOH promulgated a COVID-19 vaccine for healthcare workers anyway.

72. As justification, the new law points to PBH § 225, asserting it provides the NYSDOH with authority to issue the Mandate. It doesn't.

73. PBH § 225 sets forth the powers and role of the Public Health Council ("Council"). According to this section, while the Council has broad authority to propose new regulations, PBH § 225(4) requires that any change to the statutory code is subject to final approval (or denial) by the Commissioner, who then has the discretion whether to promulgate it as a regulation pursuant to the steps set forth in the State Administrative Procedures Act ("SAPA"). Because the Commissioner is expressly forbidden from mandating any new vaccines, the Commissioner *was prohibited* from adopting the new Mandate, and was not authorized to give such authority.

74. In *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), the Court of Appeals addressed similar claims that PBH § 225 provided the NYSDOH authority to make sweeping policy decisions, stating:

While the Legislature has given the PHC broad authority to promulgate regulations on matters concerning the public health, the scope of the PHC's authority under its enabling statute (Public Health Law § 225 [5] [a]) must be deemed limited by its role as an administrative, rather than a legislative, body. The PHC usurped the latter role and thereby exceeded its legislative mandate, when, following the Legislature's inability to reach an acceptable balance, the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests.

Id. at 1-2. So too here.

75. The statutory provisions cited by the Mandate as providing "authority" to §2.61 are equally as unavailing. Specifically, the DOH cites PBH §§ 2800, 2803, 3612, and 4010, and Social Services Law,

Sections 461 and 461-e, each of which details powers held by the Commissioner to inspect and regulate various types of health facilities. Absent from these sections is any authorization to mandate vaccines.

76. Nor can any such authority be inferred. Principles of statutory construction require that statutes are to be read as a whole, in context, and that every word must be given effect. If there is a conflict between two statutory provisions – one of them a general statement and the other a specific statement as here – the court must apply the more specific statement as an exception to the general.

77. Thus, while the Commissioner may have broad authority to regulate and inspect hospitals and healthcare facilities, and even to pass regulations to encourage vaccination, she does not have the authority to violate her enumerated powers in § 206 by imposing any new vaccine mandates not found in §§2164-5 of the Public Health Law upon any adult or child, including healthcare workers.

78. COVID-19 vaccination does not appear anywhere in § 2164 or §2165, so it cannot be mandated by the NYSDOH.

79. Accordingly, on February 8, 2022, at least forty elected members of the New York State Senate and Assembly wrote a letter to Respondents, urging the NYSDOH to cease and desist from attempting to permanently adopt § 2.61 and two other emergency regulations. A true and accurate copy of this letter is attached hereto as Exhibit C and incorporated by reference herein.

80. As the Legislators pointed out, “[t]he decision to unilaterally declare these emergency regulations as permanent rules circumvents the legislative process that is enshrined in state law... We believe that the power to entrust the DOH [] to permanently impose such mandates lies with the duly elected members of the state Assembly and Senate, not appointed commissioners.” *Id.* at 1.

81. The Legislators pointed out that any enhanced emergency powers were long-since revoked by the Legislature and stated “[r]egardless of one’s opinion regarding the effectiveness of mask mandates, vaccine mandates, isolation or quarantine, the people of this state deserve to have a voice in this discussion through their elected representatives. Unfortunately, New Yorkers currently are in the dark as to what data the DOH [] are relying on in making permanent these mandates, which greatly impact our school children, businesses and communities.” *Id.* at 2.

82. Again, the NYSDOH refused to comply with the Legislature’s clear instructions regarding the limits of their authority.

83. Two of the emergency regulations addressed in the aforementioned letter have already been struck down by Supreme Courts Justices, who each found that the NYSDOH acted ultra vires. For example, on January 24, 2022, Nassau County Supreme Court Justice Hon. Thomas Rademaker held that 10 NYCRR §§2.60(a) (imposing a mask mandate) was issued ultra vires in violation of the state constitution and the PBH, among other laws, and was null, void, and unenforceable. *Demetrious v. New York State Department of Health, Public Health and Health Planning Council*, Index No. 616124/2021 (Nassau Co. Supreme Court, January 24, 2022) (Decision and Order is attached as Exhibit D and incorporated herein by reference). While a stay pending appeal was granted so long as Respondents perfected their appeal by March 2, 2022, the state elected to repeal § 2.60(a) on March 2, 2022, mooted this issue for now. No merits decision has been issued by the Second Department to date.

