To be argued
By: DUSTIN J. BROCKNER
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Fourth Department

No. CA 23-00161

In the Matter of the Application of
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., OLESYA GIRICH, RT(R), and ELIZABETH STORELLI, R.N., Individually and on Behalf of Others Similarly Situated,

Petitioners-Plaintiffs-Respondents,

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-Appellants,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

BRIEF FOR APPELLANTS

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Supreme Court, Onondaga County – Index No. 008575/2022

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PRELIMINARY STATEMENT

The COVID-19 pandemic has imposed a heavy burden on New York's healthcare system. Healthcare facilities today face the threat posed by surges in new cases, staffing shortages, and deterioration of patient care. To combat these issues, the Public Health and Health Planning Council ("Council")—a body within the New York State Department of Health ("DOH")—adopted a regulation that requires covered healthcare facilities to ensure patient-facing personnel be vaccinated against COVID-19. The COVID-19 vaccines are a safe and effective way to protect against the virus and the severe health outcomes it can cause. State and federal courts have found that DOH's regulation is a reasonable exercise of its rulemaking authority.

In this hybrid C.P.L.R. article 78 proceeding and declaratory judgment action, petitioners allege that DOH's regulation exceeds its rulemaking authority and is irrational. Supreme Court, Onondaga County (Neri, J.), granted the petition, declared the regulation unlawful, and permanently enjoined its enforcement.

This Court should reverse and enter judgment declaring that the challenged regulation is valid. The Legislature has broadly empowered

DOH—acting through its Commissioner and the Council—to issues rules to protect the public health and ensure that hospitals and other healthcare facilities are safely run. Consistent with this grant of authority, DOH has long required covered healthcare facilities to ensure that their personnel follow health and safety standards, including those concerning immunizations against contagious diseases such as measles and rubella. The challenged regulation fits squarely within that long-exercised authority: It is a health-related condition of employment meant to protect healthcare workers and the vulnerable populations they serve, including by reducing the chance that workers suffer severe health outcomes that could result in protracted absences from work or death.

In holding otherwise, Supreme Court misread the Public Health Law. Despite DOH's longstanding immunization requirements for healthcare workers, the court held that two provisions—Public Health Law §§ 206 and 613—prohibit DOH from issuing *any* vaccination requirements beyond those that the Public Health Law already imposes on schoolchildren and college students. But these two provisions contain no such prohibition. Rather, as the Court of Appeals has held, the two provisions—which allow DOH to support public vaccination programs—

simply clarify that those provisions themselves do not permit DOH to create mandatory vaccination programs. The provisions do not bar DOH from issuing vaccination requirements if it is authorized to do so by another statute. And ample statutory authority empowers DOH to require healthcare personnel to abide by health and safety standards. Further, and contrary to Supreme Court's holding, DOH's regulation complies with the separation-of-powers doctrine and has a rational basis.

QUESTIONS PRESENTED

1. Whether DOH validly exercised its longstanding authority to protect the public health and set standards for covered healthcare facilities when it issued a regulation that requires such facilities to ensure that patient-facing healthcare workers be vaccinated against COVID-19.

2. Whether the challenged regulation has a rational basis.

3. Whether this Court should issue a judgment declaring that the challenged regulation is a valid exercise of DOH's rulemaking authority.

STATEMENT OF THE CASE

A. Statutory Background

1. The Public Health and Health Planning Council

The Council, a body within DOH, consists of the Commissioner of Health and twenty-four members whom the Governor appoints with the Senate's advice and consent. P.H.L. § 220. The Council is comprised of health experts, including healthcare providers and public health specialists. *Id.*

The Legislature has "delegated broad authority" to DOH—acting through its Commissioner and the Council—to "implement regulations regarding the preservation and improvement of public health, as well as establishing standards in health care facilities that serve to foster the prevention and treatment of human disease." *Matter of Spence v. Shah*, 136 A.D.3d 1242, 1245 (3d Dep't) (citing P.H.L. §§ 225, 2800, 2803, 3612, 4010), *lv. denied*, 27 N.Y.3d 908 (2016). The Council must, at the Commissioner's request, "consider *any* matter relating to the preservation and improvement of public health." P.H.L. § 225(1) (emphasis added). The Council is also empowered, subject to the Commissioner's approval, to adopt regulations, known as the State

Sanitary Code, to "deal with *any* matters affecting the security of life or health or the preservation and improvement of public health." *Id.* § 225(5)(a) (emphasis added); *see generally* 10 N.Y.C.R.R. ch. I (State Sanitary Code).

The "essence" of this delegation is to give the Council the "flexibility" and authority to "adapt[] . . . legislative policy to infinitely variable conditions." *Chiropractic Assn. of N.Y. v. Hilleboe*, 12 N.Y.2d 109, 119-20 (1962); *accord Matter of New York State Socy. of Surgeons v. Axelrod*, 77 N.Y.2d 677, 683 (1991). Among the core subjects of the Sanitary Code are "communicable diseases which are dangerous to the public health." P.H.L. § 225(5)(h); *see generally* 10 N.Y.C.R.R. part 2 (Communicable Diseases).

2. DOH's Long History of Promulgating Vaccine and Other Health-Related Requirements for Healthcare Workers

DOH is also statutorily responsible for regulating the conditions and quality of care at covered healthcare facilities, which include hospitals, hospices, certified home health agencies, long-term health care programs, AIDS home care programs, and adult care facilities. And DOH has long exercised this authority to require that covered facilities ensure

that their patient-facing employees are vaccinated against certain contagious diseases.

Regarding hospital services, section 2800 of Public Health Law article 28 states: "In order to provide for the protection and promotion of the health of the inhabitants of the state," DOH "shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services." P.H.L. § 2800. As the Court of Appeals has held, § 2800 sets forth "an easily understood principle in a field where a substantial degree of flexibility is required." *Levine v. Whalen*, 39 N.Y.2d 510, 516 (1976). Because medical standards "change constantly," "[p]ractical necessities compelled the Legislature to assign broad functions to [DOH] and to leave to it the duty of bringing about the result pointed out by statute." *Id.* at 516-17.

Relatedly, Public Health Law § 2803 empowers the Council to issue regulations, subject to the Commissioner's approval, "to effectuate the provisions and purposes of" article 28 of the Public Health Law. P.H.L. § 2803(2)(a). This authority includes the power to set minimum "standards and procedures" governing "hospital operating certificates"

and to amend those standards to protect "the health and safety of the residents of hospitals." *Id.* § 2803(2)(a)(v).

