To be Argued by:
SUJATA S. GIBSON
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

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,

Petitioners-Plaintiffs-Respondents,

Docket No.: CA 23-00161

-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-Appellants.

BRIEF FOR PETITIONERS-PLAINTIFFS-RESPONDENTS

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PRELIMINARY STATEMENT

The New York State Constitution commands that the power to enact new laws is reserved to the legislative branch, and the executive branch may not usurp this prerogative, whether by agency rulemaking or otherwise. N.Y. Const. Art. III, § 1; Art. IV, § 1. Indeed, the separation of powers doctrine is the core safeguard of our representative government and a fundamental constitutional guarantee. This case illustrates why it is so important.

At issue here is a New York State Department of Health ("NYSDOH") regulation requiring healthcare workers to be vaccinated against COVID-19. *See,* 10 NYCRR § 2.61 (the "Mandate"). The Supreme Court, Onondaga County properly held that the Mandate violates the separation of powers doctrine. First, it violates the Public Health Law ("PBH"), throughout which the legislature clarifies that the NYSDOH does not have the power to issue vaccine mandates for any adult or child other than as set forth by the legislature in PBH §§ 2164-2165. The legislature never chose to add COVID-19 vaccines to the list of permissibly mandate vaccines, and the NYSDOH was preempted from doing it for them.

Second, the Mandate also violates the separation of powers doctrine because it attempts to resolve broad policy issues – like how best to balance important religious rights and civil rights against public health goals. The New York State legislature already has a statute that balances public health against religious rights, codified in the New York State Human Rights Law ("NYSHRL"). The Mandate impermissibly overrides the individualized standard of the NYSHRL along with its command that employers and licensing agencies accommodate their employees' religious practices unless doing so would present a significant hardship or expense or present a direct threat that cannot be mitigated through accommodation.

Third, the Mandate is arbitrary and capricious. NYSDOH codified § 2.61 into law on June 22, 2022, when it was already beyond dispute that vaccines cannot stop the spread of COVID-19. Vaccinated people can catch and spread COVID-19 at least as easily as unvaccinated people. The regulatory impact statement acknowledged this fact but still, the NYSDOH plowed ahead, and even began fining employers who attempted to meet their responsibilities under the NYSHRL.

The results were predictably devastating. Over 34,000 healthcare workers have been pushed out of the field because of the Mandate, causing an unprecedented crisis in New York's healthcare system. On January 13, 2023, the Supreme Court, Onondaga County, properly held that the Mandate was issued "beyond the scope of Respondents' authority and is therefore null, void, and of no effect" [R. 19] and in the alternative, that "the Mandate is arbitrary and capricious" [R. 18]. For the reasons set forth herein, this Court should affirm both holdings.

QUESTIONS PRESENTED

1. Whether the NYSDOH had legal authority to issue the Mandate.
    a. Answer below: the lower court found that the NYSDOH was prohibited from issuing the Mandate and acted *ultra vires*.
2. Whether the Mandate is arbitrary and capricious.
    a. Answer below: the lower court found that it is arbitrary and capricious and invalidated it.
3. Whether this Court should issue a judgment declaring that the Mandate is a valid exercise of DOH's rulemaking authority.
    a. Answer below: the lower court found that the Mandate violates the Public Health Law, and the separation of powers

doctrine, and so did not need to reach the question of whether the Mandate violates any other law, such as the New York State Human Rights Law.

STATEMENT OF THE CASE

""The accumulation of all powers, legislative, executive and judiciary, in the same hands ... [is] the very definition of tyranny."

-James Madison

At the beginning of the pandemic, unprecedented power was temporarily ceded to the executive branch. With his enhanced power, former Governor Cuomo executed hundreds of "Emergency Executive Orders," imposing many controversial policies and mandates that carried the force of law. Elected lawmakers on both sides of the political spectrum began to describe New York's executive branch as dictatorial. [R. 192-196]. "You're giving the governor power to write legislation on his own" said one state Senator to the Wall Street Journal, "that is the very definition of dictatorial action." [R. 194].

In March 2021, the New York State Legislature repealed the Governor's authority to issue new directives, even during a declared emergency. N.Y. Executive Law § 29-A. In June 2021, the Governor conceded that the COVID-19 state disaster emergency was officially over. [R. 198]. But Petitioners assert that he continued issuing new edicts with the force of law, attempting to get around the limits of §29-A by issuing them through his administrative departments.

For example, on August 18, 2021, "the Governor announced that all healthcare workers in New York State, including staff at hospitals and long-term care facilities will be required to get vaccinated against COVID-19 by Monday, September 27, 2021." [R. 200-203].

This first "emergency" version of the Mandate included a religious exemption, stating: “Religious exemption. Covered entities shall grant a religious exemption for the COVID-19 vaccination for covered personnel if they hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer”]. [R. 53]. However, when Governor Hochul took office eight days later, she directed that the mandate be amended to remove any reasonable possibility of a religious exemption other than for fully remote healthcare workers. The regulatory impact statement accompanying the amended emergency mandate did not even mention the feasibility of a religious exemption for anyone else or the reasons for removing it. [R. 173-179]. But the new Governor did. At a news conference, when asked whether healthcare workers could get a religious exemption from the Mandate, Governor Hochul said: “We left that off in our regulation intentionally…I’m not aware of a sanctioned religious exemption from

any 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." [R. 208-209].

Speaking to a different audience the day before the mandate went into effect, Governor Hochul again expressed her view that religious objections to COVID-19 vaccines are theologically flawed, asserting that God made the vaccines and wants us to all be vaccinated, and further stating: "All of you, yes, I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants. You know who they are." [R. 217]. The Governor than asked the congregation to be her "apostles" to convince people that they shouldn't have to go to the hospital and be treated by someone who might make them sick. [Id.]

The Governor's statements on religion were as ignorant as they were inappropriate. While many religious people have no issue with COVID-19 vaccines (or other vaccines) there has always been sincere religious opposition to vaccination among a subset of the population. In

the Catholic faith, like many faiths, there is a pronounced debate about the religious implications of taking COVID-19 vaccines.[1]

Targeting religious minority groups in response to real or perceived threats, no matter how well-intentioned the reason, is forbidden under our laws. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu v. United States*, 323 U.S. 214 (1944)). It violates the most basic tents of the federal and state constitutions for the Governor to dismiss the sincere beliefs of religious minorities as beneath protection because they are not "sanctioned" by the Governor's preferred religious leaders. *Larson v. Valente*, 456 U.S. 228 (1982).

Because of the Mandate, thousands of New York State frontline doctors, nurses, and other medical professionals were suddenly faced with a choice: violate your sincerely held religious beliefs or give up your career and ability to practice in New York. [R. 42]. As a result, close to 34,000 medical professionals were forced to leave the field in New York State. [Id].

[1] *See, e.g.,* Archbishop Timothy P. Broglio, *Statement on Coronavirus Vaccines*, (2021, March 14), available at https://files.milarch.org/archbishop/abp-statement-on-COVID19-vaccines-and-conscience-12oct2021.pdf

Meanwhile, the staffing crisis caused by the mass termination and forced resignation of qualified medical professionals caused a devastating cascade of hospital and nursing home closures and caused the disruption of critical services that continue to this day. [R. 39-42]. As further set forth in the Verified Petition and supporting documents, the outcry against the Mandate has been substantial.

Erie County Medical Center President, Tom Quatroche, said that the Mandate caused an "unprecedented crisis" forcing hospitals to pause ICU transfers and suspend critical patient surgeries. [R. 40]. He told the *New York Times,* "For all the right reasons, the vaccine mandate was put in place. But the reality is it is creating a public health crisis in hospitals, with nobody to care for our patients." [Id.]

The three hospital systems in Syracuse lost one out of every five hospital beds because of the Mandate – a 20% decline. [Id.] Hospitals across the region are still turning away thousands of patients, and ambulances are routinely rerouted to emergency rooms in other states, since there is no one available to care for these patients in the decimated hospitals upstate. [Id.]

The Mandate was supposed to be a temporary emergency measure, and employers, employees and patients hoped that when it expired, the nightmare would end. But, despite the lack of any related declared emergency and even though the mounting evidence showed that the vaccines are non-sterilizing and cannot protect against infection and spread of disease, the NYSDOH has continued to renew the "emergency" mandate and codified it into a permanent regulation last June. *See, e.g.,* [R. 38-39].

By early 2022, there was no longer any reasonable scientific debate about the ability of the vaccine to stop the spread of COVID-19. Dr. Jay Bhattacharya, a professor of medicine, health and policy at Stanford University Medical School, who has published over a hundred peer reviewed articles on public health, and whose research has been cited over 12,400 times in peer-reviewed journals, co-authored an amicus brief to the U.S. Supreme Court setting forth the basis for the scientific consensus at that point that "COVID-19 vaccines offer near-zero protection against transmission, particularly against the now-dominant omicron variant." [R. 243-280]. The Court is respectfully referred to this brief. As the brief points out, as far back as August 2021, CDC Director

Rochelle Walensky admitted that "[w]hat [the vaccines] can't do anymore is prevent transmission." [R. 259]. Countless studies confirmed this conclusion, and by January 2022, even the vaccine manufacturers admitted that their products cannot stop the spread of COVID-19. [R. 260-261]. In August 2022, the Centers for Disease Control and Prevention ("CDC") updated its guidance to recommend that healthcare facilities stop requiring work restrictions, based on vaccination status. [R. 813].