84. Similarly, on July 8, 2022, in a separate lawsuit, challenging 10 NYCRR § 2.13 (giving the Governor certain quarantine powers), Cattaraugus County Supreme Court Justice Hon. Ronald D. Ploetz held that § 2.13 was issued ultra vires in violation of New York State Law and is therefore null, void, and unenforceable as a matter of law. *Borrello v. Hochul*, Index No. 91239/2022 (Cattaraugus Co. Supreme Court July 8, 2022). Respondents appealed but were not granted a stay on appeal and have not perfected the appeal upon information and belief. (Decision and Order is attached as Exhibit E and incorporated herein by reference).

85. Here, Legislative intent regarding the limits of any grant of authority is even clearer than in either of the other two cases, since the PBH explicitly prohibits the Commissioner from enacting a new vaccine mandate for any adult or child. This Court should likewise hold § 2.61 null, void and unenforceable.

D. The Mandate is Irrational, Constitutes Abuse of Discretion, and Exceeds the Scope of Permissible Executive Branch Power.

86. Even if the Mandate were not preempted by state law, it should be struck down.

87. The Mandate is irrational, given that we know that vaccination cannot stop infection or transmission.

88. This is relevant both to a determination of whether it might be arbitrary and capricious and an abuse of discretion and whether the Mandate constitutes unauthorized policymaking.

89. For example, when determining whether a local department of health's vaccine mandate crossed the line into policy making, the Court of appeals distinguished mandates that are primarily for personal protection, which would likely be a policy choice, from those that are necessary to reduce the spread of contagious disease, which might be more in line with the powers and role of a department of health. *Garcia*, 31 N.Y. 3d at 612.

90. Initially, the NYSDOH justified the emergency mandates, and even proposed the permanent rule, on the assumption that vaccines could meaningfully prevent transmission.

91. This assumption turned out to be false. Well before June 2022, when the Mandate was adopted as a permanent regulation, there was no longer any credible basis to argue that vaccines can meaningfully stop the spread of COVID.

92. Responding to public comment pointing out this fundamental flaw in the rationale for continuing to impose such an impactful and devastating mandate, the NYSDOH changed tack, acknowledging that vaccination has little if any effect against transmission, but arguing that vaccinated people have less morbidity and mortality when they do catch COVID-19, so that was the new basis for the Mandate. *See, e.g., Exhibit F* at 25.

93. Even if this were true, which is contested particularly for those who, like most or all Petitioners, have natural immunity, this is not a valid reason to issue this ultra vires mandate. Protecting healthcare workers from themselves does not serve a tangible public health purpose and is an abuse of discretion.

94. Just as the Court of Appeals has held that the NYSDOH cannot forbid healthcare workers from drinking sugary beverages, or smoking, or any other such personal choice outside of work, this encroachment is an abuse of discretion. Forcing people to make choices that the NYSDOH believes will increase their personal level of health and well-being may be tempting, and it might even be good advice, but such mandates exceed the authority of the NYSDOH.

95. Similarly, in the Regulatory Impact Statement, the NYSDOH breezily states that the vaccine requirement will have little if any costs on the myriad private and public covered entities and local governments, stating "[t]his is a modest investment to protect the health and safety of patients,

residents, and personnel, especially when compared to both the direct medical costs and indirect costs of personnel absences.” *Id.* at 11. Nothing could be further from the truth.

96. As pointed out in the news coverage, and the letter from Senator Borello, this Mandate has had crippling economic and other consequences for the covered entities, their patients, their employees and all persons in the State, who are now made substantially less safe by the staffing crisis.

97. Moreover, hospitals are now hiring scores of travel nurses and other medical professionals, at huge financial cost and cost to patient care.

98. In rejecting the many requests that the NYSDOH at least allow testing in lieu of vaccination, the agency wrote that it “place an unreasonable burden and financial burden on covered entities...” *Id.* at 13.

99. But shouldn’t this be decided by the covered entities themselves, who might find that testing and other appropriate accommodations (if any are justified or needed at all) is more cost effective than closing down entire units and hiring travel nurses at three times the regular rate?

100. The regulatory impact statement also dismissed concerns about the impact on religious rights, and falsely asserted that the federal Medicaid mandate would in any event require staff to be vaccinated. This is inaccurate – the federal mandate explicitly requires the opportunity for religious exemption if a healthcare worker has sincere religious objections.

101. At the very least, the Legislature is far better equipped to balance the myriad important policy considerations against the public health needs (including the equally important policy goals of upholding and protecting religious rights, bodily autonomy rights, and local and regional economies and access to goods and services).

