STATE OF NEW YORK
SUPREME COURT: COUNTY OF ONONDAGA

MEDICAL PROFESSIONALS FOR INFORMED CONSENT, et al.,

Petitioners-Plaintiffs,

- v -

MARY T. BASSETT, et al.,

Respondents-Defendants.

Index No. 008575/2022
Hon. Gerard J. Neri

PETITIONERS-PLAINTIFFS' REPLY AND OPPOSITION TO MOTION TO DISMISS

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TABLE OF CONTENTS

INTRODUCTION

Rather than answer the hybrid petition before this Court, Respondents submitted a motion to dismiss that appears to have been written for another case. Throughout their papers, Respondents attempt to divert attention from the claims at issue, and instead repeatedly focus on arguments that Petitioners did not make and have not asked this Honorable Court to adjudicate. For example, though there is no pending motion for a preliminary injunction, Respondents dedicate a fifth of their brief to that issue. Similarly, much of the brief is dedicated to arguments about the constitutionality of vaccine mandates under federal law, which is odd, as this suit solely raises state law claims.

But these red herrings cannot distract from the glaring and unavoidable preemption problems that plague 10 NYCRR § 2.61 (the "Mandate"). The plain and simple fact is that the Mandate not only lacks an enabling statute, but the Legislature expressly prohibited the NYSDOH from issuing any new vaccine mandates other than those listed by the Legislature in Public Health Law ("PBH") §§ 2164-2165. Absent from these sections is any authority to mandate a COVID-19 vaccine.

In *Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 N.Y. 3d 601 (2018), the Court of Appeals already affirmed that the PBH preempts the New York State Department of Health ("NYSDOH") from issuing any new vaccine mandates. *Id.* at 602. This Court can and should issue declaratory relief that the Mandate is preempted, and permanently enjoin it's enforcement. To the extent that this lawsuit is not resolved on the preemption claims, triable issues of fact require Respondents' motion to dismiss to be denied and an answer filed forthwith.

STANDARD OF REVIEW

"A pre-answer motion to dismiss a CPLR article 78 petition for failure to state a cause of action is 'tantamount to a demurrer, assumes the truth of the allegations of the petition, and permits no consideration of facts alleged in support of the motion.'" *Bihary v. Zoning Bd. Of Appeals of City of*

Buffalo, 206 A.D.3d 1575, 1576 (2022) (citing cases). Where, as here, Respondents seek to dismiss a hybrid action for failure to state a claim, all allegations in the petition must be deemed true, and all favorable inferences afforded to petitioners. *Gilbert v. Plan Bd. Of Town of Irondequoit*, 148 A.D.3d 1587 (2017). So long as the allegations in a petition fit within any cognizable legal theory, the Petition must not be dismissed. *Bihary,* 206 A.D.3d at 1576.

ARGUMENT

A. Respondents failed to rebut the glaring pre-emption problems.

Respondents fail to rebut, or even address, most of the pre-emption claims. As a matter of law, the Vaccine Mandate should be declared null and void on these claims alone, which would resolve this lawsuit and allow Petitioners and thousands of other dedicated healthcare workers to go back to working at the dangerously short-staffed healthcare facilities across the state who desperately need them back.

1. The Public Health Law prohibits the NYSDOH from issuing new vaccine mandates.

First, § 2.61 is pre-empted by the Public Health Law ("PBH"), which bars the NYSDOH from issuing any new vaccine mandates for adults or children other than those enumerated by the Legislature in PBH §§ 2164-2165. [Pet. Brief, ECF No. 31 pp. 7-9].