Consistent with these grants of authority, the Council has long maintained minimum standards for hospitals, *see* 10 N.Y.C.R.R. part 405 (Hospitals—Minimum Standards), including that they "provide a sanitary environment to avoid" the transmission of communicable disease that may "lead to morbidity or mortality in patients and hospital personnel," *id.* § 405.11 (eff. Jan. 1, 1989). Hospitals must also maintain "an effective infection control program for the prevention" of communicable diseases. *Id.*

The Council's standards have further required hospital personnel to follow certain health measures as conditions of their employment. These include tuberculosis testing, *id.* § 405.3(b)(10)(iv), and periodic health assessments to ensure that such personnel are "free from health impairments which pose potential risk to patients or personnel," *id.* § 405.3(b)(11). The standards have also long included the requirement that certain personnel be vaccinated against specified contagious diseases. *Id.* § 405.3(b)(10)(i)-(ii). Specifically, personnel who pose a risk of transmission to patients have been required to be immunized against

rubella since 1980 and measles since 1991. *See* 3 N.Y. Reg. 6, 6 (Jan. 14, 1981) (rubella); 13 N.Y. Reg. 16, 16 (Dec. 24, 1991) (measles). The sole exceptions to this requirement are for personnel who either cannot be vaccinated for valid medical reasons or who obtained a blood test that provides "serologic evidence" demonstrating that the personnel have antibodies to measles or rubella. 10 N.Y.C.R.R. § 405.3(b)(10)(i)-(iii).

DOH is similarly responsible for regulating the conditions and quality of care at other healthcare facilities, including hospices, *see* P.H.L. § 4010; certified home health agencies, long-term health care programs, and AIDS home care programs, *see id.* § 3612; and adult care facilities, Social Services Law ("S.S.L.") §§ 461, 461-e. As with hospitals, DOH has required personnel at such facilities to follow health and safety standards, including that covered personnel be immunized against rubella and measles. *See* 10 N.Y.C.R.R. §§ 763.13(c)(1)-(3) (home health agencies, long-term health care programs, and AIDS home care programs), 766.11(d)(1)-(3) (licensed home care services agencies), 794.3(d)(1)-(3) (hospice), 1001.11(q)(1)-(3) (assisted living residences); *see also* 10 N.Y.C.R.R. §§ 415.26(c)(1)(v)(a)(2)-(4) (nursing homes), 751.6(d)(1)-(3) (diagnostic and treatment centers).

More recently, in 2013, DOH again exercised its authority to issue regulations to promote the public health and set standards for healthcare facilities. The Council issued a regulation that required covered healthcare personnel to either be vaccinated against influenza or wear a surgical mask during flu season when in areas where patients are present. *See* 10 N.Y.C.R.R. § 2.59(d) (eff. July 11, 2013). The Third Department held that this health-related condition fell "comfortably within the intent of" the aforementioned statutes—Public Health Law §§ 225, 2800 2803, 3612, and 4010. *Matter of Spence,* 136 A.D.3d at 1245-1246.

Two other Public Health Law provisions are at issue in this appeal: §§ 206(1)(*l*) and 613(1). Both provisions were adopted in pertinent part in 2004. *See* L. 2004, ch. 207, §§ 5, 6. Section 206(1)(*l*) states that DOH's Commissioner shall "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," which "may include the purchase and distribution of vaccines to providers and municipalities, the operation of public immunization programs," and "other immunization related activities." The provision further specifies:

"Nothing in *this paragraph* shall *authorize* mandatory immunization of adults or children, except as provided in [P.H.L. §§ 2164 and 2165]" (emphasis added). Sections 2164 and 2165 of the Public Health Law impose vaccination requirements on schoolchildren and college students, respectively. *See* P.H.L. §§ 2164, 2165.

Public Health Law § 613(1), as amended, empowers the Commissioner to promote educational programming relating to immunizations. That provision states: "Nothing in *this subdivision* shall *authorize* mandatory immunization of adults or children, except as provided in [P.H.L. §§ 2164 and 2165]." P.H.L. § 613(1)(c) (emphasis added).

Both Public Health Law §§ 206(1)(*l*) and 613(1) were adopted at DOH's request. *See* Memorandum from Dennis Whalen, DOH Executive Deputy Commissioner, July 13, 2004, Bill Jacket, L. 2004, ch. 207, at 14. Nothing in the accompanying legislative history suggests that the provisions were meant to roll back DOH's longstanding authority to set health and safety standards for healthcare personnel, including by requiring certain personnel to be immunized against contagious diseases.

B. The COVID-19 Vaccination Requirement for Healthcare Workers

In August 2021, DOH proposed and the Council adopted an emergency regulation that required certain healthcare workers to be immunized against COVID-19. (Record on Appeal ["R."] 403.) That regulation, 10 N.Y.C.R.R. § 2.61, was extended multiple times on an emergency basis before it was made permanent on June 22, 2022. (R. 403-404; *see* R. 565-605 [notice of adoption of permanent regulation].)

The regulation provides that covered healthcare entities must ensure that their employees are "fully vaccinated" against COVID-19 if those employees "engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." 10 N.Y.C.R.R. § 2.61(a)(2), (c). The regulation has a narrow medical exemption for personnel for whom a "COVID-19 vaccine [would be] detrimental to" their health "based upon a pre-existing health condition." *Id.* § 2.61(d)(1).

The term "fully vaccinated" is "determined by [DOH] in accordance with applicable federal guidelines and recommendations." *Id.* § 2.61(a)(3). Consistent with guidance from the U.S. Centers for Disease Control and Prevention ("CDC") and U.S. Centers for Medicare and

Medicaid Services, DOH has specified that "fully vaccinated" refers to staff who have completed the vaccine's "primary series." (R. 601-602.)[1]

DOH explained that the statutory authority for its regulation is contained in Public Health Law §§ 225, 2800, 2803, 3612, and 4010 (R. 572-573, 594), which are the same provisions that the Third Department held authorized DOH to promulgate a vaccine-related rule for healthcare workers. *See Matter of Spence*, 136 A.D.3d at 1245. DOH further explained that Social Services Law §§ 461 and 461-e authorize it to impose the vaccine requirement for adult care facilities. (R. 573, 594.) As DOH noted, those provisions empower DOH to set standards for such facilities and require they keep records regarding their operation. (R. 573.) *See also* S.S.L. § 460 (specifying that the term "department" refers to DOH for certain adult care programs).

In response to comments that the regulation "appears to confer new powers" to DOH, the agency noted that it "routinely establishes requirements for personnel who work in health care and residential

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[1] *See* U.S. Centers for Medicare & Medicaid Services, Revised Guidance for Staff Vaccination Requirements (Oct. 26, 2022), https://www.cms.gov/files/document/qs0-23-02-all.pdf ("fully vaccinated" refers to staff who have completed the "primary vaccination series").

facilities regulated by [DOH]." (R. 593-595.) One example includes the "long-standing requirement that such personnel get measles and rubella vaccine[s]." (R. 603.)