102. Troublingly, the NYSDOH appears to have acted with animus in removing a religious exemption from the Mandate, which is an abuse of discretion.

103. Like the federal mandate, the first version of the emergency mandate, issued on August 26, 2021, provided a religious exemption:

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. Covered entities shall document such exemptions and such reasonable accommodations in

personnel records or other appropriate records in accordance with applicable privacy laws by September 27, 2021, and continuously, as needed, thereafter.

104. But when Governor Hochul took office in September 2021, her first order of business was to direct that the religious exemption be removed.

105. Governor Hochul has expressed strong religious views about vaccination. An avowed Catholic, she has many times publicly stated that religious objections to vaccination are “illegitimate” because they are not sanctioned by the Pope or other religious leaders she respects.

106. On September 15, 2021, two weeks before the amended Mandate was to take effect, Governor Hochul held a press briefing in which she boldly admitted that she intentionally removed the religious exemption from § 2.61 because she does not find religious objects to vaccination to be a valid religious viewpoint.

107. The Governor’s subsequent public statements clarify that it is not that she does not think the objections are religious in nature, or that they are insincere, but rather, in blatant violation of governing legal standards, she does not think the views are valid because they are not “what God wants.”

108. On September 26, 2021, for example, the night before the Mandate was to take effect, Governor Hochul Sermonized from the pulpit at a Church in Brooklyn, stating:

I prayed a lot to God during this time and you know what - God did answer our prayers. He made the smartest men and women, the scientists, the doctors, the researchers - he made them come up with a vaccine. That is from God to us and we must say, thank you, God. Thank you. And I wear my 'vaccinated' necklace all the time to say I'm vaccinated. All of you, yes, **I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants.** You know who they are.

109. Governor Hochul then proceeded to recruit “apostles” from the congregation to convert those who “aren’t listening to God and what God wants” by remaining unvaccinated.

110. In amending §2.61 to remove the religious exemption, the Governor improperly used her power as a state-actor to establish a state view about what constituted “valid” religious beliefs about vaccines and to discriminate against and burden those, like Petitioners whose sincere religious beliefs require abstinence from the COVID-19 vaccines. This exceeds her authority and violates existing state and federal law.

111. Combined with the lack of scientific support in the record justifying such impactful and devastating policies, the evidence of animus here provides an independent basis to strike the Mandate as an abuse of discretion, arbitrary and capricious. There is no evident rational reason to deprive Petitioners and thousands of others of their religious rights, guaranteed by the NYSHRL and other statutes.

112. Ultimately, though, neither this Petition nor this Court need take any position on the safety or efficacy of the COVID-19 vaccines, or the propriety of Respondents' motivations, for relief to be issued. As the Court of Appeals held in *Boreali* when striking down NYSDOH public smoking ban as issued ultra vires in violation of separation of powers:

[W]e stress that this case presents no question concerning the wisdom of the challenged regulations, the propriety of the procedures by which they were adopted, or the right of government in general to promulgate restrictions on the use of tobacco in public places. The degree of scientific support for the regulations and their unquestionable value in protecting those who choose not to smoke are, likewise, not pertinent except as background information... The only dispute is whether the challenged regulations were properly adopted by an administrative agency acting under a general grant of authority.

N.Y.2d 1, 8-9 (1987).

113. Here, like in *Borelli*, the regime the Commissioner created in promulgating the Mandate crosses far beyond the line of interstitial rulemaking and into the prerogative of the Legislature. Petitioners seek declaratory and injunctive relief in this hybrid action so that they can return to their beleaguered healthcare facilities and care for the patients who so desperately need them.

FIRST CAUSE OF ACTION
(Declaratory Relief under Article 30 of the CPLR)

114. Petitioners incorporate all preceding paragraphs as if fully set forth herein.

115. As and for a First Cause of Action, Petitioners seek a declaratory judgment that 10 NYCRR § 2.61 was promulgated in violation of the NYS Constitution, and is thus unconstitutional, ultra vires, null and void, and unenforceable.

116. The New York State Constitution is clear: Article V § 3, Article III § 1 and Article IV §1 establish the separation of powers in our state government, providing that only the Legislature can make the law, and only the Legislature can assign new powers to executive branch agents.

117. This Mandate constitutes unauthorized lawmaking by a regulatory body in violation of these constitutional protections.

118. The Legislature did not authorize the NYSDOH with lawmaking power and did not authorize the promulgation of 10 NYCRR § 2.61.

119. In addition, or in the alternative, Petitioners seek a declaratory judgment that 10 NYCRR § 2.61 is preempted by the Public Health Law, and is ultra vires, null and void and unenforceable.