Respondents assert that while the Commissioner admittedly lacks the power to enact any new vaccine mandate for adults or children pursuant to PBH §§ 206, 613, and 2164-65, the Mandate is somehow still allowable pursuant to PBH § 225. However, the plain language of PBH § 225 itself contradicts Respondents' argument. PBH § 225 sets forth the powers and limitations of the Public Health and Health Planning Council ("Council). It gives the Council broad instructions to propose changes to the statutory code necessary to "deal with any matters affecting the security of life or health or the preservation and improvement of public health in the state of New York." But § 225 also clarifies that while the Council may freely *recommend* changes to the code, any regulation or amendment

to the sanitary code must be ultimately approved (or rejected) by the Commissioner before it is adopted by the NYSDOH. *See, e.g.*, PBH §§ 225(3)-(4).

Thus, the limitations on the Commissioner's powers are the relevant inquiry. PBH § 206 sets forth the Commissioner's powers and limitations. There, as Respondents acknowledge, the Legislature expressly states that the Commissioner is prohibited from issuing any new vaccine mandate for adults or children other than those determined and enumerated by the Legislature in §§ 2164-2165. *See, e.g.*, PBH § 206(1)(l).

Respondents' argument against the clear statutory scheme is that the pre-emption "only applies to that paragraph." But the paragraph at issue defines the limitations and boundaries governing the Commissioner's powers, and so any limitation therein constrains the Commissioner in all actions under the Code, absent a specific instruction to deviate. Moreover, in the only other paragraph in which the PBH addresses the Commissioner's role in vaccine policy (PBH § 613), the Legislature reiterated the same clear limitation – noting that the Commissioner is not authorized to issue any new vaccine mandates for adults or children other than those set forth by the Legislature in §§ 2164-2165.

The Court of Appeals already examined this issue and affirmed that the NYSDOH is preempted pursuant to PBH §§ 206 and 613 from issuing any new vaccine mandates. *Garcia*, 31 N.Y. 3d at 602. Respondents materially misrepresent the holding of *Garcia,* omitting key language to allege that the Court held that "nothing in § 206(1)(l) 'prohibits the adoption of mandatory immunizations if otherwise authorized by law.'" What Respondents fail to provide to the Court is the rest of the sentence and paragraph in context, which clarify that the NYSDOH is pre-empted but local municipalities might enjoy more leeway than the state agency. The full paragraph reads:

> Nothing in Public Health Law § 2164 suggests that its list of vaccinations that are preconditions to enrollment in school and in institutions of higher education is an exclusive one that may not be expanded by **local municipalities to which the authority to regulate vaccinations has been delegated**...Similarly, the legislative history of Public Health Law §§ 206 and 613, which are directed to the powers and duties of the Commissioner of the New York State Department of Health (NYSDOH), reveals no

> intent to restrict **respondent's** authority to regulate vaccinations. **By their plain language, these provisions simply make clear that the particular statutory subdivisions at issue do not authorize NYSDOH to adopt mandatory immunizations,** but nothing therein prohibits the adoption of mandatory immunizations if otherwise authorized by law.

Id (emphasis added).

Nor would Respondents' argument make any sense in any event. There is no grant of authority that Respondents point to that "otherwise authorizes" the NYSDOH to issue new vaccine mandates. Respondents' reliance on the State Administrative Procedures Act ("SAPA") is particularly baffling. SAPA does not authorize the Commissioner to issue vaccine mandates or grant any other substantive authority to the NYSDOH. It merely sets forth the process by which a rule must be noticed, the types of information required in a regulatory impact statement, and the procedures necessary to finalize its adoption. Respondents argue if an agency submits a notice of adoption to the secretary of state, SAPA authorizes them to issue any law that they wish, even if no enabling statute allowed it and even if the Legislature specifically pre-empted them from doing so. [Resp. Brief, ECF No. 39 at 9]. This alarming argument is contradicted by SAPA itself, which requires that agencies must only promulgate rules that are "consistent with the objectives of applicable statutes." SAPA § 202-a. Since mandating COVID-19 vaccines is inconsistent with the objectives and clear direction of the Public Health Law and is also inconsistent with other applicable statutes, like the New York State Human Rights Law ("SHRL"), compliance with the notice and comment procedures in SAPA cannot save § 2.61 from the pre-emption claims.