Moreover, as Dr. Bhattacharya's brief points out, natural immunity has been conclusively shown to be as good or better than vaccine immunity. [R. 242-280]. Recent data only underscore this point. The largest meta study conducted to date found that natural immunity is as good or better than vaccine immunity both for stopping infection and transmission and for prevention of serious symptoms.[2][3] All named

[2] *See,* Stein C., Nassereldine H., Sorensen R., Amlag J., Bisignano C., Byrne S., et al. (2023). Past SARS-CoV-2 infection protection against re-infection: a systematic review and meta-analysis. *The Lancet, 401*(10379), 833-842. https://doi.org/10.1016/S0140-6736(22)02465-5

[3] *See, also, The Lancet: Most comprehensive study to date provides evidence on natural immunity protection by COVID-19 variant and how protection fades over time.* (2023, February 16). Institute for Health Metrics and Evaluation (IHME). https://www.healthdata.org/news-release/lancet-most-comprehensive-study-date-provides-evidence-natural-immunity-protection

Petitioners, and most unvaccinated healthcare workers, have natural immunity and do not pose a direct threat to anyone because of their vaccine status. [*See,* Prof. Bhattacharya Amicus Brief R. 242-280].

The stated goal of the Mandate is "Prevention of COVID-19 Transmission by Covered Entities" but even the regulatory impact statement acknowledges that the vaccines cannot stop the transmission of COVID-19 [R. 125]. For the first time on appeal, Appellants attempt to recast the Mandate as a reasonable measure to help ameliorate a staffing crisis. But this is unsupported by the facts in the record. Appellants were fully aware that their draconian Mandate was the primary *cause* of the staffing crisis. In fact, on the eve of the implementation of the Mandate, the Governor's office announced it was preemptively declaring a statewide-disaster emergency (and invoking new "emergency" powers) to deal with the expected healthcare worker shortage that would result from the Mandate. [R. 220-221]. The Governor's own press release was entitled: "In preparation for Monday's vaccination deadline, Governor Hochul releases comprehensive plan to address preventable health care staffing shortage." [Id.]. When asked by reporters about the staffing shortage the Mandate was causing, Governor Hochul acknowledged that

it was true that the Mandate was causing a staffing crisis at least for now, but asserted that the Mandate was more important, and she would try to fix the problem by calling in the National Guard. [R. 208-209]. As discussed in the petition, even these drastic measures did not alleviate the crisis, which has only grown worse [R. 40-42].

Petitioners-Appellees ("Appellees") are Medical Professionals for Informed Consent, an unincorporated membership organization made up of medical professionals who believe in informed consent, along with two named doctors, a nurse, a lab scientist, and a radiologic technician.

Petitioner Robillard ("Dr. Robillard") worked for decades as a family medicine physician at a hospital in Binghamton, and as a Clinical Associate Professor of Medicine at Upstate Medical before she was forced out because her sincere religious beliefs preclude her taking this vaccine. [R. 44]. Petitioner Hemandez-Schipplick ("Dr. Hernandez-Schipplick") also worked for decades as a physician at the same hospital as Dr. Robillard and like Dr. Robillard was also denied religious accommodation on the grounds that it would pose an "undue hardship" to accommodate her because of the Mandate (not because of safety). [R. 44]. The same hospital found it would pose no danger or difficulty to continue to

accommodate a medical exemption, which is based on Dr. Hemandez-Schipplick's participation in a clinical trial. [Id.] Thus, Dr. Hemandez-Schipplick has been able to continue working unvaccinated in person this last year while her colleagues cannot.

It is irrational to say that she can safely work in person for purposes of scientific research but not her religious needs. She either is or isn't a threat. Clearly, she isn't. However, the state's blanket refusal to consider religious accommodation commands such arbitrary results (the very essence of religious discrimination). In any event, the trial is ending soon, and absent relief, Dr. Hernandez-Schipplick will soon be forced to leave the practice of medicine, leave the state, or violate her faith [R. 44].

Petitioner Florini, a lab scientist in a critically understaffed Binghamton hospital, was also denied religious accommodation and terminated because of the Mandate [R. 45]. She was pregnant when the first temporary Mandate took effect last fall, and her family has been in an ongoing state of crisis since. Petitioner Florini's husband now works two back-to-back full-time jobs - as a full-time firefighter and as a full-time police officer - so that the family can try to make the ends meet. Petitioner Florini now faces the stark reality that unless this Court

affirms the lower court ruling and drops the stay, her beloved career as a lab scientist in this state is over. [R. 45].

Petitioner Girich, an experienced Radiologic and CT Technologist, was also denied religious accommodation by her employer in Syracuse because of the Mandate. Without relief, Petitioner Girich, her husband and their four children will likely have to leave the state forever, as so many of their friends and family working in the healthcare field already had to do. [R. 45].

Petitioner Storelli's employer granted her medical exemption and allowed her to continue working in person after the Mandate took effect. Her employer asserted that the Mandate is unconstitutional and precludes them from following their statutory responsibility to provide reasonable religious accommodation. It does. But in October 2022, after NYSDOH began "cracking down," Petitioner Storelli's employer was forced by Appellants to suspend Storelli with pay and require her to violate her religious beliefs if she wanted to continue at her job, even though they properly found she can safely be accommodated continuing to work in person unvaccinated. [R. 44-45].

Petitioners and thousands more like them worked heroically throughout the worst of the pandemic, contracting, and gaining natural immunity to COVID before any vaccine was available. They were called heroes. Now they are cast aside. Deprived of income, many have already lost, or are about to lose, their homes. They've had to spend their retirement accounts and savings, forego Christmas and birthday presents for their children, and even sometimes go without food as they wait and pray for relief. Most of the rest either violated their faith or become religious refugees, forced to leave family and friends and communities so that they can honor their faith. [R. 143].

In February 2022, over forty duly elected New York State legislators wrote Appellants, alerting them that the proposed permanent adoption of the Mandate and two other COVID related NYSDOH regulations (a mask regulation and a quarantine regulation) exceeded the scope of Appellants' authority and that each of these three regulations violate the separation of powers doctrine. [R. 73-74]. Appellants ignored this direction from the legislators, forcing citizens and lawmakers to file lawsuits.

The mask and quarantine regulations were struck down by two different Supreme Court justices, who found that the NYSDOH lacked authority to promulgate them and violated the separation of powers doctrine. *Demetriou v. New York State Department* of *Health, et al,* Index No. 616124/2021 (Sup Ct, Nassau County, January 24, 2022) [R.78]; *Borrello v. Hochul,* Index No. 91239/2022 (Sup Ct, Cattaragus County, July 8, 2022) [R. 85]. On January 13, 2023, the Onondaga Supreme Court similarly held that the NYSDOH lacked the authority to issue this Mandate, and that it is arbitrary and capricious, as even the NYSDOH acknowledges that vaccines cannot meaningfully prevent the transmission of COVID-19 in healthcare facilities. Appellants filed their appeal on January 25, 2023. [NYSCEF No. 1]. On February 27, 2023, this Court granted them a temporary stay and expedited briefing and arguments. [NYSCEF No. 6].

ARGUMENT

Judicial review of the acts of an administrative agency under Article 78 is limited to questions expressly identified by statute. *Matter of Featherstone v Franco*, 95 NY2d 550, 554 (2000). The lower court properly held that the Mandate violates CPLR § 7803(2) because

Appellants issued the Mandate "in excess of jurisdiction," and CPLR § 7803(3) because the Mandate is affected by errors of law, arbitrary and capricious and constitutes an abuse of discretion. [R. 15-19].

POINT I

APPELLANTS LACK THE AUTHORITY TO ISSUE THE MANDATE, WHICH VIOLATES STATE LAW

A. The lower court correctly found that the Mandate violates the Public Health Law.

The Supreme Court properly held that the NYSDOH lacks the authority to issue the Mandate because under the PBH they are "clearly prohibited from mandating any vaccination outside of those specifically authorized by the Legislature" [R. 16]. Indeed, in every section addressing vaccines, the PBH clarifies that the NYSDOH has the power to facilitate vaccination but lacks the power to mandate any new vaccines. The power to decide which vaccines to mandate, and what exemptions or other governing terms apply, is reserved repeatedly and solely to the legislature. *See,* e.g., PBH §§ 206, 613, 2164, 2165.

1. The *Garcia* decision held that the NYSDOH lacks authority to enact any vaccine mandate.

This issue was already decided by the Court of Appeals, which examined these provisions in the PBH, along with their legislative history, and found that "the legislature intended to grant NYSDOH the

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. New York City Dept. of Health & Mental Hygiene,* 31 N.Y.3d 601, 620 (2018).