120. Public Health Law § 206(l) sets forth the powers of the Commissioner to promulgate regulations related to vaccination. By its clear language, PBH § 206(l) prohibits the Commissioner from adopting any new vaccine mandate for adults or children, other as defined by the Legislature in §§2164 and 2165. By the plain language of this section, and the law as a whole, the Commissioner and the NYSDOH are prohibited from issuing a COVID-19 vaccine mandate absent express authorization from the Legislature (which was not given).

SECOND CAUSE OF ACTION
(Relief under Article 78 of the CPLR)

121. Petitioners incorporate all preceding paragraphs as if fully set forth herein.

122. As and for a Second Cause of Action, Petitioners seek relief under Article 78 of the CPLR.

123. As set forth more fully above, Respondents NYSDOH and Commissioner Bassett acted in excess of their jurisdiction in promulgating 10 NYCRR § 2.61, and such action is properly enjoined by this Court pursuant to Article 78 of the CPLR.

124. The New York State Constitution prohibits executive agency lawmaking, and the Public Health Law prohibits the NYSDOH from enacting any new vaccine mandates other than as allowed by the legislature in the PBH.

125. The Mandate is also preempted by the New York State Human Rights Law, which requires reasonable religious accommodation absent a finding *by the employer* that the individual in question cannot be safely accommodated without posing a direct threat.

126. NYSHRL requires employers to reasonably accommodate the practices of religious employees, including practices requiring abstention from vaccination, unless doing so would cause significant hardship or expense. To the extent that the hardship is related to concerns about health and safety, the Legislature imposes an affirmative obligation on the employer to examine current, high quality and objective data to determine the significance of the risk and any available accommodations.

127. Nonetheless, the Commissioner arbitrarily and capriciously removed the religious exemption previously offered in the Mandate, and then promulgated the final Mandate to preclude reasonable religious accommodation even in such cases where the employer finds that the employee poses no threat to anyone based on their religious practices. As such, the Mandate is an abuse of discretion, to the extent the Commissioner or NYSDOH have jurisdiction at all to make policy in this area.

128. Nothing in the law authorizes Respondents to make such blanket determinations, particularly on a permanent basis. Rather, NYSHRL requires that employers make this analysis on an individualized basis supported by the most current data. Nothing in the currently available data supports a finding that Petitioners even are a direct threat based on their vaccination status.

THIRD CAUSE OF ACTION **(Attorney's Fees and Costs)**

129. Petitioners incorporate all preceding paragraphs as if fully set forth herein.

130. CPLR § 8601 (a) provides in relevant part: "except as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust."

131. A party prevails when they are awarded a substantial part of the relief sought in the lawsuit. *New York State Clinical Lav. Ass'n v Keledjian*, 85 NY2d 346, 352-356 [1995]). Petitioners respectfully ask for fees and costs here if successful.

132. Here, if Petitioners prevail, it would be unjust to withhold fees.

133. Respondents position that it had authority to enact and enforce its fiat Mandate is without merit.

134. Respondents have repeatedly been put on notice that this Mandate exceeds their authority and is an abuse of discretion.

135. Petitioners, meanwhile, have been seriously harmed, losing their jobs and their right to practice their careers anywhere in New York State, and being deprived of the right to have such impactful laws made by duly elected representatives who are accountable to Petitioners and other voters.

136. Petitioners lack the resources to retain counsel to advocate on their behalf against the Mandate. Yet, they were forced to litigate as Respondents will not back down, even after it has become impossibly clear that there is no rational basis to continue mandating COVID-19 vaccination.

NO PRIOR APPLICATION

137. No prior application has been made for the relief requested herein.

RELIEF REQUESTED

WHEREFORE, Plaintiffs-Petitioners request that this Court enter an Order:

(a) Enjoining and permanently restraining Defendants-Respondents and any of their agents, officers, and employees from implementing or enforcing 10 NYCRR § 2.61; and


(b) Declaring that 10 NYCRR § 2.61 is ultra vires, preempted by state law, null and void and/or unenforceable; and

(c) Awarding Plaintiffs-Petitioners reasonable attorney's fees, costs, and disbursements pursuant to CPLR § 8101, and any other applicable statutory, common law or equitable provision, because any defense to the validity of the Mandate is without merit; and

(d) Granting such other and further relief as the Court deems just and proper.