The Court can and should grant declaratory relief holding that §2.61 is pre-empted and thus null, void, and unenforceable. In making this pre-emption determination, the Court need not determine the rationality of the Mandate, or any other issue of contested fact because this claim is purely about statutory construction and legislative intent, and no material facts are in dispute that would change the outcome. In such cases, the Court of Appeals recognizes that an answer need not

be filed pursuant to CPLR 7804(f), and relief may be issued immediately as a matter of law. *Kickertz v. New York Univ.*, 25 N.Y.3d 942, 944 (2015).

2. The State Human Rights Law also preempts § 2.61.

As an alternative, or in addition, the Court should also declare that § 2.61 is pre-empted because it interferes with rights and responsibilities required by the SHRL, codified at Executive Law Article 15. N.Y. Exec. Law § 296 (McKinney). Respondents arguments on religious accommodation are inapposite to the preemption analysis. Whether the state is *required* to offer a religious accommodation mechanism to employees is irrelevant. The Legislature already enacted SHRL, which carefully sets forth detailed requirements for balancing religious rights against public health needs. The question is whether the NYSDOH improperly contravened the statutory scheme by enacting § 2.61.

The answer is yes. SHRL prohibits discrimination, including any change in employment terms including segregation, privileges, or compensation on the basis of religion, creed or disability, among other protected characteristics. *Id.* § 296 (1). Disability is defined to include those who may be "regarded by others" as having a disability or disease. *Id.* at § 292 (21). In some instances, the categories will intersect. An example would be the cases where a person is regarded as being more likely to carry HIV because of their sexual orientation or practices. Similarly, here, Petitioners assert that the state assumes they are more likely to be infected with COVID because of their religious practices and thus they are "regarded as" having a disability. These hybrid cases carry a high risk of discrimination.

Pursuant to the SHRL, employers bear the burden of demonstrating, after engaging in a "bona fide effort" that they are unable to accommodate an employee's religious practices or real or perceived disability without "undue hardship." N.Y. Exec. Law § 296. Under state law, "undue hardship" is defined as "an accommodation requiring a *significant* expense or difficulty (including a significant interference with the safe or efficient operation of the workplace...)" *Id.* at § 296(10)(d) (emphasis added).

The safety analysis requires employers to ascertain whether a particular person would pose a "direct threat" to the safety of those around them if accommodated. These determinations cannot be generalized or speculative. Rather, "in determining whether a direct threat exists, 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 the risk; the probability that the potential injury will actually occur, and whether reasonable accommodations, such as modification of policies, practices or procedures, will mitigate the risk." 9 CRR-NY 466.11. If employers cannot meet their burden of proof that a particular employee would pose a direct threat, or that accommodation would cause significant expense or hardship, they must provide accommodation.

This "individualized standard" is a key component of the SHRL, and categorical prohibitions on accommodation are precluded by the law. *See, e.g., Doe v. Roe, Inc.*, 143 Misc. 2d 156, 159 (Sup. Ct. 1989), aff'd, 160 A.D. 2d 255 (1990). For example, the First Department held that the state could not categorically bar methadone users from public employment, but rather, needed to assess in an individualized fashion whether the individual petitioner's methadone dependency would prevent him from performing in a reasonable manner the activities involved in the specific jobs he sought without posing a direct threat to others. *Perez v. New York State Hum. Rts. Appeal Bd.*, 70 A.D.2d 558, 559 (1979). Certainly, if drug users are afforded the right to an individualized review of the actual danger they pose, it would be shocking and unjust to deny the same individualized non-speculative review to those who require religious accommodation.

