

SUPREME COURT THE STATE OF NEW YORK
COUNTY OF ONONDAGA

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

NOTICE OF APPEAL

Index No.: 008575/2022

Petitioners-Plaintiffs,

-against-

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,


Respondent – Defendants.

PLEASE TAKE NOTICE that Respondents, MARY T. BASSETT, in her official capacity as the Commissioner of Health of 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, hereby appeal to the Appellate Division of the Supreme Court for the Fourth Judicial Department from the Decision and Order dated January 13, 2023, by Supreme Court, Onondaga County (Neri, J.S.C.), and filed via New York State Court Electronic Filing System (“NYSCEF”) on January 13, 2023.

This appeal is taken from each and every part of said Decision and Order as well as the whole thereof.

Dated: Syracuse, New York
January 24, 2023

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Onondaga County Supreme Court

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008575/2022

Medical Professionals for Informed Consent et al v. Mary T. Bassett M.D. et al

Assigned Judge: Gerard J Neri

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At a Special Term of the Supreme Court of the State of New York, held in and for the County of Onondaga, at 401 Montgomery Street, Syracuse, New York, on January 5, 2023.

Present: Hon. Gerard J. Neri, J.S.C.

STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

**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,
RN., individually and on behalf of others similarly situated,**

DECISION and ORDER

Motion #1

Motion #2

Index No: 008575/2022

Petitioners-Plaintiffs,

-against-

**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.

On October 20, 2022, Petitioners-Plaintiffs Medical Professionals for Informed Consent, Kristen Robillard, M.D., Zarina Hernandez-Schipplick, M.D., Margaret Florini, A.S.C.P., Olesya Girich, RT(R), and Elizabeth Storelli, RN (collectively as the "Petitioners") filed a verified petition commencing this hybrid Article 78 and Declaratory Judgment action (*see* Petition). The Petition seeks an order of the Court enjoining and permanently restraining Defendants-Respondents Commissioner of Health Mary T. Bassett (the "Commissioner"), Governor Kathleen C. Hochul (the "Governor"), and the New York State Department of Health ("DOH", and collectively as the (Respondents")) and any of their agents, officers, and employees from implementing or enforcing 10 NYCRR §2.61, Declaring that 10 NYCRR §2.61 is ultra vires,

preempted by state law, null and void and/or unenforceable, and awarding 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 (*see* Petition, prayer for relief, Doc. No. 1). The matter was set down for December 8, 2022 (*see* Amended Notice of Petition, Doc. No. 30). On November 18, 2022, Respondents requested an adjournment of the return date (Doc. No. 36). The Court held a conference on November 22, 2022 and set forth a briefing schedule and moved the return date to January 5, 2023. On December 22, 2022, Respondents answered and opposed the relief sought (Doc. No. 37). Respondents further moved to dismiss the petition (*see* Notice of Motion, Doc. No. 38).

Petitioners seek, *inter alia*, an order of this Court declaring that the COVID-19 vaccine mandate for medical providers pursuant to 10 NYCRR §2.61 (the "Mandate") be declared an ultra vires act by the DOH. The Mandate has its origin in the beginning stages of the COVID-19 Pandemic. The New York State Legislature ceded powers to the then Governor Andrew Cuomo on an emergency basis. On June 24, 2021, Governor Cuomo rescinded his previous emergency orders related to the COVID-19 Pandemic under certain Executive Orders (*see* Executive Order 210, Doc. No. 15). Despite the end of the emergency, on June 22, 2022, the Commissioner adopted the Mandate as a permanent regulation (*see* Petition, Doc. No. 1, ¶9). The Mandate provides:

"Covered entities shall continuously require personnel to be fully vaccinated against COVID-19, absent receipt of an exemption as allowed below. Covered entities shall require all personnel to receive at least their first dose before engaging in activities covered under paragraph (2) of subdivision (a) of this section" (10 NYCRR §2.61(c)).