Further, DOH found when adopting the permanent regulation that the vaccine requirement "has decreased and will continue to decrease COVID cases, hospitalizations, and deaths." (R. 574.) DOH explained that COVID-19 vaccines are safe and effective. (R. 574.) And DOH found that the presence of unvaccinated personnel in healthcare settings poses "an unacceptably high risk" that those personnel may contract COVID-19 and spread the virus either to "vulnerable patients or residents," thereby "causing [an] unacceptably high risk of complications," or to colleagues, thereby "exacerbating staffing shortages." (R. 574.)

Staffing shortages at healthcare facilities have been a particularly acute problem for New York. (R. 779-780.) In late 2021, Governor Kathy Hochul declared a state disaster emergency based on the "severe understaffing in hospitals and other healthcare facilities." Executive Order No. 4 (2021), 9 N.Y.C.R.R. § 9.4 (reproduced at R. 783-788). That emergency has been extended to March 23, 2023. *See* Executive Order No. 4.18 (2023), 9 N.Y.C.R.R. § 9.4.18. Senior personnel at DOH have

explained that "vaccination of healthcare workers is a key strategy to prevent staffing shortages, because it protects both healthcare workers and the vulnerable communities they serve." (R. 780.) Guidance from the CDC likewise recommends that healthcare workers follow COVID-19 vaccine requirements to help reduce staffing shortages. (R. 814.)

When DOH adopted the permanent regulation, it found that the vaccination requirement remained necessary notwithstanding that "breakthrough" infections in vaccinated individuals are more likely given the new COVID-19 variants. (R. 596.) This is so for two reasons. First, although COVID-19 vaccines (like all vaccines) are not "100% effective" at preventing infection, they still "strengthen individual immunity and decrease transmission" by reducing the overall number of cases in healthcare facilities. (R. 596, 597 ["All COVID-19 vaccines currently available in the United States are effective at preventing COVID-19."].) Second, individuals who are vaccinated are "less likely to develop serious illness, be hospitalized or die than those who are unvaccinated and get COVID-19." (R. 589, 596 [COVID-19 vaccination decreases "morbidity and mortality"].) The regulation thus reduces the likelihood that healthcare workers would develop a severe case or long-term health

issues that would result in a protracted absence from work, which, in turn, could further compound staffing issues and increase the burdens on personnel who are able to work. (R. 576, 597-598, 616-617, 780.)

When it adopted the regulation, DOH also cited data showing that vaccination when combined with natural immunity—i.e., immunity resulting from a past infection—can provide better protection against re-infection and severe health outcomes than natural immunity alone. (R. 597.) Moreover, recent data has indicated that vaccination reduces the risk that a person will experience persistent symptoms after infection, often known as long COVID.[2]

State and federal courts have rejected challenges to DOH's regulation. Supreme Court, Albany County, has held in three cases that the regulation was (i) a valid exercise of DOH's rulemaking authority, (ii) did not otherwise violate with the separation of powers doctrine under *Boreali v. Axelrod,* 71 N.Y.2d 1, 13 (1987), and (iii) had a rational basis. *See Matter of Coalition of Citizens for Medical Choice, Inc. v. NYS Dept.*

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[2] CDC, *Long COVID or Post-COVID Conditions* (updated Dec. 16, 2022), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/ (noting that research suggests that vaccinated people are less likely to report having long COVID than unvaccinated people).

of Health, Index No. 908359-21 (Sup. Ct., Albany County, March 16, 2022) (reproduced at R. 382-401); *Matter of Serafin v. NYS Dept. of Health*, Index No. 908296-21 (Sup. Ct., Albany County, Dec. 9, 2021) (reproduced at R. 363-381); *Matter of McGlynn v. NYS Dept. of Health*, Index No. 904317-22, (Sup. Ct., Albany County, Jan. 10, 2023).[3]

The U.S. Court of Appeals for the Second Circuit has similarly found that the challenged regulation 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), *cert. denied sub nom. Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022); *see also, e.g.*, *Andre-Rodney v. Hochul*, No. 21 Civ. 1053, 2022 WL 3027094, at *6 (N.D.N.Y. Aug. 1, 2022) (rejecting claim that 10 N.Y.C.R.R. § 2.61 lacked a rational basis).

C. Supreme Court Proceedings

In October 2022, petitioners-plaintiffs—an unincorporated association and several medical professionals—commenced this hybrid C.P.L.R. article 78 proceeding and declaratory judgment action in

[3] Supreme Court's decision in *Matter of McGlynn* is attached in an addendum to this brief.

Supreme Court, Onondaga County, to challenge 10 N.Y.C.R.R. § 2.61. (R. 37-59.) The petition alleged that the regulation exceeded DOH's rulemaking authority, violated the separation of powers doctrine under *Boreali*, and was arbitrary and capricious.[4] (R. 55-56.)

By judgment (denominated "decision and order"), entered on January 17, 2023, Supreme Court granted the petition, declared § 2.61 unlawful, and permanently enjoined its enforcement. (R. 6-19.) Supreme Court held that two Public Health Law provisions—§§ 206(1)(*l*) and 613—"specifically prohibited" DOH from "implementing a mandatory immunization program for adults and children, 'except as provided in [P.H.L. §§ 2164 and 2165].'" (R. 16 [quoting P.H.L. § 206(1)(*l*)].) Sections 2164 and 2165 impose vaccination requirements on schoolchildren and

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[4] The petition also alleged that the regulation is "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." (R. 56.) Supreme Court, however, did not hold that this claim warranted relief. In any event, this claim fails because nothing in the regulation prevents employers from accommodating religious objectors by offering assignments, such as telemedicine, where they would not pose a risk of infection to other personnel or patients. *See We The Patriots*, 17 F.4th at 291-92 (rejecting analogous preemption claim regarding religious accommodations under Title VII of the Civil Rights Act of 1964).

college students, respectively. The court reasoned that because the COVID-19 vaccines are "not covered" by the school and college vaccination laws, the regulation is "beyond the scope of Respondents' authority." (R. 16-17.)

Supreme Court further held that the regulation is invalid because the *Boreali* factors that courts use to analyze a separation-of-powers claim "do not lay in favor of Respondents" and because the regulation lacked a rational basis. (R. 17-18.)

Respondents filed a timely notice of appeal. (R. 3.) They also moved in this Court for a stay of Supreme Court's judgment pending appeal, which this Court granted.