The NYSDOH violated the spirit and letter of the SHRL by imposing a categorical ban on reasonable religious accommodation and usurping the employer's job of engaging in good faith individualized religious accommodation review. Respondents confusingly assert that "Section 2.61 does not require employers to violate the Human Rights Law because, although it bars religious

exemption, it does not prevent employers from granting an accommodation allowing them to continue working consistent with Section 2.61 while avoiding the vaccine requirement." [Resp. Brief, NYSCEF No. 39 at 7]. As a threshold matter, Respondents' reliance on the federal court interlocutory decision in *We the Patriots v. Hochul,* 17 F.4th 266, 293 (2d Cir. 2021), which assessed federal constitutional and statutory claims, is misplaced. The standards are completely different for state and federal statutory analysis. For example, Title VII's undue hardship analysis has been construed to require only a *de minimis* showing of burden, whereas the SHRL requires employers to demonstrate significant hardship before denying accommodation. And, the Legislature clarified that federal statutory interpretation is to have no bearing on the interpretation of what constitutes discrimination pursuant to the state counterpart: "in 2019, the New York State Human Rights Law was amended to direct courts to construe the Human Rights Law liberally for the accomplishment of the "remedial" purposes thereof, "regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of [the New York State Human Rights Law], have been so construed."' N.Y. Pattern Jury Instr.--Civil Division 9 I Intro. 1 (citing Executive Law § 300).

Moreover, the argument is disingenuous. The Petition alleges, and Respondents agree, that § 2.61 requires segregation of religious objectors, even if their religious practices could be accommodated without undue hardship or threat to safety. Whether it is theoretically possible that some healthcare worker may still be able to convince their employers to pay them or demote them to a remote position that does not include the practice of medicine and thereby avoid total termination is irrelevant. Executive Law § 296(10) makes it unlawful for employers to impose *any* adverse employment condition, including segregation from patients and colleagues, without taking "all reasonable steps, short of those involving undue economic hardship" to accommodate an employee's religious practices. *Schweizer Aircraft Corp. v. State Division of Human Rights,* 48 NY2d 294 (1979).

Each of the named Petitioners asserts in the Verified Petition that they were forced to choose between their job and their faith, despite the fact that their employers acknowledged that they could be safely accommodated without undue hardship absent the Mandate.[1] "The statute is designed to ensure 'that no citizen will be required to choose between piety and gainful employment unless the pragmatic realities of the workplace make accommodation impossible.'" N.Y. Pattern Jury Instr. – Civil Division 9 1 Intro. 1 (quoting *New York City Transit Authority v. State, Executive Dept., Div. of Human Rights*, 89 NY2d 79 (1996). Clearly, a categorical rule that bars doctors and nurses from seeing patients or working in a building with colleagues is an adverse employment condition that will swiftly lead to dire career consequences. Without individualized review to ensure that religious accommodation is truly unsafe, this categorical rule violates the SHRL.

Respondents' remaining arguments only bolster the pre-emption argument. For example, Respondents point out that the Legislature repealed the religious exemption for the childhood vaccine mandates in PBH § 2164 in 2019. But this action is not about the Legislature's authority to wrestle with religious exemption policy decisions. It is about the agency's authority to usurp that role. Moreover, what Respondents fail to mention is that in making the difficult policy choice to repeal the religious exemption in § 2164, the Legislature reached a hard-fought compromise, repealing the religious exemption for children under eighteen, but leaving intact the religious exemption for adults (PBH § 2165(9)). Section § 2.61 violates the Legislature's careful compromise. For example, many nursing students and residents are now unable to finish school because the Mandate prevents them

[1] Respondents puzzlingly argue that Petitioners fail to allege that they have sincere religious objections to the COVID-19 vaccine. This is incorrect. *See, e.g.*, Verified Petition, NYSCEF No. 1 ¶¶ 47-51.

from completing their hospital rotations without violating their religious beliefs, even though the PBH still provides that they are entitled to a religious exemption from vaccine requirements.[2]

The Legislature enacted a clear and well thought out statutory scheme to balance religious concerns against public health needs. The NYSDOH has no authority to upend the complex policy decisions of elected officials, or to deprive students and employees of their rights under the PBH and the SHRL. There is no real factual dispute that the Mandate deprives religious objectors of their rights to individualized and non-categorical or speculative review by their individual employers pursuant to SHRL. For this reason, the Court can and should declare that § 2.61 is preempted, null, void, and unenforceable as a matter of law on this basis as well.