Appellants grossly mischaracterize the *Garcia* Court's follow up sentence that "by their plain language, these provisions simply make clear that the particular statutory subdivisions at issue do not authorize NYSDOH to adopt additional mandatory immunizations, but nothing therein prohibits the adoption of mandatory immunization if otherwise authorized by law." [Appellants' Brief at 22-24, quoting *Garcia,* 31 N.Y.3d at 620]. While Appellants assert this cherry-picked language from *Garcia* should be interpreted to mean *NYSDOH* can somehow mandate additional vaccines outside of those listed in PBH §§ 2164, 2165, this argument misstates *Garcia's* holding. The context reveals that the Court was very specifically talking about whether New York City's *local* board of health [referred to as the "Board"] could adopt additional mandatory immunizations outside of the PBH if otherwise authorized, not whether the Commissioner could get around the legislature's clear limit on the state agency's powers.

First, the Court examined PBH §§ 2164 and 2165, and held that nothing therein suggests that the list of vaccines "may not be expanded by *local* municipalities to which the authority to regulate vaccinations has been delegated." (*Id.* at 619) (emphasis added). Then, the Court examined PBH §§ 613 and 206, and found that these statutes only constrain the State Department of Health: "Contrary to petitioners' assertions, [New York City's] flu vaccine rules also do not conflict with Public Health Law §§ 206 and 613. Those provisions are directed to the powers and duties of the Commissioner of NYSDOH, not of the Board…and the legislative history reveals no intent to restrict the Board's authority to regulate vaccinations." *Id.* at 620.

After inquiry, the *Garcia* Court found that the state's grant of authority to the City specifically reflected the policy of the state that the City's Board "has the authority to regulate vaccination in New York City, including mandatory vaccinations of children enrolled in day care programs" beyond those the NYSDOH was empowered to impose. *Garcia,* 31 N.Y.3d at 614.

In fact, as the Court pointed out, this was so well-understood that the state acknowledged in 2015 that "proposed amendments to the state's

school immunization requirements 'do not address additional immunizations that may be required for school admission by the New York City Health Code.'" *Id.* at 620. But the same cannot be said about the Commissioner's powers, which are expressly constrained by the PBH. [*See supra* § IA(2)-(4)].

2. The Mandate violates the clear language of the Public Health Law.

Both the lower court in this case and the Court of Appeals in *Garcia* correctly interpreted the PBH as constraining the powers of the NYSDOH to issue any new vaccine mandates. "Agencies, as creatures of the Legislature, act pursuant to specific grants of authority conferred by their creator." *Matter of Campagna v. Shaffer,* 73 N.Y.2d 237, 242 (1989). If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers. *Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Comm.,* 25 N.Y.3d 600, 608 (2015).

Here, not only is there no grant of authority to mandate vaccines, but the Commissioner is specifically prohibited from authorizing any vaccine mandate in every section of the PBH in which the Legislature addresses vaccines. First, PBH § 206, entitled "Commissioner; general

powers and duties" defines the powers and duties of the Commissioner. It is significant that it is in this section that the legislature curbs the Commissioner's power, enumerating the Commissioners powers and duties such that the Commissioner is empowered to "establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease to protect the public health" and "may promulgate such regulations as are necessary for implementation of this paragraph," but "[n]othing in this paragraph shall authorize mandatory immunization of adults or children, except as provided in sections [2164] and [2165] of this chapter." PBH § 206(1)(l).

PBH § 206(1) sets forth a number of other specific powers, including, for example, the power to carry out pre-employment tuberculosis testing on hospital employees, the power to inspect hospitals and healthcare facilities and make recommendations to the governing bodies, and the power to oversee food safety, but does not provide any other power that could be inferred to allow the Commissioner to authorize a vaccine mandate for "adults or children" outside of the mandates listed in PBH §§ 2164-2165.

Notably, PBH § 2016(1)(l) does not make any carve outs to the prohibition against authorizing any mandatory vaccination "of adults or children" for healthcare workers, students, or volunteers in healthcare facilities, other than as already expressed in PBH §§ 2164 and 2165.

Since 1966, the legislature has maintained in PBH §§ 2164 and 2165, a list of all vaccines that the NYSDOH is authorized to mandate and the conditions pertaining to those mandates. PBH § 2164 sets forth the list of required childhood immunization for every child under eighteen, and PBH § 2165 sets forth immunization requirements for adult "post-secondary" students enrolled in higher education, including nursing students and others whose studies take place in healthcare facilities.

These statutes include exemptions, incorporate an appeal process, and explain the procedures and penalties for noncompliance. Despite proposals, the legislature has not elected to add COVID-19 vaccinations to the list in either section. Therefore, as held below, the Commissioner was not empowered to authorize any Mandate for COVID-19 vaccination.

Also, the Mandate interferes with the religious exemption in PBH § 2165. In 2019, the legislature made the hotly debated and difficult

decision to remove the religious exemption for children under eighteen. But it kept the religious exemption for adults. To this date, PBH § 2165(9) provides that: "This section shall not apply to a person who holds genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such person being admitted or received into or attending an institution." Medical schools and nursing schools conduct classes and rotations in healthcare facilities. The Mandate violates this legislative policy decision by categorically precluding religious exemptions for adults, including nursing and medical students who are supposed to be protected by PBH §2165(9) but are now being removed from school because they cannot attend due to the Mandate.

The only other place that the PBH addresses immunization is in PBH § 613, titled "State Aid; Immunization" which details the Commissioner's authority to provide programs and services to encourage adult and child immunization uptake. To carry out these activities, "[t]he Commissioner shall invite and encourage the active assistance and cooperation…of: the medical societies…hospitals" and the Council, among other groups to help raise immunization levels. PBH § 613(c). But,

once again, the Legislature created a clear boundary against any mandate, reiterating that: "Nothing in this subdivision shall authorize mandatory immunization of adults or children except as provided in sections [2164] and [2165] of this chapter."

In short, the statutory construct our courts must interpret contains very specific prohibitions against mandatory immunizations which the legislature has retained despite making other major changes to the state's immunization regiment.

3. Appellants fail to point to any other law that would authorize them to issue the Mandate.

Appellants attempt to get around these specific statutory limits by citing inapposite and generalized sections of the PBH as somehow providing authority to override them. However, "the rules of statutory interpretation [] require both that a statute be construed to give meaning to all its words and that, where a conflict arises between parts of a statute, the specific overrides the general." *People v. Pabon,* 28 N.Y. 3d 147, 153 (2016). Reading the PBH as Appellants suggest would violate both rules.

Appellants first argue that PBH § 225 overrides the specific statutory limitation on the Commissioner's power, because the Council

has the general power to consider ("at the Commissioner's request") "any matter relating to the preservation and improvement of public health." [Appellants' Brief at 8, citing PBH § 225(1)]. But this argument is irrational and tautological. According to PBH §225, the Council's powers are strictly advisory, and they cannot issue any regulation without authorization of the Commissioner. PBH § 225(1)-(4). Since the Commissioner is prohibited from "authorizing mandatory immunization of adults or children" outside of those set forth by the legislature in §§ 2164-2165, she cannot authorize the Council to issue a new vaccine mandate, no matter how broad its powers are to "consider" and make recommendations on matters she requests advice on.

The same problem arises with respect to all the other generalized statutes cited by Appellants. For example, PBH § 2800 is a generalized "Declaration and Policy Statement" stating the importance of having high quality healthcare and noting that the NYSDOH has the central and comprehensive responsibility for "the development and administration of the state's policy with respect to hospital services…" But nothing in this generalized policy statement authorizes the Commissioner to violate the limitation on her duties and powers

enumerated in the powers and duties section of the PBH. In fact, nothing in this policy statement even mentions vaccines.

Similarly, PBH §§ 2803, 3612, and 4010 merely direct the Commissioner and Council to inspect hospitals, nursing homes and other care facilities and make recommendations, which is consistent with the enumerated powers in PBH § 206 and has nothing to do with vaccination. For hospitals, these inspections allow assessment of compliance with minimum standards, "equal to the standards and procedures which federal law and regulation require for hospitals to qualify as providers pursuant to titles XVIII and XIX of the federal social security act" (the "Medicaid" standards). PBH § 2803(2)(v). Notably, the Medicaid standards require consideration of a religious exemption for any employee whose sincere religious beliefs conflict with the COVID-19 vaccine mandate, including staff who do not "exclusively provide telehealth or telemedicine services outside of the" hospital setting but have "direct contact with patients or colleagues." *See, e.g.*, 86 Fed. Reg. at 61619; amending 42 C.F.R. § 482.42(g)(2), (g)(3)(i),(ii),(vi).

PBH § 2803 also states: "The existing state standards and procedures in effect in effect [on the date the subdivision became

effective] shall be deemed to constitute maximum standards and procedures…" [Id.] To the extent that the Council is empowered to promulgate additional state standards, these changes must be authorized by the Commissioner. [Id.] Once more, because the powers section of the PBH states that the Commissioner cannot authorize vaccine mandates for adults or children other than as set forth in PBH §§ 2164-2165, any new standards cannot include a new vaccine requirement. The lower court correctly held that: "The sections cited by Respondents provide nothing more than general grants of power. Reading those sections in the manner urged by the Respondents would render Public Health Law §§ 206, 613, 2164, and 2165 meaningless." [R. 17].