Petitioners assert the Mandate is preempted by State Law, specifically Public Health Law §§206, 613, 2164, and 2165. Public Health Law §206(1)(l) provides:

“establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health. Such programs may include the purchase and distribution of vaccines to providers and municipalities, the operation of public immunization programs, quality assurance for immunization related activities and other immunization related activities. The commissioner may promulgate such regulations as are necessary for the implementation of this paragraph. ***Nothing in this paragraph shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter***” (Public Health Law § 206(1)(l), *emphasis added*).

Public Health Law §613 has a similar prohibition on mandatory immunization: “Nothing in this subdivision shall authorize mandatory immunization of adults or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter”

(Public Health Law § 613(1)(c)). Public Health Law §2164 covers children attending day care through high school (*see* Public Health Law §2164(1)(a) and requires immunization for “poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B” (Public Health Law § 2164(2)(a). Boosters are detailed in subparagraph b of said paragraph (*ibid*, sub. b).

Subparagraph c covers Meningococcal Disease (*ibid*, sub. c). Public Health Law §2165 covers college students and requires immunization for “measles, mumps and rubella” (Public Health Law §2165). COVID-19 or coronaviruses generally are not covered by any of the aforementioned sections. “[T]he 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” (*Garcia v. N.Y. City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 620 [2018], *citing* 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 N.Y. Legis. Ann. at 179).

Petitioners further argue that the Mandate violates the separation of power doctrine.

“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 at 608, *citations omitted*).

“If a rule exceeds the parameters of the power granted by the legislature to the enacting agency—that is, ‘if an agency was not delegated the authority to [establish the] rule[], then it would usurp the authority of the legislative branch by enacting th[at] [regulation]’” (Matter of NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Preserv., 27 N.Y.3d 174, 178 [2016], *citing* Greater NY Taxi Assn. v. NY City Taxi & Limousine Commn., 25 N.Y.3d 600, 608 [2015]).

In New York, the Boreali test is used to determine whether an agency has exceeded its authority.

“To determine whether an administrative agency has usurped the power of the Legislature, courts must consider whether the agency: (1) ‘operat[ed] outside of its proper sphere of authority’ by balancing competing social concerns in reliance ‘solely on [its] own ideas of sound public policy’; (2) engaged in typical, ‘interstitial’ rulemaking or ‘wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance’; (3) ‘acted in an area in which the Legislature has repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions’; and (4) applied its ‘special expertise or technical competence’ to develop the challenged regulations” (Matter of Acevedo v. N.Y. State Dept. of Motor Vehs., 132 A.D.3d 112, 119 [3d Dept 2015], *citing* Boreali v. Axelrod, 71 N.Y.2d 1, 12-14 [1987]).

Petitioners assert that the Mandate fails all four considerations.

Petitioners further assert that for the reasons proffered in support of their declaratory judgment, Petitioners are also entitled to relief under Article 78 of the CPLR. Further, Petitioners argue the Mandate must be struck down as arbitrary and capricious. “The challenger must establish that a regulation is so lacking in reason for its promulgation that it is essentially arbitrary” (N.Y. State Assn. of Counties v. Axelrod, 78 N.Y.2d 158, 166 [1991], *internal citations omitted*). Petitioners note that the original vaccine mandate had a religious exception, but the final Mandate did not. Petitioners note that on September 15, 2021, in response to a question about why the religious exception was not included, Respondent Governor stated:

“We left off that in our regulations intentionally, and we believe that there, this is my personal opinion, because I'm going to, you know, we'll be defending this in court. To the extent that there's leadership of different religious organizations that have spoken, and they have, I'm not aware of a, sanctioned religious exemption from any organized religion. In fact, they're encouraging the opposite. They're encouraging their members, everybody from the Pope on down is encouraging people to get vaccinated” (*see* Transcript of Governor's Comments, September 15, 2021, Doc. No. 17).