B. The Petition properly alleges claims pursuant to Article 78 and the Separation of Powers doctrine.

The facts supporting the preemption claim also require relief on the separation of powers claim and support a finding that Respondents acted in excess of authority in violation of Article 78. These arguments are fully set forth in the opening brief, incorporated by reference here. [NYSCEF No. 31 pp. 9-21]. Respondents do not rebut, and therefore should be deemed to concede, that an agency usurps the authority of the legislative branch, acts ultra vires, and violates the Separation of Powers doctrine enshrined in the New York State Constitution, when it promulgates a rule without a grant of legislative authority. *See, e.g., Mattter of NYC v. CLASH, Inc. v. New York State Office of Parks and Recreation and Historic Preserv.*, 27 NY3d 600, 609 (2015).

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[2] Respondents also attempt to bolster their argument by pointing out that they issued a measles vaccine requirement for healthcare workers without offering a religious exemption too. They cite no case upholding that regulation, leave aside any holding that the measles regulation could withstand a preemption claim pursuant to the PBH or the SHRL. While it is outside of the scope of this lawsuit, it is likely that the measles vaccine regulation should also be struck down as preempted and ultra vires if challenged, though at least the measles regulation allows healthcare workers to submit evidence of natural immunity in lieu of vaccination, and proof of receipt of a measles vaccines received pursuant to the Legislature's childhood vaccine requirements in PBH § 2164 suffice, which could perhaps undercut an argument that the healthcare mandate for measles is a "new" vaccine requirement.

Respondents primary argument against these causes of action is that agency's must receive deference in determining legislative intent to confer authority through an enabling statute. But, as the Court of Appeals repeatedly reiterates, such deference is not appropriate in determining legislative intent: "[w]here instead the question requires statutory analysis 'dependent only on an accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight.'" *Leggio v. Devine*, 34 N.Y.3d 448, 460 (2020).

Further, Respondents do not rebut, and should be deemed to concede that pursuant to PBH §§ 225(3)-(4), the Council has no independent authority to issue regulations absent approval by the Commissioner, and that the Commissioner's powers are limited by §§ 206 and 613 to preclude issuance of new vaccine mandates. These arguments were not before the Court in the two non-precedential Albany Supreme Court cases cited by Respondents as authority to dismiss the Article 78 and Separation of Powers claims. *See, Serafin v. NYSDOH,* Index No. 908296-21 [NYSCEF No. 178, December 9, 2021] (NY Sup.Ct. Albany Cnty) ("*Serafin*"); and *Coalition of Citizens for Medical Choice, Inc., v. NYSDOH,* Index No. 908359-21 [NYSCEF No. 151, March 16, 2022) (NY Sup.Ct. Albany Cnty.) ("*Coalition of Citizens for Medical Choice*).

Moreover, in both of those cases, Acting Supreme Court Justice Roger D. McDonough, addressed whether the emergency rule was reasonable pursuant to the more forgiving standards governing emergency rulemaking, as opposed to permanent rulemaking. This Court is not bound by the Albany Supreme Court's analysis of the Separation of Powers claims or the rationality determinations made by a different lower court on different facts. And, as Justice McDonough acknowledged in *Coalition of Citizens for Medical Choice,* the adoption of a permanent rule would and does provide the opportunity for fresh consideration of Article 78 challenges to the Mandate even in the Albany County courts. *Id.* at 17. Indeed, the facts in favor of Petitioners are considerably stronger

now. As set forth in the Petition, there is at this point no credible scientific basis to conclude that vaccines are necessary or effective at stopping the spread of disease, and this was well understood at the time that § 2.61 was adopted as a permanent regulation. Even the most enthusiastic vaccine proponents, including the CDC, now caution that employers should refrain from differentiating between vaccinated and unvaccinated people when adopting mitigation strategies, since vaccinated people catch and spread COVID-19 at substantially the same rate as unvaccinated. [Petition NYSCEF No. 1 at ¶ 40]. And the regulatory impact statement issued in support of the permanent regulation reflects this too, admitting repeatedly that the vaccines are primarily for personal protection. [*See e.g.*, Regulatory Impact Statement, NYSCEF No. 47 at p.25]. Yet, the NYSDOH continues to insist that the unvaccinated need to be segregated from those who could catch COVID from them. Why?