Appellants rely heavily on *Spence v. Shah*, 136 A.D.3d 1242 (3rd Dept. 2016), citing this Third Department case at least seven times, allegedly for the proposition that the "broad authority" to promote public health and regulate hospitals set forth in PBH §§ 225, 2800, 2803, 3612, 4010 should overcome the plain language of PBH §§ 206(1) and 613(c) prohibiting mandatory immunization other than as set forth by the legislature in PBH §§ 2164-65. But *Spence* holds nothing of the sort. That

non-controlling case did not involve a vaccine mandate – in fact, one of the factors that the Third Department considered persuasive when deciding whether the NYSDOH operated "outside of its proper sphere of authority" in issuing the mask regulation at issue was the fact that "[t]he regulation offers the options of being vaccinated or, if not, wearing a mask" and thus does not involve any mandatory vaccine. *Id.* at 1245. In other words, *Spence* does not provide precedent to violate the clear provisions of the PBH regarding mandatory immunization, just the opposite – the first factor it considered in addressing separation of powers was whether the Commissioner improperly imposed a vaccine mandate, which he had not.

Appellants' next argument is that certain other regulations the NYSDOH has issued show that it has the power to issue this Mandate. First, they submit that the NYSDOH requires certain healthcare workers to submit to a tuberculosis testing requirement. But such tests are not vaccine mandates, and are explicitly authorized under PBH § 206(1)(m), which allows the Commissioner to "make such rules and regulations which may be necessary to require pre-employment physical examination

and therefore require such annual examinations of all hospital employees for discovery of tuberculosis…"

Second, they point to N.Y. Comp. Codes R. & Regs. tit. 10, § 405.3, a NYSDOH regulation requiring healthcare facilities to ensure employees provide a certification showing that they are in compliance with PBH § 2164 insofar as they were either vaccinated for measles and rubella as an infant or can provide proof of natural immunity. Appellants assert that this shows they can issue any new vaccine mandate, and for authority, cite an Albany Supreme Court case, *Matter of Ritterbrand v. Axelrod,* 149 Misc. 2d 135 (Sup. Ct., Albany County 1990). But *Ritterbrand* was decided fourteen years before the legislature amended the PBH to clarify that the Commissioner cannot authorize any new vaccine mandates outside of those in PBH §§ 2164 and 2165. It cannot stand as authority to overcome the limitations imposed in 2004 in PBH §§206(1)(l) and 603. And, in any event, the measles and rubella certification requirement is entirely distinguishable from the COVID-19 vaccine mandate. All that regulation appears to require is that employees submit proof that they are in compliance with PBH § 2164, and thus it does not necessarily violate PBH § 206(1)(l), which provides that the

Commissioner may not "authorize mandatory immunization of adults or children *except as provided in sections [2164] and [2165] of this chapter*" (emphasis added). The COVID-19 vaccine mandate, on the other hand, is an entirely new vaccine mandate and clearly runs afoul of the limit.

4. The legislative history cuts against Appellants' argument.

Last, for the first time on appeal, Appellants argue that the legislative history supports their reading of the PBH, because they assert former NYSDOH Commissioner Whalen would not have advocated for amendments that limited his power. [Appellants' Brief at 10]. But this argument ignores the many reasons Commissioner Whalen says he supported the bill. First, the legislative history shows that the NYSDOH primarily supported the bill because it added pertussis and tetanus to the list of mandated vaccines maintained by the legislature in PBH §2164. *See* Memorandum from Dennis Whalen, DOH Executive Deputy Commissioner, July 13, 2004, Bill Jacket, L. 2004, ch. 207, at 14. Rather than support Appellants' point, this shows that the Commissioner understood he did not have the power to add new vaccine mandates on his own. Second, the legislative history reveals that at the time the amendments were passed, it was unclear whether the Commissioner

even had the authority to create programs to encourage vaccination. For example, Assemblyman Gottfried wrote, "the bill should resolve questions that have raised about the Department's authority to provide and support child and adult immunization programs." [Letter from Richard N. Gottfried, Chair, Assembly Comm on Health, to Richard Platkin, Counsel to the Governor, July 16, 2004, Bill Jacket L 2004, ch 207 at 5]. Senator Hannon similarly stated that the Commissioner lacked clear authority to implement programs to encourage adult vaccine uptake. [Letter from Kemp Hannon, to Governor Pataki, July 14, 2004, Bill Jacket, L2004, ch 207 at 3]. So, reasons existed for the Commissioner to support the amendments even if the amendments clarify that he does not have authority to issue new vaccine mandates.

Importantly, each sponsor stressed the hard limit, that the bill "clearly does not require adult immunization. To that end, the bill states, in pertinent part, that nothing in this bill 'shall authorize mandatory immunization of adults…'" [*Id.*]. In *Garcia*, the Court of Appeals already interpreted the legislative history as showing "the legislature intended to grant NYSDOH authority to oversee voluntary adult immunization programs, while ensuring that its grant of authority would not be

construed as extending to the adoption of mandatory adult immunizations" *Garcia,* 31 N.Y. 3d at 620 (citing Letter from Richard N. Gottfried, *supra*).

In sum, here, the Supreme Court correctly held that the NYSDOH "violated Public Health Law §§206, 613, 2164 and 2165" [R. 17] and thus acted beyond the scope of their authority [R. 19].

B. The Mandate violates the New York State Constitution.

The Supreme Court also properly held that the Mandate was issued in violation of the separation of powers doctrine, which is a separate, but related error of law. "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*, 31 N.Y. 3d at 608.

It is well-settled law in New York that where, as here, a regulation not only lacks clear legislative authority (which alone likely dooms a rule

as *ultra vires),* but rather directly conflicts with New York law, it should be struck down without further inquiry as *ultra vires* under the separation of powers doctrine. *See, e.g., Morris v. New York City Dep't of Health & Mental Hygiene,* 41 Misc. 3d 1209(A) (Sup Ct, New York County, 2013) ("agency's regulations must not conflict with state statute"); *Broidrick v. Lindsay,* 39 N.Y.2d 641, 645-46 (1976) ("executive action ... may not go beyond stated legislative policy"); *Rapp v. Carry,* 44 N.Y.2d 157, 163 (1978) ("executive ... may not ... go beyond stated legislative policy and prescribe a remedial device not embraced by the policy"); *People ex rel Spitzer v. Grasso,* 42 A.D.3d 126, 141 (2007) *aff'd* 11 N.Y.3d 64 (2008) (same); *Campagna v. Shaffer,* 73 N.Y.2d 237, 242-43 (1989) ("an administrative officer has no power to declare through administrative fiat that which was never contemplated or delegated by the Legislature."); *Edenwald Contracting Co. v. City of New York,* 86 Misc. 2d 711, 720 (Sup. Ct. N.Y. County 1974) *aff'd* 47 A.D.2d 610 (1st Dep't 1975) ("An administrative agency is a creature of the Legislature. It possesses no inherent legislative power and must strictly confine the exercise of its delegated authority within the boundaries of the

Legislature's mandate."); *see, also, Subcontractors Trade Ass'n v. Koch,* 62 N.Y.2d 422, 427-30 (1984).

Where it is not as clear whether the legislature delegated authority, or had the power to do so, courts use the "conceptual framework" established in *Boreali v. Axelrod,* 71 N.Y.2d 1 (1987). *See, New York Statewide Coal. of Hisp. Chambers of Com. v. New York City Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 696 (2014). Applying that framework, New York courts have repeatedly struck down health related regulations when there was no clear legislative grant of authority rendering such regulation proper interstitial rulemaking. For example, in *Boreali,* 71 N.Y.2d, the Court of Appeals struck down a NYSDOH prohibition on smoking in certain public spaces; in *Statewide Coalition,* 23 N.Y.3d, the Court of Appeals struck down a municipal health regulation prohibiting certain size cups for sugary beverages; and in *American Kennel Club, Inc., et al v. City of New York, et al,* Index No. 13584/89, slip op. (Sup Ct, New York County, Sept. 19, 1989), the court struck down a health regulation that restricted and eventually barred pit bulls from New York City.

More recently, two different Supreme Court Justices struck down NYSDOH COVID-19 related "regulations" that crossed the line from rulemaking into the legislative function. First, in January, the Nassau Supreme Court held that a mask mandate codified at 10 NYCRR §2.60, proposed as permanent law at the same time as § 2.61, was not authorized by any grant of authority and constituted impermissible law and policy making. *Demetriou,* Index No. 616124/2021. In July, the Cattaraugus Supreme Court then struck down 10 NYCRR § 2.13, which provided sweeping powers to the NYSDOH to issue isolation and quarantine orders. *Borrello,* Index No. 91239 /2022. This case is even stronger because the enabling statute directly forbids the Mandate.

The lower court held that *Boreali* analysis is not necessary here, because, as discussed *infra* [§ IA], "this is not a case where DOH acted in some gray area…DOH blatantly violated the boundaries of its authority as set forth by the Legislature." [R.17]. Nonetheless, the court proceeded with a *Boreali* analysis and correctly held that the Mandate violates the separation of powers doctrine under this test as well. [Id.]