Petitioners argue that the State may not target religious minorities solely on the basis of their view regardless of how well-intentioned the subject regulation may be (*see Trump v. Hawaii*, 138 S. Ct. 2392, 2423 [2018]). *Petitioners argue that there is no rational basis for the Mandate when Respondent DOH acknowledges the mandated vaccine fails to accomplish its stated goal, i.e., prevent the spread of COVID-19* (*see* DOH Response to Comments, Doc. No. 7, p. 25). Petitioners submitted news articles highlighting vaccine proponents, who publicly stated they received a COVID-19 vaccine and in some instances multiple boosters, nonetheless were still infected by COVID-19 one or multiple times (Doc. Nos. 23-27). Petitioners pray the Court grant the requested relief.

Respondents oppose the relief sought and simultaneously move to dismiss the Petition. Respondents open their memorandum of law by stating:

“Petitioners have filed the instant action in the misguided hope that this Court will rule against a growing body of precedent and belatedly upend the state-wide requirement—as well as the settled status quo since at least October 29, 2021, if not earlier—under 10 N.Y.C.R.R. § 2.61 which mandates that Petitioners are vaccinated against COVID-19. In the State of New York alone, COVID-19 has infected more than 5 million New Yorkers and has caused more than 73,000 deaths” (*see* Memorandum of Law, Doc. No. 39, p. 1).

Respondents argue the Mandate has a rational basis and its enactment was not arbitrary or capricious.

“Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld” (Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 [1980]).

Respondents argue DOH may promulgate regulations that “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” (*see* Public Health Law §225(4) and (5)(a)). Respondents further note that the Second Circuit in disposing of a case challenging the Mandate’s lack of a religious exception under Federal Law declared that the Mandate “was a reasonable exercise of the State’s power to enact rules to protect the public health” (We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 290 [2d Cir 2021]). Respondents assert that the Petitioners failed to meet their burden to demonstrate outright irrationality, arbitrariness, or capriciousness concerning the Mandate.

Respondents argue they are not required to include a religious exception for vaccine requirements. “The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death” (Prince v. Massachusetts, 321 U.S. 158, 166-167 [1944]; *see also* Phillips v. City of N.Y., 775 F.3d 538, 543 [2d Cir. 2015]). Respondents note the Federal Courts have previously concluded that the Mandate does not run afoul of religious freedom guaranteed to New York citizens.

Respondents argue that the Mandate does not violate the State Administrative Procedure Act. Respondents argue that the basis for the Mandate comes from Public Health Law §§225(5), 2800, 2803(2), 3612, and 4010(4). Respondents do not explain the basis of the cited sections. Public Health Law §225 sets forth the general powers and duties of the public health and health planning council to implement the sanitary code, and paragraph 5 provides for what the sanitary code may do (Public Health §225). Public Health Law §2800 is entitled “Declaration of policy and statement of purpose” for Public Health Law Article 28 – Hospitals (Public Health Law §2800). Public Health Law §2803(2) provides for the powers and duties of the DOH commissioner and council to set rules and regulations for hospitals (Public Health Law §2803). Public Health Law §3612 entitled “Powers and duties of commissioner and state hospital review and planning council” and provides for general oversight of certified home health agencies, long term home health care programs, and certain AIDS home care programs (Public Health Law §3612). Public Health Law §4010(4) provides for the oversight powers concerning hospice (Public Health Law §4010). Respondents argue that they have complied with the State Administrative Procedure Act and the Mandate is a valid exercise of power.

Respondents argue that the Boreali factors favor Respondents. The focus of the first factor “must be on whether the challenged regulation attempts to resolve difficult social problems in this manner” (Natl. Rest. Assn. v. N.Y. City Dept. of Health & Mental Hygiene, 148 A.D.3d 169, 174 [First Dept. 2017]). Respondents argue the Mandate does not weigh considerations but is simply an across the board requirement mandating COVID-19 vaccinations. Respondents argue the second factor is similarly in Respondents’ favor as they did not write on a “clean slate”. Respondents argue they have broad authority under the Public Health Law to implement the Mandate. Respondents assert that Petitioners failed to meet their burden by

demonstrating any failed legislative attempts to regulate COVID-19 vaccinations of medical personnel. Respondents sum up Petitioners' argument on this point by stating that there has been no legislative action. The fourth factor lies in Respondents' favor as it "turns on agency knowledge, and specifically whether the agency used special expertise or competence in the field to develop the challenged regulation" (Matter of NYC C.L.A.S.H., Inc. v. N.Y. State Off. of Parks, Recreation & Historic Preserv., 27 N.Y.3d 174, 184 [2016]). Respondents assert the Boreali factors lie in their favor. Respondents pray the Court deny the relief sought in the Petition.