Respectfully Submitted,

Dated: October 19, 2022
Ithaca, New York

Gibson Law Firm, PLLC

Sujata Sidhu Gibson
832 Hanshaw Rd., Suite A
Ithaca, New York 14850

Tel: (607) 327-4125
Pro Bono Counsel


VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF BROOME)

MARGARET FLORINI, being duly sworn, deposes and states that your Deponent is a Petitioner in this proceeding, and that your Deponent has read the foregoing Verified Petition and knows of the contents thereof, and that the same are true as of your Deponent's knowledge, except to matters therein stated to be alleged upon information and belief, and as to those matters, that your Deponent believes them to be true.


MARGARET FLORINI

Sworn to before me this
10th day of October, 2022


Notary Public

JAMES A. SACCO
Notary Public, State of New York
No. 4994355
Residing in Broome County
My Commission Expires 4-6-26

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF TOMPKINS)

OLESYA GIRICH, being duly sworn, deposes and states that your Deponent is a Petitioner in this proceeding, and that your Deponent has read the foregoing Verified Petition and knows of the contents thereof, and that the same are true as of your Deponent's knowledge, except to matters therein stated to be alleged upon information and belief, and as to those matters, that your Deponent believes them to be true.



OLESYA GIRICH

Sworn to before me this
20th day of October, 2022



Notary Public

Sujata S. Gibson
Notary Public, State of New York
No. 02GI6291641
Qualified in Tompkins County
Term Expires October 15, 2023

VERIFICATION


STATE OF NEW YORK)
) ss:
COUNTY OF BROOME)

ZARINA HERNANDEZ-SCHIPPLICK, being duly sworn, deposes and states that your Deponent is a Petitioner in this proceeding, and that your Deponent has read the foregoing Verified Petition and knows of the contents thereof, and that the same are true as of your Deponent's knowledge, except to matters therein stated to be alleged upon information and belief, and as to those matters, that your Deponent believes them to be true.



ZARINA HERNANDEZ-SCHIPPLICK

Sworn to before me this
19th day of October, 2022



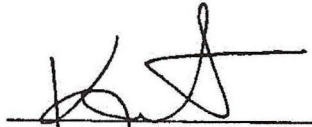
Notary Public

JAMES A. SACCO
Notary Public, State of New York
No. 4994355
Residing in Broome County
My Commission Expires 12-26


VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF BROOME)

KRISTEN ROBILLARD, being duly sworn, deposes and states that your Deponent is a Petitioner in this proceeding, and that your Deponent has read the foregoing Verified Petition and knows of the contents thereof, and that the same are true as of your Deponent's knowledge, except to matters therein stated to be alleged upon information and belief, and as to those matters, that your Deponent believes them to be true.


KRISTEN ROBILLARD

Sworn to before me this
19th day of October, 2022


Notary Public

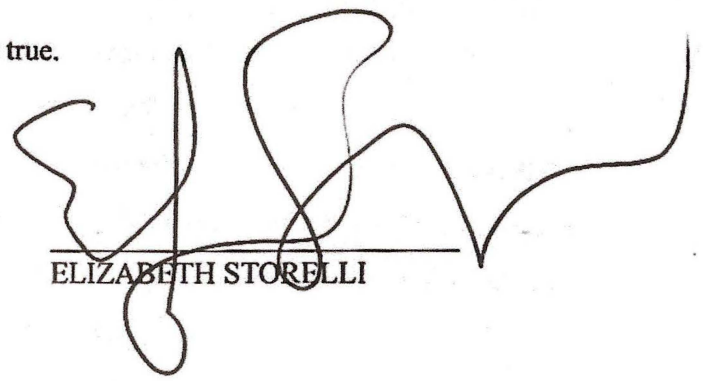
JAMES A. SACCO
Notary Public, State of New York
No. 4994355
Residing in Broome County
My Commission Expires April 26

VERIFICATION

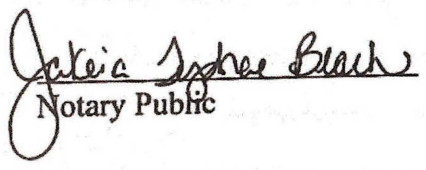
~~STATE OF NEW YORK)
COUNTY OF NEW YORK)~~ ss:

. Exmore
Virginia

ELIZABETH STORELLI, being duly sworn, deposes and states that your Deponent is a Petitioner in this proceeding, and that your Deponent has read the foregoing Verified Petition and knows of the contents thereof, and that the same are true as of your Deponent's knowledge, except to matters therein stated to be alleged upon information and belief, and as to those matters, that your Deponent believes them to be true.


ELIZABETH STORELLI

Sworn to before me this
20th day of October, 2022


Notary Public