The *Boreali* analysis considers four "coalescing factors." These are "whether (1) the regulatory agency 'balanc[ed] costs and benefits

according to preexisting guidelines,' or instead made 'value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems' (*Matter of Acevedo*, 29 NY3d at 222-223, quoting *Greater N.Y. Taxi Assn.*, 25 NY3d at 610); (2) the agency 'merely filled in details of a broad policy' or if it 'wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance' (*Matter of NYC C.L.A.S.H.*, 27 NY3d at 182, quoting *Greater N.Y. Taxi Assn.*, 25 NY3d at 611); (3) the legislature had unsuccessfully attempted to enact laws pertaining to the issue (*see Boreali*, 71 NY2d at 13); and (4) the agency used special technical expertise in the applicable field (*see id.* at 13-14)." *Garcia,* 31 N.Y. 3d at 609-610.

These factors are not to be rigidly applied but are "designed to ascertain whether an agency has transgressed the bounds of permissible rulemaking." Ultimately, '[a]ny *Boreali* analysis should center on the theme that it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Id.*

1. **The Mandate fails the first factor because the NYSDOH made value judgments entailing difficult and complex choices severely impacting thousands of people.**

The first factor highlights that "it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends" *Boreali,* 71 N.Y.2d at 13. "That task, policy making, is reserved to the legislative branch." *Statewide Coalition,* 23 N.Y.3d at 697. Here, it is readily apparent that the NYSDOH crossed the line into lawmaking.

In *Boreali,* the Court found a smoking ban by the NYSDOH was an impermissible "effort to weight the goal of promoting health against its social cost and to reach a suitable compromise ... We took this to violate the principle that '[s]triking the proper balance among health concerns, cost and privacy interests…is a uniquely legislative function.'" *Id.* (internal citations omitted). Here too, Appellants attempted to balance difficult social problems by making choices among competing difficult policy questions. On the one hand, there are fundamental rights, such as privacy, like in *Boreali*, but also bodily autonomy, informed consent, and most importantly well-protected religious rights, which the Mandate forces employers to disregard. On the other, there are public

health goals. The NYSDOH may be competent to provide opinions about the objective evidence supporting their assessment of risk if employees are allowed to work unvaccinated or are allowed religious accommodation, which could certainly be cited by employers in making individualized safety decisions. But they are not allowed to decide that those risks are more important than other important rights, make categorical permanent determinations that override the emerging best available individualized and *current* evidence standard that employers are required to consult before denying religious accommodation, or decide what scheme will best balance and protect all the important interests.

The sheer number of people severely impacted here also resolves any doubt that this is policymaking not-rule making. In *Statewide Coalition,* 23 N.Y.3d, the Court held: "An agency that adopts a regulation, such as the Portion Cap Rule or an outright prohibition of sugary beverages, that interferes with commonplace daily activities preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy and economics. That is policy making, not rule-making." *Id.* at 699. In this case too, thousands of people have religious objections to COVID-19 vaccines, and the regulation has

had devastating effects on them, their families, their communities, and the whole state.

In short, this was policy making over issues of vast economic and political significance. The United States Supreme Court held that "[w]e expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *See, e.g., Alabama Assn. of Realtors v. Department of Health and Human Servs.,* 594 U.S. __, (2021) (per curiam) (slip op., at 6) (internal quotation marks omitted), and the same expectation is imposed in New York against state agencies. *Statewide Coalition,* 23 N.Y.3d at 699.

2. **The Mandate fails the second factor because the NYSDOH did not fill in details of an existing policy, but instead acted in contravention of existing law.**

The Supreme Court held that the second factor clearly counsels against Appellants, since they did not "engage in interstitial rulemaking" or "fill in some missing area" but instead acted contrary to statute. [R. 17]. As discussed *infra* [§ IA], the Mandate violates the PBH by violating the Commissioner's defined powers and issuing a mandate for a vaccine that is not authorized by the legislature in PBH §§ 2164 or 2165, and by eviscerating the guarantee of religious exemption provided to adults in

§2165(9). Indeed, because of the Mandate, hundreds of medical students and nursing students were forced to leave their programs, as the Mandate applies to students and volunteers whose programs take place in covered facilities, as well as traditional employees. [R. 102]. The Mandate's reliance on PBH § 225, is particularly unavailing in this analysis.

Indeed, this was the precise statutory provision analyzed in *Boreali,* 71 N.Y.2d, in which the Court of Appeals rejected similar claims by Appellants that PBH § 225 provided the NYSDOH authority to make sweeping policy decisions, stating:

> While the Legislature has given the PHC broad authority to promulgate regulations on matters concerning the public health, the scope of the PHC's authority under its enabling statute (Public Health Law § 225 [5] [a]) must be deemed limited by its role as an administrative, rather than a legislative, body. The PHC usurped the latter role and thereby exceeded its legislative mandate, when, following the Legislature's inability to reach an acceptable balance, the Council weighed the concerns of nonsmokers, smokers, affected businesses and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests. *Id.* at 1-2.

So, in addition to the problem that the Council is unable to act without the authorization of the Commissioner (who is prohibited from

authorizing new vaccine mandates), in any event, the Council's power is not to be read so broadly as Appellants suggest.

In addition to violating the PBH, the Mandate also contravenes the legislature's careful balancing of religious rights and perceived disabilities against public safety set forth in the NYSHRL.

The NYSHRL imposes an affirmative obligation on employers to accommodate religious practices of employees, unless the employer can prove, after good faith individualized review, undue hardship. N.Y. Exec. Law § 296(10)(a). Unlike in the federal statutory context, "undue hardship" is defined under the state law as a robust standard, meaning "an accommodation requiring *significant expense or difficulty* (including a *significant* interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system)." N.Y. Exec. Law § 296(10)(d) (emphasis added).

While employers have some leeway in deciding between available reasonable accommodations, they cannot segregate or otherwise materially change an employee's job without substantial justification showing that it is necessary for safety reasons. The safety analysis cannot be speculative. Rather, "the employer must make an individualized

assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective information, to ascertain: the nature, duration, and severity of risk; the probability that the potential injury will actually occur; and whether reasonable accommodations, such as modification of policies, practices or procedures will mitigate risk." 9 CRR-NY 466.11(g)(2).

It is well-established that COVID-19 vaccines cannot meaningfully stop transmission, and even the CDC has advised that employers stop differentiating between vaccinated and unvaccinated employees when assessing prevention and mitigation measures. [R. 813]. Yet the Commissioner made the brazen (and preempted) choice to permanently preclude the option of religious exemption, regardless of what the evidence or individualized review show, and regardless of what the best available *current* science shows is safe, thus prohibiting employers from meeting their obligations under NYSHRL and preventing employees from exercising their rights protected by NYSHRL. Appellants even usurped the economic analysis, rejecting the possibility of alternatives such as testing on the unsupported assertion that it would be too costly for employers. One wonders if the hospitals, who now have to pay travel

medics three or four times the amount they were paying Appellees, would really agree with that assessment.

Ultimately, the Commissioner cannot create a new, more restrictive, and contradictory standard for judging whether employees' sincere religious beliefs can be accommodated than the comprehensive scheme set forth by the legislature. Employers must justify denials of accommodation with high-quality, current evidence after good faith individualized review. 9 CRR-NY 466.11 (g)(2). § 2.61 does not allow for that. In a recent decision overturning Appellants' new draconian quarantine regulation, the Cattaraugus Supreme Court held that the regulation was *ultra vires*, because it "ignores the balancing act between an individual's rights and the need for safety" set forth in the legislature's existing laws governing quarantine procedures. *Borrello,* Index No. 91239 /2022, at 7. The Mandate similarly ignores the balancing act between individual rights and the need for safety set forth in the legislature's laws governing religious and disability accommodation.

3. **The Mandate fails because the Legislature has tried and failed to pass similar regulations.**

The Mandate fails the third factor too. Thus far, the legislature has not been able to get a single co-sponsor on any bill proposing to mandate

COVID-19 vaccination as a condition of school or work. None of those bills even made it out of committee or shows any likelihood of ever doing so. [R. 148-164]. Moreover, various legislators proposed hundreds of bills since March 2020 involving COVID-19, but only one, that speaks only to contract tracing, was passed into law (PHL §§ 2180-2182). [*Id*., list of COVID-19 related bills proposed but not passed]. Indeed, over forty elected state legislators wrote to Respondents to alert them that this regulation violates the separation of powers doctrine and is not within the legislature's grant of authority. [R. 73-77]. The legislature has also tried, and failed, to issue vaccine mandates for healthcare workers. For example, in *Spence,* the Third Circuit acknowledged that the legislature had tried and failed to pass a flu vaccine mandate for healthcare workers. *Spence,* 136 A.D.3d at 617.