Petitioners replied and reiterated their arguments. The Court held oral arguments on January 5, 2023.

Discussion:

At the outset, the Court must address the Respondents' motion to dismiss. The Notice of Motion simply states that Respondents seek an order of the Court "dismissing all portions of the Petition and Complaint seeking relief pursuant to CPLR §3001 and/or Article 78 relief" (*see* Notice of Motion, Doc. No. 38). While the Answer lists "objections in point of law" without any explanation (*see* Answer, Doc. No. 37, ¶¶7-14), the supporting Memorandum of Law solely addresses the merits of the Petition (*see* Memorandum of Law, Doc. No. 39). The Court deems the motion to dismiss abandoned, denies to the extent necessary, and shall address the merits of the Petition. The Court further notes that for reasons detailed below, the Respondents acted outside of their legislative grant of authority and the 120-day statute of limitations is inapplicable (*see* NYPERB v. Bd. of Ed. Of the City of Buffalo, 39 N.Y.2d 86, 93 [1976]; *see also* Foy v. Schechter, 1 N.Y.2d 604 [1956]).

Petitioners seek a declaration that 10 NYCRR §2.61, entitled “Prevention of COVID-19 transmission by covered entities”, mandating that certain medical professionals be “fully vaccinated”, as that term is defined, against COVID-19, is null, void, and of no effect as it is an *ultra vires* act of the New York State Department of Health. Petitioners assert that the Mandate is preempted by certain sections of the Public Health Law. Respondents oppose and assert that general grants of power contained within the Public Health Law permit Respondents to impose the subject Mandate. “[I]t is a commonplace of statutory construction that the specific governs the general” (Morales v. TWA, 504 U.S. 374, 384 [1992]; *see also* Strategic Risk Mgt., Inc. v. Fed. Express Corp., 253 A.D.2d 167, 172 [First Dept. 1999]). The Commissioner is specifically prohibited from implementing a mandatory immunization program for adults and children, “except as provided in section twenty-one hundred sixty-four and twenty-one hundred sixty five” of the Public Health Law (Public Health Law §206(1)(l)). An identical prohibition on mandatory immunization programs is found in Public Health Law §613. Public Health Law §2164 covers children attending day care through high school (*see* Public Health Law §2164(1)(a) and requires immunization for “poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B” (Public Health Law § 2164(2)(a). Boosters are detailed in subparagraph b of said paragraph (*ibid*, sub. b). Subparagraph c covers Meningococcal Disease (*ibid*, sub. c). Public Health Law §2165 covers college students and requires immunization for “measles, mumps and rubella” (Public Health Law §2165). COVID-19 or coronaviruses generally are not covered by any of the aforementioned sections. Respondents are clearly prohibited from mandating any vaccination outside of those specifically authorized by the Legislature. The sections cited by Respondents provide nothing more than general grants of power. Reading those sections in the manner urged

by Respondents would render Public Health Law §§206, 613, 2164, and 2165 meaningless. “It is well settled that in the interpretation of a statute we must assume that the Legislature did not deliberately place a phrase in the statute which was intended to serve no purpose” (In re Smathers' Will, 309 N.Y. 487, 495 [1956]). Public Health Law §§206, 613, 2164, and 2165 thus create a ceiling, limiting what Respondents may do, not a floor demarking the base from which to start. Even without this analysis, the Court of Appeals has already defined the limitations of Respondents’ authority regarding vaccine mandates. “[T]he 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” (Garcia at 620). The Mandate, 10 NYCRR §2.61, is beyond the scope of Respondents’ authority and is therefore null, void, and of no effect, and Respondents, their agents, officers, and employees are prohibited from implementing or enforcing the Mandate.