ARGUMENT

POINT I

DOH'S REGULATION IS A PROPER EXERCISE OF ITS LONGSTANDING AUTHORITY TO ADOPT RULES TO PROTECT THE PUBLIC HEALTH AND SET STANDARDS FOR COVERED HEALTHCARE FACILITIES

A. The Regulation Does Not Conflict With the Public Health Law.

DOH validly exercised its delegated authority when it issued the regulation requiring healthcare facilities subject to DOH's oversight to

ensure that patient-facing personnel are vaccinated against COVID-19. To start, the Legislature has given DOH broad powers to promulgate regulations to protect the public health. The Council is statutorily responsible for maintaining a Sanitary Code 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." P.H.L. § 225(5)(a) (emphasis added). A central purpose of this authority is to give DOH the "flexibility" to adapt to the "infinitely variable conditions" that threaten the public health. *Chiropractic Assn.*, 12 N.Y.2d at 120-21; *Matter of Vapor Tech. Assn. v. Cuomo*, 203 A.D.3d 1516, 1518 (3d Dep't) (observing that DOH regulations banning flavored electronic cigarettes were "within [§ 225(a)(5)'s] grant of authority"), *lv. dismissed*, 39 N.Y.3d 960 (2022). And addressing "communicable diseases which are dangerous to the public health" is a core concern of the statute authorizing the Sanitary Code. P.H.L. § 225(5)(h).

The Legislature has also given DOH broad authority to set standards in healthcare facilities that are subject to DOH's regulatory purview. *Matter of Spence*, 136 A.D.3d at 1254 (citing, e.g., P.H.L. §§ 2800, 2803, 3612, 4010); *see also Matter of Neurological*

Surgery, P.C. v. New York State Dept. of Health, 203 A.D.3d 1252, 1252 (3d Dep't 2022). In order to protect the health of New Yorkers, DOH has "central, comprehensive responsibility" for developing the State's policy "for hospitals and related services." P.H.L. § 2800. This delegation gives DOH "flexibility" and "broad function[s]" to oversee hospitals. *Levine*, 39 N.Y.2d at 516. And the Council is accordingly empowered to set minimum standards for hospitals to protect patient health and safety. P.H.L. § 2803(2)(a)(v). The Council has similar authority to regulate conditions and quality of care at the other facilities covered by the challenged regulation at issue, such as hospices. *See Matter of Spence*, 136 A.D.3d at 1254; S.S.L. §§ 461, 461-e. Consistent with these grants of authority, DOH has for decades required healthcare workers to follow health and safety standards, including by requiring such workers to be immunized against measles and rubella. *See supra* at 7-9.

DOH properly exercised its delegated authority here. The regulation is designed to protect public health, P.H.L. § 225(5)(a), and does so by imposing a health-related measure, as a condition of healthcare workers' employment, to ensure that healthcare facilities are safely run, *see id.* §§ 2800, 2803(2)(a)(v), 3612, 4010. As DOH found, the

regulation reduces the incidence of COVID-19 and the incidence of severe cases in frontline healthcare workers and vulnerable populations they serve. (R. 574, 589, 596-597.) Moreover, the regulation is designed to ameliorate staffing shortages and thereby protect the quality of care at healthcare facilities by reducing the likelihood that workers develop a severe case or complications that could require a lengthy absence from work. (R. 597-598, 616-617, 780.)

Although Supreme Court held that DOH exceeded its delegated authority, the court did *not* hold that, under the foregoing statutes, DOH lacks the authority to ensure healthcare personnel follow health and safety standards. (*See* R. 15-19.) Supreme Court held instead that the regulation was invalid because two other Public Health Law provisions—§§ 206(1)(*l*) and 613(1)—"specifically prohibited" DOH "from implementing a mandatory immunization program for adults and children, 'except as provided in [P.H.L. §§ 2164, 2165],'" which impose vaccination requirements on schoolchildren and college students. (R. 16 [quoting P.H.L. § 206(1)(*l*)].)

This reading of Public Health Law §§ 206(1)(*l*) and 613(1) flies in the face of the statutory text, Court of Appeals' precedent, and legislative

history. Starting with text, these two provisions generally authorize DOH to promote adult and child immunization programs, P.H.L. § 206(1)(*l*), and related educational activities, *id.* § 613(1). Each provision also states that "[n]othing in *this subdivision*," *id.* § 613(1)(c), or "*this paragraph* shall *authorize* mandatory immunization of adults or children, except as provided in [P.H.L. §§ 2164, 2165]," *id.* § 206(1)(*l*) (emphasis added).

By their plain language, the two provisions do not "specifically prohibit[ ]" DOH from doing anything. Rather, the provisions merely clarify that the provisions *themselves* do not "authorize" DOH to impose vaccination requirements. DOH may still require vaccination if it has separate statutory authority to do so.

This is precisely how the Court of Appeals construed these provisions in *Garcia v. New York City Department of Health & Mental Hygiene*, 31 N.Y.3d 601, 619-20 (2018). There, the petitioners challenged a rule imposed by the New York City Board of Health that required flu vaccines for children in covered daycare facilities. *See id.* at 604-05. Like the petitioners in this case (R. 39), the petitioners in *Garcia* alleged that the vaccine requirement conflicted with Public Health Law §§ 206 and

613. *Garcia,* 31 N.Y.3d at 619. In rejecting that argument, the Court of Appeals observed that the two provisions were directed to the powers of DOH, not the City Board of Health, and that, even as to DOH, the provisions clarified that the "grant of authority would not be construed as extending to the adoption of mandatory adult immunizations." *Id.* at 620. As that court emphasized, "[b]y their plain language, these provisions simply make clear that the particular statutory subdivisions at issue do not authorize [DOH] to adopt additional mandatory immunizations, but nothing therein prohibits the adoption of mandatory immunizations if *otherwise authorized by law*." *Id.* (emphasis added).

The regulation at issue here is authorized by the longstanding grants of authority that empower DOH to protect the public health and set standards for covered healthcare facilities. *See Matter of Spence*, 136 A.D.3d at 1254. DOH has relied on these statutes for decades to require healthcare workers to follow health and safety standards, which include being vaccinated against certain contagious diseases. *See supra* at 7-9. And one court held decades ago that DOH is empowered to require hospital personnel to be vaccinated against rubella. *See Matter of Ritterband v. Axelrod*, 149 Misc. 2d 135, 141-42 (Sup. Ct., Albany County

1990) (citing P.H.L. §§ 2800, 2803). That the Legislature has not interfered with these longstanding vaccination rules further confirms that DOH has the authority to adopt them. *See, e.g.*, *Garcia*, 31 N.Y.3d at 614; *Matter of Acevedo v. New York State Dept. of Motor Vehicles*, 29 N.Y.3d 202, 225 (2017).