Most significant, though, is the history of legislative agony over religious exemptions. In 2019, the legislature made the controversial and heavily debated decision to remove religious exemptions from the childhood vaccine requirements (formerly available under PBH § 2164), becoming the fourth state in the United States to remove the possibility of religious or personal exemptions from the state childhood vaccine

requirements. "The Assembly narrowly voted for the measure by an unofficial tally of 77-53, just one vote more than the minimum needed to pass a bill in the 150-seat chamber. Rarely does a bill in Albany pass with so few votes."[4] The senate vote was also very close. In fact, the bill almost did not make it to the floor since it was deadlocked in committee. A member of the health committee was urged to change his vote to bring it to the full legislature.[5]

Though the legislature narrowly repealed the religious exemption for children, it elected to leave in place the religious exemption in the provisions governing adult vaccination. PBH § 2165(9). The challenged Mandate violates the compromise reached by the legislature by eliminating the religious exemption that is still supposed to be available to adults. This history also reveals the importance and difficulty of religious exemption policy decisions. This is exactly the type of difficult policy decision that must remain in the hands of the people's elected

[4] Campbell J., and Spector J. (2019, June 13). *New York repeals religious exemption for school vaccinations.* Lohud.com. https://www.lohud.com/story/news/2019/06/13/new-york-repeal-religious-exemption-school-vaccinations/1445973001/

[5] *Id.*

representatives, rather than unilaterally decided by appointed administrators. *Garcia,* 31 N.Y. 3d at 609-610.

4. **The Mandate fails because the NYSDOH does not have specialized expertise in religious and economic policy considerations weighed here.**

The last factor counsels in favor of Petitioners as well. Respondents presumably have experience in analyzing data on safety and efficacy of vaccines. But the lower court properly made a factual finding, after analyzing the evidence, that the NYSDOH failed to utilize this expertise, given that even the NYSDOH acknowledges that vaccines cannot stop transmission. [R. 18]. Moreover, here, NYSDOH wandered far beyond that expertise and attempted to balance critical individual rights against public safety, which is not within its area of competency or authority. The NYSDOH has no expertise or authority to weigh important religious and liberty rights against public health needs. Particularly here, where the vaccine at issue cannot even stop transmission, Appellants' decision to eviscerate employees' religious accommodation protections guaranteed by the legislature clearly exceeded regulatory authority and altered rights recognized by the legislature.

POINT II

THE MANDATE IS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

As an alternative, the lower court properly found that the Mandate is arbitrary and capricious. [R. 18]. In reviewing a determination made without a hearing, the standard of review is whether the action taken had a "rational basis" and was not "arbitrary and capricious." *Ward v. City of Long Beach,* 20 N.Y. 3d 1042, 1043 (2013). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v. Bd. of Union Free Sch. Dist.,* 34 N.Y. 2d 222, 231 (1974). "Capricious action in a legal sense is established when an administrative agency on identical facts decides differently." *Matter of Italian Sons & Daughters of Am.-Amici Lodge No. 255 v Common Council of Buffalo*, 89 AD2d 822, 823 (4th Dept 1982).

An agency "is entitled to a 'high degree of judicial deference, especially when…act[ing] in the area of its particular expertise." *Nazareth Home of Franciscan Sisters v. Novello*, 7 N.Y.3d 538, 544 (2006). But, while courts will uphold an agency decision that demonstrates a rational basis for the determination, the record must provide sufficient detail to give rise to a determination of rationality, as courts cannot

affirm an agency determination by "substituting what it deems a more appropriate or proper basis" to save a deficiently reasoned decision. *Pell,* 34 N.Y.2d at 231. Accordingly, if the agency's decision is not supported in the original record "by proof sufficient to satisfy a reasonable [person], of all the facts necessary to be proved in order to authorize the determination" then the decision should be vacated. *Ador Realty, LLC v. Division of Housing and Community Renewal*, 25 AD.3d 128, 139-140 (2d Dept 2005) (quoting *Pell,* 34 N.Y. 2d at 231).

A. The Mandate is arbitrary and capricious.

Here, the Supreme Court held that the Mandate is not supported by adequate proof or rationality, pointing out that "[i]n true Orwellian fashion, the Respondents acknowledge then-current COVID-19 shots do not prevent transmission" of COVID-19 and yet, the NYSDOH nonetheless adopted the Mandate, entitled "Prevention of COVID-19 Transmission by Covered Entities" [R. 565] for the stated purpose of attempting to prevent transmission of COVID-19 in healthcare facilities [*Id*.].

The regulation is clearly imposed to address transmission, as it is entitled that way, and defines as "personnel" as "all persons employed or

affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who 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."

Since it was beyond dispute when the Mandate was issued in late June 2022 that vaccinated and unvaccinated people are equally (if not more) likely to get and spread COVID-19, the decision to bar only unvaccinated persons from any job where they can interact with a colleague or patient whom they could spread COVID-19 to if infected is irrational and capricious. *Italian Sons & Daughters*, 89 AD2d at 823.

The "Needs and Benefits" section of the regulatory impact statement [R. 574-575] does not contain any study or data to support the theory that vaccination can stop transmission, though it does make several conclusory statements about the effectiveness of the vaccines.

But, by June of 2022, these findings were thoroughly at variance with the consensus of the scientific community. The CDC reiterated last summer, receipt of the primary series of the COVID-19 vaccines, which is all the Mandate requires, "provides minimal protection against

infection and transmission" [R. 234]. This finding is consistent with the great weight of the scientific evidence and consensus available in June 2022. *See* Amicus Brief, Prof. Jay Bhattacharya, M.D., PhD [R. 242-280]. Indeed, because it was so well understood that vaccination cannot stop transmission, CDC updated its guidance for prevention and transmission in 2022 to state, "CDC's COVID-19 prevention recommendations no longer differentiate on a person's vaccination status"[6]

Instead of supporting the Needs and Benefits section with any science, the conclusory statements about effectiveness in the regulatory impact statement were carried over from previous emergency versions of the Mandate, generated the year before [R. 175], and zero scientific support is offered for them. The findings in this section are also undermined by Appellants' own response to comments later in the same regulatory impact statement. In the response to "thousands of comments" pointing out that the COVID-19 vaccines are not effective at stopping

[6] Greta M. Massetti *et al.*, "Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems – United States, August 2022", MMWR Morbidity and Mortality Weekly Report August 2022, available at https://www.cdc.gov/mmwr/volumes/71/wr/mm7133e1.htm#:~:text=CDC's%20COVID%2D19%20prevention%20recommendations,severe%20illness%20from%20their%20previous (last visited Feb 3, 2023).

transmission, the NYSDOH appears to acknowledge that this is the case, pivoting to alternative reasons why the Mandate might still be justified even though it could not support the claim that these vaccines stop transmission. [R. 525, R. 596-598].

The lack of any support in the record for the factual predicate for the Mandate set forth in the regulatory impact statement supports the court's conclusion that the Mandate was arbitrary and capricious when promulgated. Pursuant to the State Administrative Procedures Act ("SAPA"), the regulatory impact statement must set forth in the "Needs and Benefits" section a citation for and summary "of each scientific or statistical study, report or analysis that served the basis for the rule, an explanation of 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." SAPA § 202(a)(3)(b). This must be updated when new information arises that needs to be addressed. Since the Mandate is not supported by proof sufficient to satisfy a reasonable person of all the facts necessary to find rationality, the Mandate is properly deemed arbitrary and capricious. *Pell,* 34 N.Y. 2d at 231.

Because the NYSDOH failed to cite to studies or data that would support their reasoning in the Needs and Benefits section, and acknowledged later in comments (albeitly tacitly) that the conclusory statements therein are incorrect ([R. 525]), the lower court did not abuse its discretion in making its factual finding that the Mandate is arbitrary and capricious. *See, Med. Soc. of State of N.Y., Inc. v. Levin*, 185 Misc. 2d 536, 546 (Sup Ct, New York County, 2000), *aff'd sub nom., Med Soc'y of State of New York, Inc. v. Levin*, 280 A.D.2d 309 (2001) (reversal under article 78 is appropriate where agency failed to publish an updated regulatory impact statement providing adequate and complete support for regulation considering comments).

Appellants try to rehabilitate the reasoning with new arguments on appeal, claiming that the Mandate is still rational because it "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" (Appellants' Brief at 32). This was not argued below, and it is not accurate in any event. As pointed out in Professor Bhattacharya's Amicus Brief, "New York's mandate ignores the clear weight of scientific evidence

confirming that natural immunity is as good as, if not superior to vaccine-based immunity." [R. 272-273]. Indeed, it was well understood and acknowledged by scientific consensus in June 2022 that natural immunity protects against both severe disease and infection, and that the protection was likely longer lasting than vaccine immunity [R. 273].

The regulatory impact statement is vague on this point but in comments the NYSDOH does appear to acknowledge that natural immunity protects against both infection and severity of symptoms, stating: "Regarding comments pertaining to natural immunity, recovery from many viral infectious diseases is followed by a period of infection-induced immunologic protection against reinfection…" [R. 596]. NYSDOH's reasoning for why natural immunity is not considered sufficient is irrational. Specifically, Appellants reject the possibility of allowing exemptions for those with natural immunity "because becoming infected with SARS-CoV-2 carries significant risks, being up to date on vaccines (with booster doses, as eligible) is the only safe choice." This is irrational for two reasons. First, Appellants and most of their colleagues have already been infected and obtained natural immunity and, therefore, are not faced with that choice. Second, boosters are not

required by the Mandate, and no explanation is provided for why those who are unboosted (and for whom any vaccine protection no doubt waned months or years ago) can keep working, while unvaccinated persons with natural immunity cannot. Moreover, the commentators do not address the waning vaccine effectiveness, while summarily stating that natural immunity wanes, and it is unclear they even considered this.