The regulatory impact statement does not provide justification for the permanent adoption of the vaccine mandate. SAPA § 202(a)(3)(b) requires that an agency set forth "a citation for and summary [] of each scientific or statistical study, report or analysis that served as the basis for the rule and how it was used to determine the necessity for and benefits derived from the rule, and the name of the person that produced each study, report or analysis." These data must be updated as the facts change. Yet, Respondents provide only two links to CDC websites to justify their Mandate – one "early release" (non-peer reviewed) snapshot from May and June of 2021 in Kentucky, suggesting that unvaccinated people got COVID at higher rates in May and June of 2021 in a county in Kentucky, and another CDC summary of research trends (much of it non-peer reviewed) that was last updated on September 15, 2021. While completely outdated, even this old summary acknowledged that natural immunity offers protection "on par with completion of a primary vaccine series." Yet, irrationally, NYSDOH refuses to allow those with natural immunity (such as all named Petitioners in this suit) the chance to work in their field. [NYSCEF No. 47 at 33].

While Respondents might have been justifiably given more leeway in enacting temporary emergency regulations early on without solid science, there is no excuse for the permanent adoption of the Mandate now. Petitioners support the contention in their petition, that it is irrational to mandate COVID-19 vaccines since they cannot stop the spread of COVID-19, with (among other things) an amicus brief written by Professors of Medicine and Public Health Dr. Jay Bhattacharya, and Dr. F. Scott French. [NYSCEF No. 22]. The brief is filled with citations to peer-reviewed published studies and points out the overwhelming scientific consensus that COVID-19 vaccines offer "near zero" protection against transmission of disease. [*See, e.g., Id.* at pp. 7-12]. Actually, emerging real-world data from reputable and replicable studies consistently shows that vaccine efficacy turns *negative* within a few months of receipt of a vaccine – meaning that vaccinated people are more likely to be infected than those who have never been vaccinated. [*See, e.g., Id.* at p.8]. To the extent that there are factual disputes about these or other material facts, Petitioners respectfully ask that discovery be allowed, and a fact finding conducted with the opportunity for expert testimony and cross-examination. While an administrative agency is afforded a high degree of deference in the area of its particular expertise, they are not entitled to blind faith, and deference is inappropriate where the rule appears irrational or arbitrary and capricious. *L. Enf't Officers Union, Dist. Council 82, AFSCME, AFL-CIO by Seide v. State,* 170 Misc. 2d 143, 149 (Sup. Ct. 1996), *aff'd sub nom. L.Enf't Officers Union, Dist. Council 82, AFSCME, AFL-CIO v. State,* 229 A.D.2d 286 (1997). At this point, given the dearth of justification in the regulatory impact statement and especially since all favorable inferences must be resolved in Petitioners' favor, it would be improper to dismiss these claims.

CONCLUSION

Based on the foregoing, and on all the papers and evidence submitted in this action to date, Petitioners-Plaintiffs respectfully request that the Court deny Respondents motion to dismiss, grant declaratory and permanent injunctive relief on the Preemption claims along with attorney's fees and

other relief sought in the Petition or, in the alternative, order Respondents to answer the Verified Hybrid Petition, issue a discovery schedule, and order such other, further, or different relief as the Court deems just.

Respectfully Submitted,

Dated: January 3, 2023,
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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Sujata Gibson, counsel for petitioners and an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 4197 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: January 3, 2023,
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