Indeed, when the Legislature intends to prohibit DOH from issuing regulations requiring or forbidding certain conduct, it says so expressly—which it did not do in the statutes cited by Supreme Court. For instance, the provision of the Public Health Law that prohibits smoking in various indoor areas specifies that DOH "*shall not* promulgate any rules or regulations that create, limit or enlarge" those smoking restrictions. P.H.L. § 1399-x (emphasis added). The Legislature has used similar prohibitory language in other statutes.[5] In sharp contrast, Public Health Law §§ 206(1)(*l*) and 613(1) merely clarify that they should not be read as authorizing DOH to impose vaccination requirements.

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[5] *See* Insurance Law § 1409(d) ("The [Superintendent of Financial Services] shall not promulgate any rules or regulations that limit the authority of any insurer to invest in mortgage related securities."); Public Service Law § 229(1) ("The [Public Service Commission] . . . may not promulgate any regulation or condition which would interfere with the right of free speech by means of cable television.")

The legislative history surrounding the two provisions further undercuts Supreme Court's reading. Those provisions were added in relevant part in 2004. *See* L. 2004, ch. 207, §§ 5, 6. By then, as noted, DOH had been requiring certain healthcare workers to be immunized against contagious diseases for decades, and a court had expressly approved of DOH's authority to do so. *See Matter of Ritterband*, 149 Misc. 2d at 141-42. Yet the legislative history of the 2004 bill does not cite to these longstanding vaccination rules, much less suggest that the bill's intent was to roll back DOH's authority to issue them.

On the contrary, the history confirms that the statutory language cited by Supreme Court merely clarified that any "adult immunization programs carried out *under the authority of this statute* be entirely voluntary." Letter from Richard N. Gottfried, Chair, Assembly Comm. on Health, July 16, 2004, Bill Jacket, L. 2004, ch. 207 at 5 (emphasis added). The challenged regulation, however, is carried out under the authority of *different* statutes. Moreover, it was DOH that requested that the provisions be adopted. *See id.*; *supra* at 10. If DOH intended those laws to divest itself of the authority it had long exercised to require vaccinations for healthcare workers, it would have said so.

In all events, even if §§ 206(1)(*l*) and 613(1) were construed as limiting DOH's power to issue vaccine-related rules under other statutes—notwithstanding the statutory text, precedent, and legislative history—it still would not follow that the challenged regulation is unlawful. Section 206(1)(*l*) authorizes voluntary "public immunization programs" and § 613(1) likewise allows for voluntary "programs of immunization" available to "children and adults." But the challenged regulation does not create an immunization program applicable to *all* adults or the public at large. Rather, the regulation covers a subject on which §§ 206(1)(*l*) and 613(1) are silent—namely, health and safety standards that healthcare workers must follow in certain facilities.

B. The Regulation Complies With the Separation-of-Powers Doctrine.

Equally unavailing is Supreme Court's holding that the challenged regulation violated the separation-of-powers doctrine under *Boreali*. That holding rested on the flawed assumption that the challenged regulation "violated Public Health Law §§ 206, 613, 2164, and 2165." (R. 17.) But, as explained, the regulation does not violate these provisions and instead falls squarely with DOH's oversight over healthcare

facilities. Thus, the separation-of-powers claim fails for this reason alone and this Court need not "apply each *Boreali* factor seriatim in order to" uphold the regulation. *Matter of Kerri W.S. v. Zucker*, 202 A.D.3d 143, 159-60 (4th Dep't 2021) (rejecting separation-of-powers challenge to DOH's vaccine-related rule without addressing each *Boreali* factor), *lv. dismissed*, 39 N.Y.3d 1028 (2022); *see also Matter of Adirondack Health-Uihlein Living Ctr. v. Shah*, 125 A.D.3d 1366, 1367 (4th Dep't 2015), *appeal dismissed*, 26 N.Y.3d 1132 (2016).

Petitioners' separation-of-powers claim also fails because the *Boreali* factors strongly favor DOH. The four factors that, when viewed together, *may* suggest that an agency improperly engaged in policymaking are whether it (i) resolved a problem by making its own "value judgments entailing difficult and complex choices between broad policy goals," rather than simply balancing costs and benefits under existing standards; (ii) wrote on a "clean slate," rather than filled in the details of a broad policy set by the Legislature; (iii) took upon itself to regulate matters on which the Legislature has tried, and failed, to set policy; and (iv) acted outside its area of expertise. *Garcia*, 31 N.Y.3d at 609 (internal quotation marks and alterations omitted).

As to the first *Boreali* factor, DOH did not make a "new 'value judgment' directed at resolution of a 'social problem.'" *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 263 (2018). Rather, the challenged regulation is "directly tied" to DOH's statutory directive to protect the public health and set standards for healthcare facilities. *Id.* DOH found that the regulation is designed to protect healthcare workers and the vulnerable populations they serve, including by helping to prevent a shortage of healthcare workers caused by COVID-19 at a time when the State's healthcare facilities are experiencing staffing issues. *Garcia*, 31 N.Y.3d at 612 (emphasizing the "very direct connection between the flu vaccine rules and the preservation of health and safety").

Petitioners' counterarguments lack merit. They contend that DOH engaged in impermissible policymaking because it did not include an exemption for healthcare workers with religious objections to COVID-19 vaccines. (R. 321.) But DOH's decision to exclude a religious exemption does not suggest that it weighed "diverse social and economic policy interests falling significantly outside [its] public health mandate." *Matter of LeadingAge*, 32 N.Y.3d at 265. Rather, that decision was based solely on health considerations. A religious exemption would increase the

number of unvaccinated patient-facing healthcare workers. Thus, the decision not to provide such an exemption was intended "to *further* the legislative goal" of protecting the public health and ensuring healthcare facilities are safely operated. *Id.*; *see also Garcia*, 31 N.Y.3d at 612-13.

Nor is there any merit to petitioners' contention that DOH made policy choices because the regulation implicates "bodily autonomy." (R. 321.) This argument is foreclosed under the Court of Appeals' decision in *Garcia*. In rejecting the *Boreali* challenge to a flu vaccine requirement in that case, the Court of Appeals explained that while that requirement "necessarily impinge[d] upon personal choice to some degree," "[t]his will almost always be true with health-related regulations." *Garcia*, 31 N.Y.3d at 612. The Court of Appeals then emphasized that the requirement did "not relate merely to a personal choice about an individual's own health but, rather, seek[s] to ensure increased public safety and health for the citizenry by reducing the prevalence and spread of a contagious infectious disease within a particularly vulnerable population." *Id.* The same reasoning applies with equal force here.