In June 2022, it was already well understood that vaccine effectiveness wanes in a matter of weeks or months; the clear weight of the evidence shows that natural immunity, on the other hand, lasts a year or more (*see,* Amicus Brief Prof. Bhattacharya R. 242-280).[7] Again, the conclusory and circular reasoning employed in the comments section is unsupported by current and quality data and runs afoul of the requirement that all studies relied on to make findings underpinning a determination be specified by name and cited. SAPA § 202(a)(3)(b).

Appellants attempt to support their new argument that the Mandate is rational because it might prevent staffing shortages by

[7] *See also, The Lancet: Most comprehensive study to date provides evidence on natural immunity protection by COVID-19 variant and how protection fades over time.* (2023, February 16). Institute for Health Metrics and Evaluation (IHME). https://www.healthdata.org/news-release/lancet-most-comprehensive-study-date-provides-evidence-natural-immunity-protection

asserting that the CDC recommends that healthcare workers follow COVID-19 vaccine requirements to help reduce staffing shortages (Appellants' Brief at 13-14). Actually, that conventional strategy was amended by the guidance cited. Appellants shockingly omit the fact that the guidance states, on the very first page, that: "Conventional strategies were updated to advise that, in most circumstances, asymptomatic healthcare personnel with higher-risk exposures do not require work restrictions, regardless of their vaccination status." [R. 813]. Rather, to address staffing shortages, the CDC updated its former conventional guidance to recommend that employees may return to work, even if they are still actively infected with COVID-19, after only five days rather than ten, and regardless of whether they are vaccinated or unvaccinated and that dropping distinctions based on vaccination status could mitigate staffing shortages. [R. 814].

Appellants new "staffing shortage" argument is also contradicted by the fact that at the time the Mandate was introduced, Appellants explicitly acknowledged that the Mandate is a primary driver of the staffing crisis in New York State. This was so well understood, that on the eve of the implementation of the first version of the Mandate, the

Governor's office announced it was preemptively declaring a statewide-disaster emergency (and invoking new "emergency" powers) to deal with the expected healthcare worker shortage that they knew the Mandate would cause. [R. 220-221]. The Governor's own press release was entitled: "In preparation for Monday's vaccination deadline, Governor Hochul releases comprehensive plan to address preventable health care staffing shortage." [*Id.*]. Indeed, these shortages *were* preventable – if only the NYSDOH wouldn't impose their arbitrary and capricious Mandate. Because they obstinately imposed the Mandate, New York State lost 34,000 critically needed healthcare workers, who have not been allowed to return, even though we know beyond any reasonable doubt that they do not pose a direct threat based on their vaccine status.

It is absurd and irrational to permanently remove 34,000 critically needed healthcare workers from critically understaffed facilities for the purpose of reducing temporary five-day staffing shortages that could occur if they were reinfected with COVID-19 at some point. As the CDC itself admits, vaccinated and unvaccinated employees can each catch COVID-19 at substantially the same rates, and if they do, they will each have to quarantine and be temporarily removed from the workplace for

five days regardless of vaccination status. To the extent that the Mandate's purpose was to stop staffing shortages, nothing cited in the Needs and Benefits section could support the rationality of that argument. *See, Ador*, 25 AD.3d at 139-140 (affirming rejection of owner's capital improvement claim where the reasoning in the record below did not sufficiently address necessary questions).

Appellants take issue with the fact that the Court did not cite the ample evidence in the record below showing that vaccinates cannot stop transmission in the Decision and Order. But the Court did not need to. As the Court pointed out, Appellants' own regulatory impact statement acknowledged that the vaccines cannot stop transmission, and this was confirmed at oral argument. The lower court's decision properly rested on the inadequacy of support in the record itself for a rational connection between the stated goal and Appellants' own acknowledgment that vaccines cannot stop transmission. Though deference is afforded, the NYSDOH is not immune from the requirement that it must make a record that supports its determination with citations to the data it relied upon. *Pell,* 34 N.Y. 2d at 231.

B. The decision to remove the religious exemption was arbitrary and capricious and an abuse of discretion.

The decision to remove the possibility of religious exemption from the Mandate is a separate basis to strike down the Mandate as the record shows that, in addition to being affected by an error of law, it was arbitrary and capricious as well as an abuse of discretion.

1. Removal of the religious exemption was an abuse of discretion.

Appellants originally included a religious exemption in their Mandate. [R. 53]. But eight days later, Governor Hochul directed that the religious exemption be omitted. [R. 54-55]. The regulatory impact statement failed to even address why removing the possibility of religious exemption was necessary. [R. 175-176]. But the Governor told the press that the possibility of religious exemption was intentionally omitted because she doesn't believe that religious opposition to vaccination is a valid point of view. [R. 54-55].

Removing the religious exemption for this reason was an abuse of discretion. Appellants improperly used the power of the executive branch to take a position on religious questions, and to impose special disability on religious minorities whose religious beliefs are not shared by leaders that the Governor believes are "sanctioned" (whatever that means). Such

action violates the most basic protections provided by the U.S. Constitution's First Amendment and the New York State Constitution's Free Exercise Clause (N.Y. Const. art 1 § 3) and Equal Protection Clause (N.Y. Const. art 1 §11).

Considering the Governor's comments as to why the religious exemption was omitted, it is likely that Petitioners met their burden of showing "direct evidence" of discrimination, which cannot be rebutted and entitles Appellants to summary judgment under the NYSHRL as well as the Article 78 claim. *TWA v. Thurston*, 469 U.S. 111, 121 (1985). But at the very least, Petitioners have alleged a *prima facie* case of discrimination under the statutory criteria. *Forrest v. Jewish Guild for the Blind,* 3 N.Y.3d 295, 305-06 (2004).

The NYSHRL protects employees from adverse employment action based on their inability to comply with a condition that requires them to waive a sincerely held religious belief [N.Y. Exec. Law § 296(1)]; and against discrimination based on real or perceived disabilities, including the perception that their vaccine status impairs their immune system such that they cannot work in person safely [N.Y. Exec. Law § 292 (21)]. *See, Scardace v. Mid Island Hosp., Inc.*, 21 A.D.3d 363, 364 (2005)

(though plaintiff was not infected with the HIV-virus, "he may nevertheless seek redress pursuant to Executive Law §296(1)(a) on the theory that, having been mistakenly evaluated as being at a higher than normal risk of HIV infection, he was incorrectly thought to be affected by a disability.")

The law prohibits employers and *licensing agencies* from such discrimination and requires both to make reasonable accommodations. N.Y. Exec. Law § 296(a). Employers cannot impose any conditions that would burden religious practices without meeting their burden of proof on undue hardship or direct threat. Employers and licensing agencies must consider specific factors for both the economic and safety analysis and use the best available current evidence. 9 CRR-NY 466.11(g)(2)(i)). If they 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. Appellants bear the burden here of showing that their categorical prohibition of any religious exemption (save for those working 100% remotely) is justified. But nothing in the record rebuts the discriminatory

reasons provided by the Governor for why the religious exemption was removed and left out of the permanent Mandate as well.

2. Imposition of a categorical bar to reasonable accommodation other than segregation is an abuse of discretion and affected by errors of law.

The Mandate also violates the NYSHRL because it categorically bars unvaccinated persons from working in, volunteering in, or attending school in a covered healthcare facilities unless they have zero contact with any other person, even if the employer finds, after reviewing the most current and best evidence, that they do not pose a direct threat. [R. 102]. This eviscerates the employer's ability to comport with the statute's "individualized standard" requirement. N.Y. Exec. Law § 296(10)(a).

The Court of Appeals has held repeatedly that individualized review is a core function and goal of the statute. When it amended the NYSHRL in 1979 to enhance protections against discrimination, the legislature sought to create an "individualized standard" for determining whether reasonable accommodation is feasible. *Matter of Miller v. Ravitch,* 60 N.Y.2d 527, 532 (1983). "The legislature enacted this more tailored approach in response to judicial decisions which had insulated employers from liability based on the mere possibility, however

speculative, that someone with the claimant's condition might become unable to perform certain job functions." *Jacobsen v. New York City Health & Hosps. Corp,* 22 N.Y.3d 824, 835 (2014).

According to the Court of Appeals, in amending the NYSHRL, the legislature "evidently concluded that an employer cannot disadvantage a disabled employee based on a generalized sense that the disabilities of the kind suffered by the employee can rarely be accommodated and that the employee is unlikely to satisfy his or her employment responsibilities." *Id.* at 836. The Court further held that courts are therefore bound to interpret the NYSHRL to require that where a request for accommodation is made, "the employer must give individualized consideration to that request and may not arbitrarily reject the employee's proposal." *Id.* In so holding, the Court considered the extensive legislative history, including statements that failure to accommodate could only be warranted based upon an "insurmountable" disability that would prevent "a particular individual" from performing tasks involved in a "particular job." *Id.* [citing Budget Rep on Bills, Bill Jacket, L. 1979, ch. 594 at 6].

The Mandate does just what the legislature wanted to prevent. Citing no evidence or studies, the Mandate categorically decrees that unvaccinated healthcare workers cannot safely work around any other colleague or person (except that if they have a medical exemption they somehow can). Categorical prohibitions such as this are not permissible, even when, unlike here, the state uses lawful authority to impose them. 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 must be 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.