The Court does not believe Boreali is applicable to the instant matter as this is not a case where DOH acted in some gray area, but will nonetheless address them. DOH blatantly violated the boundaries of its authority as set forth by the Legislature. Even so, the Boreali factors do not lay in favor of Respondents. The first factor, whether Respondents “operated outside of its proper sphere of authority” (Boreali at 12) clearly weighs against Respondents as they violated Public Health Law §§206, 613, 2164, and 2165. Similarly, the second factor, whether Respondents engaged in “interstitial” rule-making (*ibid* at 13) weighs against Respondents as they violated Public Health Law §§206, 613, 2164, and 2165. Clearly Respondents did not “fill in” some missing area, but acted contrary to statute. Concerning the third factor, whether the Legislature has failed to act (*ibid*), this record is replete with COVID-19 Legislative proposals. The fourth Boreali factor, special expertise in the field (*ibid* at 13-14) is implicated as this is a

health-related proposal, but for reasons set forth below, it is clear such expertise was not utilized as the COVID-19 shots do not prevent transmission.

Respondents fare no better under the “arbitrary and capricious” standard of Article 78. “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cnty., 34 N.Y.2d 222, 231 [1974]). The Mandate is entitled “Prevention of COVID-19 transmission by covered entities” (10 NYCRR §2.61). In true Orwellian fashion, the Respondents acknowledge then-current COVID-19 shots do not prevent transmission (*see* Summary of Assessment of Public Comment, NYSCEF Doc. No. 7, p. 25). The Mandate defines, in the loosest meaning of the word, “fully vaccinated” as “determined by the Department in accordance with applicable federal guidelines and recommendations” (*ibid*). “[I]t is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning” (Gawron v. Town of Cheektowaga, 117 A.D.3d 1410, 1412 [Fourth Dept. 2014], *citing* Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 [1998]). A term which is defined at the whim of an entity, subject to change without a moment’s notice contains all the hallmarks of “absurdity”¹ and is no definition at all. In the alternative, the Court finds the Mandate is arbitrary and capricious.

¹ Absurdity – 1) the quality or state of being absurd; 2) something that is absurd - <https://www.merriam-webster.com/dictionary/absurdity>

Absurd – 1) ridiculously unreasonable, unsound, or incongruous; 2) having no rational or orderly relationship to human life; 3) dealing with the absurd (the state or condition in which human beings exist in an irrational and meaningless universe and in which human life has no ultimate meaning) - <https://www.merriam-webster.com/dictionary/absurd>

Petitioners further seek attorneys' fees, costs, and disbursements of the action pursuant to CPLR §8101 and any other applicable statutory, common law or equitable provision. The Court shall permit the Parties to submit a concise memorandum of law concerning the award of attorneys' fees pursuant to Article 86 of the CPLR and any other relevant provision of law. Petitioners' counsel shall include with her submission an affirmation of fees supporting her request. Petitioners' submission shall be due on or before January 27, 2023, the Respondents shall file their submission on or before February 3, 2023.

NOW, THEREFORE, upon reading and filing the papers with respect to the Petition and the Motion, the arguments, and due deliberation having been had thereon, it is hereby


ORDERED, that the motion to dismiss brought by Respondents is DENIED; and it is further

ORDERED, that the relief sought by the Petition seeking a declaration that the Mandate, 10 NYCRR §2.61, as being beyond the scope of Respondents' authority and is therefore null, void, and of no effect, so that the Respondents, their agents, officers, and employees are prohibited from implementing or enforcing the Mandate is GRANTED; and it is further

ORDERED, that the Court reserves on Petitioners' request for attorneys' fees, costs, and disbursements and shall make a determination on said request upon the filing of papers as set forth hereinabove.

Dated: January 13, 2023

ENTER.


HON. GERARD J. NERI, J.S.C.