As for the second *Boreali* factor, DOH did not write on a clean slate but rather "filled in details" of broadly stated legislative policies. *Matter*

of NYC C.L.A.S.H. v. New York State Off. of Parks, Recreation & Historic Preserv., 27 N.Y.3d 174, 182 (2016). The Legislature has "delegated significant power" to DOH to issue rules to protect the public health and set standards for regulated healthcare facilities. *Garcia*, 31 N.Y.3d at 601. Consistent with that authority, DOH has a long history of imposing health-related conditions on healthcare personnel, including by requiring them to be immunized against a contagious disease. *See supra* at 7-9; *Garcia*, 31 N.Y.3d at 601 (health agency did not write on blank slate in adopting vaccine requirement where agency had established practice of issuing such requirements). Indeed, DOH has for decades ensured "sanitary conditions" and infection prevention in regulated healthcare facilities. *See, e.g.*, 10 N.Y.C.R.R. § 405.11.

Further, the Council did not write on a clean slate in the sense that the grants of authority are intended to give DOH the "flexibility" to adapt to changed conditions and emergent health threats that are not directly contemplated by the enabling legislation. *See Chiropractic Assn. of N.Y.*, 12 N.Y.2d at 119-20; *Levine*, 39 N.Y.2d at 516. Here, faced with a novel threat to its healthcare system, DOH responded by adjusting its standards for regulated healthcare facilities.

The third *Boreali* factor—which considers the extent to which the Legislature has tried but failed to reach agreement on the issue—does not favor petitioners. Supreme Court noted that petitioners had cited numerous "COVID-19 Legislative proposals" that were never enacted. (R. 17.) But neither Supreme Court nor petitioners have identified a single failed bill that concerned the subject matter of the regulation, which is requiring healthcare workers to receive a COVID-19 vaccine. The numerous bills thus do not show that the vaccination of healthcare workers is the "type of broad public policy issue reserved exclusively to the legislature." *Matter of LeadingAge*, 32 N.Y.3d at 266.

The fourth *Boreali* factor, which looks to whether the regulation was within DOH's area of expertise, heavily favors DOH. In support of its rule, DOH considered (i) scientific studies, including one that it conducted (R. 597), (ii) guidance issued by the CDC (R. 595, 597), (iii) the federal government's policies with respect to healthcare workers (R. 591, 633), and (iv) other data relating to COVID-19, including its transmission and the safety and efficacy of existing vaccines. (R. 599.) "Unquestionably, the [Council's] health expertise was essential to its determination of whether to require the [COVID-19] vaccination" for

healthcare workers. *See Garcia*, 31 N.Y.3d at 616 (agency used expertise when it considered data and recommendations of federal government).

POINT II

THE REGULATION HAS A RATIONAL BASIS

Supreme Court erred in holding that the challenged regulation was irrational and thus arbitrary and capricious. (R. 18.) To invalidate a regulation on this basis, petitioners must carry their "heavy burden" to show that the regulation is "so lacking in reason that [it is] essentially arbitrary." *Matter of Acevedo*, 29 N.Y.3d at 227 (internal quotation marks omitted).

But the regulation's rationality is manifest. DOH found the vaccination requirement "has decreased and will continue to decrease COVID cases, hospitalizations, and deaths." (R. 574.) The regulation protects healthcare workers and the populations they serve from the consequences of staffing shortages or overstrained facilities that may follow a severe COVID-19 outbreak among healthcare workers. (R. 598, 616-617, 780.) Indeed, the federal government generally requires healthcare facilities that participate in Medicare and Medicaid to ensure their staff receive a COVID-19 vaccine; the U.S. Supreme Court has

rejected the claim that this rule falls outside the "zone of reasonableness" or is otherwise arbitrary and capricious. *Biden v. Missouri*, 142 S. Ct. 647, 654 (2022) (internal quotation marks omitted).

Contrary to Supreme Court's holding, the fact that the regulation does not entirely "prevent transmission" fails to show that it is irrational. (R. 18.) This is true for two reasons. First, as DOH acknowledged, although no vaccine is 100% effective at preventing transmission and breakthrough infections are more likely with emerging variants, the vaccines still "strengthen individual immunity" and thereby "decrease transmission" to some degree. (R. 596-597.) Indeed, Supreme Court failed to cite *any* evidence to show that COVID-19 vaccines entirely fail to decrease transmission, much less show that it was irrational for DOH to reach a contrary conclusion based on what DOH noted was "a growing body of epidemiologic evidence." (R. 597; *see also* R. 729 [November 2022 article that found being "unvaccinated was associated with 2.34 times the odds of reinfection compared with being fully vaccinated"].) Second, as DOH explained, a vaccine's effectiveness is measured not just by how well it protects against infection but also other health outcomes such as "symptomatic illness, hospitalization, and death." (R. 596.) And the

COVID-19 vaccines significantly help to prevent "serious illnesses, hospitalizations, and deaths." (R. 596.) DOH thus rationally found that the vaccination requirement is an effective way to protect healthcare workers from serious illness or complications that could further exacerbate existing staffing shortages in healthcare facilities. (R. 576, 597-598, 616-617, 780.)

Lastly, Supreme Court erred in holding that the regulation's definition of "fully vaccinated" renders the regulation irrational. (R. 18.) The regulation specifies that "fully vaccinated" is "determined by [DOH] in accordance with applicable federal guidelines and recommendations." 10 N.Y.C.R.R. § 2.61(a)(3). It was perfectly rational for DOH to tailor the regulation so that it aligns with the considered judgment of federal public health officials. The Legislature has taken the same approach: It requires that schoolchildren be vaccinated for meningitis "as recommended by" the CDC's Advisory Committee on Immunization Practices ("ACIP"). P.H.L. § 2164(2)(c); *see also, e.g.*, Education Law § 6909(7) (authorizing nurse practitioners to prescribe "immunizations recommended by" ACIP). Further, and contrary to Supreme Court's finding, DOH's determination as to what constitutes "fully vaccinated" is clear and

consistent: It refers to staff who have completed their primary vaccination series, which accords with the definition that has been used by the U.S. Centers for Medicare & Medicaid Service. (R. 601-602.) *See supra* at 11-12.