Moreover, the Mandate prevents employers from acknowledging the best available *current* evidence. There is no reasonable argument at

this point that the primary series provides better protection against infection, transmission, or severe disease than prior infection does. To the extent that the NYSDOH had data at some point to support a direct threat finding (which is contested), this cannot be argued in good faith now. (*See* Risch Affidavit at NYSCEF Doc. 5 at 38-55; *see, also,* Stein C., Nassereldine H., Sorensen R., Amlag J., Bisignano C., Byrne S., et al. (2023). Past SARS-CoV-2 infection protection against re-infection: a systematic review and meta-analysis. *The Lancet, 401*(10379), 833-842. https://doi.org/10.1016/S0140-6736(22)02465-5.

It violates the spirit and the letter of the NYSHRL to obstruct the current evidence requirement and individualized review standard of the NYSHRL by predetermining that reasonable accommodation short of segregation is categorically precluded. Suppose, for example, that the same approach was taken with HIV infection. Clearly, it would violate the NYSHRL for the NYSDOH to make a categorical rule that no person infected with HIV (or engaging in practices that make it more likely to be infected) could work in a hospital setting, for their own protection and the protection of the patients and colleagues.

Even if some rational were articulated, such a determination can only be lawfully made on an individualized basis considering the best current evidence, not conclusions drawn from incomplete data and understandings arrived at early in the HIV pandemic in a generalized fashion. The same is true in the context of COVID-19. The NYSDOH decision to obstruct the individualized review standard of the NYSHRL is an abuse of discretion, affected by errors of law, arbitrary and capricious and unsupported by any rational reason in the record.

3. The decision to leave out the possibility of religious exemptions was wholly unsupported in the record.

The decision to categorically preclude religious exemptions was also arbitrary and capricious because the regulatory impact statement is completely silent about the feasibility of reasonable religious accommodation and why it was left out. The court must be certain that "an agency has considered all the important aspects of the issue and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Forest Watch v. U.S. Forest Service,* 410 F.3d 115, 118-19 (2d Cir. 2005). Moreover, an agency decision which "provides no basis for lack of adherence (to a prior practice) is arbitrary and capricious and will not be upheld." *Uniform*

Firefighters of Cohoes, Local v. Cuevas, 276 AD2d 184, 187 (3d Dep't 2000).

Here, there is no support whatsoever in the record for why the religious exemption was removed or why it still could not be considered by employers (as required by NYSHRL) when the Mandate was enacted as permanent law. Clearly, religious exemptions are not inherently unsafe. The Medicare vaccine requirement requires them nationwide, and the NYSDOH has no issue with other exemptions, like medical exemptions. Moreover, even though the NYSDOH acknowledged that the vaccines cannot stop transmission in the regulatory impact statement, it continued to ignore religious exemptions altogether. Because they fail to even consider this question in the regulatory impact statement, and the only explanation in the record are the Governor's discriminatory statements to the press, the Mandate is arbitrary and capricious on this basis as well.

POINT III

THE LOWER COURT PROPERLY DENIED APPELLANTS MOTION TO DISMISS AND DECLARATORY RELIEF IN THEIR FAVOR IS NOT WARRANTED

Appellants assert that because they made a motion to dismiss the declaratory action, this Court should reverse the lower court's denial and issue an order "declaring that the challenged regulation was validly promulgated, has a rational basis and otherwise dismissing the petition." [Appellants' Brief at 35]. Such relief would be inappropriate here.

The lower court denied Appellants' motion to dismiss the declaratory action because they did not actually set forth any arguments on that point in a memorandum of law. Therefore: "The Court deems the motion to dismiss abandoned, denies to the extent necessary, and shall address the merits of the Petition." [R. 15]. Appellants offer no argument on appeal either for why their motion to dismiss was improperly denied and have once more waived any appeal on that point.

Moreover, this case does not meet the standard for granting declaratory relief not sought below. *See, Kerri W.S. v. Zucker,* 202 A.D.3d 143, 153 (2021), *leave to appeal dismissed*, 38 N.Y.3d 1028 (2022). As Appellants acknowledge, having reached a determination that

Appellants acted *ultra vires*, and that the Mandate is arbitrary and capricious under the standards set forth in CPLR 7803, the lower court had no need to go on to decide whether the Mandate also violates Appellees' rights under the NYSHRL in the hybrid declaratory claims.

To the extent that this court overturns the lower court's ruling that the Mandate should be set aside because it violates the PBH and is arbitrary and capricious, the court should remand this case to the lower court to continue in its ordinary course, so that the parties have the opportunity to resolve factual issues related to the Mandate's interference with Appellees' rights under the NYSHRL.

Appellants assert that the Mandate does not violate the NYSHRL 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." [Appellant Brief n. 4 at 17]. In making this argument, they rely on *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir.), opinion clarified, 17 F.4th 368 (2d Cir. 2021), and cert. denied sub nom. *Dr. A. v. Hochul*, 213 L. Ed. 2d 1126 (2022).

This reliance is misplaced, particularly on a motion to dismiss or for summary declaratory relief that the Mandate is lawful. First, *We the Patriots, USA* assessed preemption under Title VII, which is governed by different standards than the NYSHRL. For example, Title VII's undue hardship analysis has been construed to require only a *de minimis* showing of burden, whereas the NYSHRL requires employers to demonstrate significant hardship before denying accommodation. And, in 2019, the NYSHRL was amended to direct courts to construe the statute 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 [NYSHRL], have been so construed." N.Y. Exec. Law § 300.

Second, the argument that reasonable religious accommodation is not obstructed by the Mandate is disingenuous. The Petition alleges, and Appellants admit, that the Mandate requires adverse employment action. In the best-case scenario, the Mandate leaves open the slim chance that an employer can offer a religious objector total and permanent segregation from all patients and other persons. Clearly for most doctors and nurses and other healthcare workers, this is an adverse

employment condition that will have major consequences and significantly diminish material responsibilities, if the employer can afford to offer such a restrictive accommodation at all. *Forrest,* 3 N.Y.3d at 306. Under the NYSHRL, it is defined as discrimination for employers or a licensing agency to impose *any* adverse employment condition, including segregation from patients and colleagues, without taking "all reasonable steps" to accommodate an employee's religious practices. N.Y. Exec. Law § 296(10); *Schweizer Aircraft Corp. v. State Division of Human Rights,* 48 NY2d 294 (1979).

Second, *We the Patriots, USA* was an interlocutory decision challenging the denial of a preliminary injunction, in a case brought before the Mandate was implemented. There, as opposed to here, the petitioners bore the burden of proof, and the case was governed by entirely different standards than a summary motion would be. Moreover, the Second Circuit expressly stated that their interlocutory holding on preemption rested on inadequacy of the factual record below. Specifically, the Court found that the district court's holding on preemption "turned on clearly erroneous factual findings" explaining:

> At this stage, the [plaintiffs] have submitted little in support of their broad allegations about the effect of Section 2.61. The district

> court reached the conclusion that the accommodation by their employers was foreclosed upon the [plaintiffs'] say-so, without any documentation supporting Plaintiffs' allegation that they were denied reasonable accommodation from their employers…It may turn out that the opportunities for a reasonable accommodation under Title VII for religious objectors to the vaccine are numerous, or it may be that there are so few as to be illusory…But without any data in the record, we cannot conclude that Plaintiffs have met their burden to show a likelihood of success on the merits, and we decline to draw any conclusion about the availability of a reasonable accommodation based solely on surmise and speculation.

We The Patriots USA, 17 F.4th at 292-93.

Here, Appellees were not speculating that they might be denied religious accommodation. Each of the named Petitioners asserts in the Verified Petition that she was forced to choose between her job and her faith, even though the employers acknowledged that they could be safely accommodated without undue hardship absent the Mandate. [R. 44-45].

Consider for example Petitioner Dr. Hernandez-Schipplick, who has a sincere religious objection to the vaccines. Dr. Hernandez-Schipplick's employer denied her religious exemption because the Mandate does not allow them to reasonably accommodate her on that ground. But they affirmed she can work safely in person without posing a direct threat to anyone or causing undue hardship and thus are accommodating her medical exemption, which is based on her

participation in a clinical trial. [R. 44-45]. Similarly, Petitioner Storelli's employer found that she can safely work in person without undue hardship as a nurse. In fact, Petitioner Storelli's employer felt so strongly about this, that they continued to accommodate her working in person for a year after the Mandate was first imposed in 2021, reasoning that their obligations under the state's law must prevail in a conflict with a regulation. [R. 45]. However, a few weeks before this suit commenced, Appellants refused to honor the employer's safety determination and threatened Petitioner Storelli's employers with crippling fines if they did not deny her reasonable accommodation. [*Id*.] As a direct result, Petitioner Storelli's employer informed her that they could no longer accommodate her sincerely held religious beliefs. Such facts show that the Mandate is directly undermining the purpose of the NYSHRL. To the extent this is in doubt, a factual finding is warranted before the Mandate is prematurely declared lawful on appeal.

CONCLUSION

Based on the foregoing, and all the papers filed herewith and below, Appellees respectfully request that the Court affirm the lower court's decision and award costs.

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Ithaca, New York

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PRINTING SPECIFICATIONS STATEMENT

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