POINT III

THE COURT SHOULD ISSUE A DECLARATION IN DOH'S FAVOR

Where, as here, the defendants have moved to dismiss a claim for declaratory judgment and "the only issues presented are questions of law," that motion should be treated as one seeking a declaration in the defendants' favor. *Matter of Kerri W.S.*, 202 A.D.3d at 155 (internal quotation marks omitted); *see Plaza Dr. Group of CNY, LLC v. Town of Sennett*, 115 A.D.3d 1165, 1166 (4th Dep't 2014). This Court may issue such a declaration even if the defendants did not seek such relief in the lower court, and "irrespective of whether the CPLR 3211(a)(7) motion was granted or denied below." *Matter of Kerri W.S.*, 202 A.D.3d at 155.

Thus, this Court should grant judgment in favor of DOH by declaring that the challenged regulation was validly promulgated and has a rational basis, and otherwise dismissing the petition. *See id.* (issuing similar declaration regarding DOH's vaccine-related regulation).

CONCLUSION

This Court should reverse Supreme Court's judgment, enter a declaration that declares that 10 N.Y.C.R.R. § 2.61 was within the scope of DOH's delegated authority, comported with the separation-of-powers doctrine, and has a rational basis, and otherwise dismiss the petition.

Dated: Albany, New York
March 17, 2023

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
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The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 6,659.

ADDENDUM

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

NATASHA MCGLYNN and JENNIFER MOONEY,

Petitioner,

DECISION, ORDER and JUDGMENT

Index No.: 904317-22
RJI No. 01-22-ST2387

For a Judgment pursuant to CPLR Article 78,

-against-

NEW YORK STATE DEPARTMENT OF HEALTH and MARY TRAVIS BASSETT in her official capacity as Commissioner of the New York City Department of Health,

Respondents.

(Supreme Court, Albany County Article 78 Term)

Appearances:

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Roger D. McDonough, J.:

Petitioners seek an Order: (1) enjoining and permanently restraining respondents and their agents, officers and employees from implementing or enforcing 10 NYCRR § 2.61 ("§ 2.61") of

the State Sanitary Code; and (2) awarding them reasonable attorneys' fees, costs and disbursements. Respondents oppose the requested relief in its entirety.

Background

Petitioners are Licensed Practical Nurses who reside in the State of New York. Respondents are the New York State Department of Health("NYSDOH") and the Commissioner of NYSDOH at the time this action was commenced. Herein, petitioners challenge § 2.61's exclusion of religious exemptions to the COVID-19 Vaccine Mandate for healthcare workers. Both petitioners allege that they were terminated from their jobs due to the exclusion of religious exemptions.

Discussion

Petitioners contend that §§ 206 and 613(1)(c) of the Public Health Law ("PHL") and related PHL statutes and caselaw specifically prohibit mandatory COVID-19 immunization for adults. Additionally, petitioners argue that the respondents are improperly relying on statutes from the PHL and Social Services law in their promulgation of § 2.61(d). The petitioners also maintain that § 2.61(d) violates the *Boreali* test. Said test is used by Courts to determine whether a State executive agency has exceeded the legislative power delegated to it (*see*, Matter of Reardon v Global Cash Card, Inc., 179 AD3d 1228, 1230-1231 [3rd Dept. 2020]). Respondents assert that they were well within their legal authority in promulgating § 2.61(d). Further, respondents contend that all *Boreali* factors favor respondents' promulgation.[1]

Respondents' Authority to Promulgate the COVID-19 Vaccine Mandate

Petitioners heavily rely on § 613(1)(c) of the Public Health Law and its express language concerning mandatory immunizations. They also note that similar language is set forth in § 206(1)(l) of the PHL. Petitioners rely on these statutes for the proposition that New York's Legislature has solely allowed NYSDOH to oversee voluntary adult immunization programs as opposed to mandatory adult immunization programs. Further, petitioners challenge respondent's

[1] The Court notes that it has issued multiple Decisions in Article 78 challenges to 10 NYCRR § 2.61, the COVID-19 Vaccine Mandate for healthcare workers and the application of the *Boreali* test on said issues. Though the last of these Decisions was issued in March of 2022, the Court is not aware that any of said Decisions been fully briefed before the Appellate Division, Third Department.

reliance on other PHL and Social Services Law statutes in promulgating § 2.61. Specifically, petitioners argue that nothing in those statutes can be construed as legislative authority for NYSDOH's adoption of the COVID-19 Vaccine Mandate.

In opposition, respondents note that § 2.61 only applies to healthcare workers in covered entities. As such, they maintain that petitioners' reliance of PHL §§ 206 and 613 are inapposite as they apply to mandatory immunizations of all children/adults. The respondents argue that § 2.61 simply cannot be construed as requiring mandatory vaccinations for adults. Respondents also principally rely upon PHL § 225 for their authority to promulgate § 2.61. In support, respondents cited case law from the 2nd Circuit addressing the promulgation of § 2.61 (We the Patriots USA, Inc. v Hochul, 17 F.4th 266, 290 [2nd Cir. 2021] op. clarified, 17 F.4th 368 [2nd Cir. 2021]). In sum, respondents contend that they properly acted, within properly granted statutory authority, in response to a global pandemic.

In reply, petitioners stress that §§ 206 and 613 forbid mandatory immunizations of adults and is in no way limited to "all adults". They also note that PHL § 225 does not allow for violations of other provisions of the PHL, including §§ 206 and 613. The petitioners also challenge respondents' cited caselaw and overly expansive interpretation of PHL § 225.

The *Boreali* factors

As to the first *Boreali* factor, petitioners maintain that promulgation of § 2.61 improperly weighed in on policy considerations between public health and privacy concerns. As to the second *Boreali* factor, the petitioners argue that NYSDOH has improperly exercised authority that can only be granted by the Legislature. In fact, petitioners maintain that NYSDOH has acted in a manner directly contrary to legislative guidance. As to the third factor, petitioners contend that the Legislature has reached clear agreement that NYSDOH is expressly prohibited from mandating vaccines. Finally, as to the fourth factor, petitioners maintain that the promulgation of § 2.61 was not an exercise of any special expertise or technical competence on the part of NYSDOH.

Respondents argue that all of the *Boreali* factors support promulgation of the COVID-19 Vaccine Mandate. As to the first, respondents maintain that § 2.61 does not include any limitations based on financial considerations of special or business interests. Additionally, they

argue that petitioners' caselaw is not applicable here because § 2.61 does not compel mandatory vaccinations. As to the second factor, respondents maintain that they are appropriately executing policy decisions set forth by the Legislature in a comprehensive statutory scheme. As to the third factor, respondents note that petitioners failed to provide any evidence of unsuccessful legislative bills applicable to the COVID-19 Vaccine Mandate for healthcare workers. Additionally, as to this factor, respondents note that the Court of Appeals requires proof of repeated unsuccessful legislative efforts that have actually made it beyond the legislative committee stage (*see*, Matter of LeadingAge N.Y., Inc. v Shah, 32 NY3d 249, 265-266 [2018]). Finally, respondents argue that they used their special expertise and competence in the field of public health in developing and implementing § 2.61 in response to a once in a generation global pandemic. As such respondents argue that the fourth *Boreali* factor also weighs in its favor.

In reply, petitioners initially argue that the Court need not even employ *Boreali* analysis because the respondents have violate a clear statutory policy and directive that forbids mandatory adult immunizations. Further, petitioners reiterate and reinforce their earlier arguments and challenge respondents' interpretations of the factors as well as the cited caselaw. Specifically as to third *Boreali* factor, the petitioners cite numerous bills pending before the Legislature related to mandatory immunization issues in employment matters.

The Court concludes that Public Health Law § 225(5) provides sufficient statutory authority for the promulgation of § 2.61. The remaining cited statutes, to varying degrees, only serve to buttress respondents' statutory authority. Specifically, Public Health Law § 225(5) broadly authorizes respondent Council to deal with any matters affecting the improvement of public health in the state of New York. More specifically, the statute authorizes the Council to establish regulations for the maintenance of hospitals for communicable diseases as well as to establish regulations regarding the methods and precautions to be observed in addressing premises that have been vacated by persons suffering from a communicable disease. Public Health Law § 2800 specifically authorizes NYSDOH to exercise comprehensive responsibility related to hospitals and related services in terms of the prevention, diagnosis or treatment of human disease. Additionally, respondents have adequately established that Public Health Law §§ 2803, 3612 and 4010 authorizes promulgation of rules and regulations to establish minimum

standards for the covered entities as to the care and services provided to patients/residents. In sum, the Court finds that the full statutory scheme embodied in the cited Public Health Law sections provides adequate statutory authority for the promulgation of § 2.61. Additionally, the Court has not been persuaded that § 2.61 in any way constitutes a mandatory immunization for adults policy of the type contemplated by PHL §§ 206 and 613. § 2.61 clearly only applies to healthcare workers at covered entities.

Moreover, the Court concludes that all four factors proffered and discussed in *Boreali* support the legality of respondents' promulgation of § 2.61. As to the first factor, respondents have adequately established that § 2.61 does not represent a balancing of competing interests between, for example, the public health and any particular industry or group (*see*, Garcia v New York City Dept. of Health & Mental Hygiene, 31 NY3d 601, 612-613 [2018]). Rather, the Court finds that respondents adequately balanced the relevant costs, benefits and considerations according to their preexisting obligations set forth by the Legislature in the Public Health Law. As to the second factor, for the reasons cited above in discussing statutory authority, the Court finds that respondents adequately established that they were executing policy decisions already articulated by the Legislature concerning public health, communicable diseases and the covered entities (*see*, Matter of Spence v Shah, 136 AD3d 1242, 1245-1247 [3rd Dept. 2016). Analysis of the third factor also supports respondents' positions. Respondents have adequately established the absence of any prior legislative attempt concerning vaccine mandates for healthcare workers. Accordingly, there is insufficient proof that respondents have acted in an area where the Legislature repeatedly, or ever, tried and failed to reach agreement in the face of substantial public debate (Boreali v Axelrod, *supra* at 12-14). As to the fourth factor, the Court finds that respondents' medical affidavit offers sufficient indicia of respondents' use of medical expertise and technical competence in the Public Health arena in the promulgation of § 2.61. Lastly, consideration of petitioners' separation of powers claim overlaps with the *Boreali* factors and its consideration of whether a state agency acted beyond its delegated powers (*see*, Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 25 NY3d 600, 608 [2015]). Based on the Court's analysis of the Boreali factors and the relevant arguments on this issue, the Court finds respondents' promulgation of § 2.61 did not cross into the enactment of outright legislation

(*see*, Matter of Spence v Shah, *supra* at 1246).

Finally, respondents have made a detailed showing as to their rational basis in promulgating § 2.61. Conversely, petitioners have not crossed the high threshold of showing by clear and convincing evidence that § 2.61 is both arbitrary and capricious (Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health, 85 NY2d 326, 331-332 [1995]).

The Court recognizes the hardships experienced by healthcare workers, like petitioners, who were likely on the front lines of fighting the pandemic and appropriately received universal acclaim for their skill, dedication and sacrifices, and who now have experienced termination due to their exercise of their religious beliefs. The Court is also cognizant of the powerful factual arguments for: (1) the efficacy of pursuing continued protections afforded by natural immunity; (2) New York's high vaccination status: (3) the efficacy of PPE usage; (4) the efficacy of weekly or frequent COVID testing of employees; (5) the potentially adverse impacts to New York's healthcare system occasioned by the loss of dedicated and experienced healthcare workers; (6) the obvious governmental and scientific consensus that COVID-19 has reached endemic status; and (7) compelling and legitimate religious belief considerations regarding vaccinations. Nevertheless, this Court is not a Court of equity, and is bound by existing statutes and case law to consider this petition under the high and exacting arbitrary and capricious Article 78 standard.

Based on all of the foregoing, and after reviewing the sole cause of action through the exacting prism of the arbitrary and capricious standard, the Court is constrained to find that the petition must be dismissed.

The parties' remaining arguments and requests for relief have been considered and found to be lacking in merit and/or unnecessary to reach in light of the Court's findings.

Based upon the foregoing it is hereby

ORDERED and ADJUDGED that relief requested in the petition is denied in all respects and the petition is dismissed.

SO ORDERED AND ADJUDGED.

This shall constitute the Decision and Order of the Court. This Decision and Order will be forwarded to the Albany County Clerk by the Court. A copy of the Decision and Order is being forwarded to counsel for both parties. The signing of this Decision and Order and delivery of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel for the petitioners is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the Decision and Order. As this is an E-FILED case, there are no original papers considered for the Court to transmit to the County Clerk.

ENTER

Dated: Albany, New York
January 6, 2023

Roger D. McDonough
Acting Supreme Court Justice

01/10/2023

Papers Considered[2]:

Verified Petition, dated June 9, 2022;
Notice of Verified Petition, dated June 10, 2022;
Amended Verified Petition, dated June 9, 2022 and filed on June 15, 2022;
Respondents' Verified Answer, dated August 5, 2022;

[2] Both parties also submitted a Memorandum of Law. Petitioners submitted a Reply Memorandum of Law as well.

Affidavit of Emily Lutterloh MD, MPH, sworn to August 5, 2022, with annexed exhibits;
Affidavit of Jason W. Riegert, sworn to August 4, 2022, with annexed exhibit;
Affirmation of Elizabeth A. Brehm, dated August 11, 2022, with annexed exhibits.