To be argued
By: JONATHAN D. HITSOUS
10 minutes requested

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

In the Matter of the Application of

No. CA 23-00161

MEDICAL PROFESSIONALS FOR INFORMED CONSENT, INC., Individually and on Behalf of its Members, KRISTEN ROBILLARD, M.D., ZARINA HERNANDEZ-SCHIPPLICK, M.D., MARGARET FLORINI, A.S.C.P., OLESYA GIRICH, RT(R), and ELIZABETH STORELLI, R.N., Individually and on Behalf of Others Similarly Situated,

Petitioners-Plaintiffs-Respondents,

v.

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

Respondents-Defendants-Appellants,

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

REPLY BRIEF FOR APPELLANTS

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 776-2017
Jonathan.Hitsous@ag.ny.gov

JEFFREY W. LANG
Deputy Solicitor General
JONATHAN D. HITSOUS
Assistant Solicitor General
of Counsel

Dated: April 27, 2023

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

State Statutes

Federal Statutes **Page(s)**

State Regulations

Miscellaneous Authorities

PRELIMINARY STATEMENT

The New York State Department of Health ("DOH") promulgated 10 N.Y.C.R.R. § 2.61, a rule requiring covered entities to ensure that certain healthcare workers be vaccinated against COVID-19, to protect these workers and the vulnerable patients they serve each day. In declaring the COVID-19 vaccination regulation (the "Rule") invalid and enjoining its enforcement, Supreme Court, Onondaga County (Neri, J.), ignored that it is one of the myriad safety standards that DOH has implemented pursuant to a legislative grant of near-plenary power to regulate the healthcare industry.

Petitioners' defense of Supreme Court's order is unavailing. Although petitioners maintain that the Public Health Law ("PHL") forbids DOH from requiring vaccines unless specifically authorized therein, courts have recognized that the PHL's grant of authority to regulate the State's healthcare industry permits it to require healthcare workers to receive vaccines. Petitioners further argue that the absence of a religious exemption in the Rule creates a conflict with state antidiscrimination law. Petitioners' argument is meritless for the same reasons the Second Circuit rejected a nearly identical challenge.

Petitioners' arguments that the Rule offends the separation of powers rely on surmise. While petitioners attack the absence of a religious exemption in the Rule as improper policymaking, this omission is not evidence of hostility to religion; it rather reflects DOH's narrow tailoring of the Rule to its mission to protect New York's health system, and by extension, all New Yorkers, from communicable diseases.

Petitioners also claim that the Rule is irrational because it fails to reduce the spread of COVID-19. But DOH relied on empirical information in determining that the vaccines are effective—both because they reduce the overall number of cases and because they mitigate the consequences of infections by reducing the likelihood of serious illness and hospitalizations. Despite petitioners' disagreement with DOH's scientific judgments, a rational basis supports the Rule.

This Court should reverse Supreme Court's order, declare that petitioners have not shown 10 N.Y.C.R.R. § 2.61 to be invalid, and dismiss their petition.

ARGUMENT

POINT I

PETITIONERS FAIL TO IDENTIFY A STATUTE THAT CONFLICTS WITH DOH'S RULE REQUIRING VACCINES FOR CERTAIN HEALTHCARE WORKERS

A. The Rule Does Not Conflict with the Public Health Law

Petitioners do not deny that the Legislature has given DOH broad authority to regulate the healthcare facilities to which 10 N.Y.C.R.R. § 2.61 applies. Nevertheless, petitioners argue that PHL §§ 206(1)(l) and 613(1) limit DOH's power to require certain healthcare workers to receive the COVID-19 vaccine because those statutes expressly withhold authorization for mandatory vaccine programs, with "no carve outs" for healthcare workers. (Br. at 21-25.)

Petitioners are mistaken. As outlined in DOH's opening brief (at 21-23), by their express terms PHL §§ 206(1)(l) and 613(1) provide only that *those statutes* do not authorize DOH to require immunization programs for adults and children. And DOH did not rely on those statutes. Rather, it relied on PHL §§ 225, 2800, 2803, 3612, and 4010, which permit it to regulate the healthcare industry. This is consistent with the Court of Appeals' holding that nothing in PHL §§ 206 and 613 "prohibits the

adoption of mandatory immunizations if otherwise authorized by law." *Garcia v. New York City Department of Health & Mental Hygiene*, 31 N.Y.3d 601, 620 (2018).

Garcia's construction of PHL §§ 206(1)(l) and 613(1) likewise dooms petitioners' contention that these provisions impose a "specific statutory limitation" that overrides the "general" grant of authority over the healthcare industry given to DOH in PHL §§ 225, 2800, 2803, 3612, and 4010. In any event, petitioners overlook that "adults and children," as used in PHL §§ 206(1)(l) and 613(1), is itself a general term. To the extent petitioners rely on letters from the sponsors of those laws (Br. at 32-33) as evidence that the Legislature intended to strip DOH of power to require vaccines for populations that are distinct from the public at large—like a subset of healthcare workers most likely to be exposed to communicable diseases—the Court of Appeals declined to read these letters so broadly. *See Garcia*, 31 N.Y.3d at 620.

Petitioners also maintain that the Rule conflicts with PHL §§ 2164 and 2165, which require students to receive certain vaccines before they enroll in schools and colleges. (Br. at 23-24.) The conflict petitioners perceive depends on the assumption that the Legislature intended PHL

§§ 2164 and 2165 to create the only vaccine requirements in New York. The Court of Appeals rejected this argument as well, observing that neither statute "suggests that the list of vaccinations set forth therein is an exclusive one." *Garcia* 31 N.Y.3d at 619. Thus, even if medical or nursing students need not receive COVID-19 vaccines to enroll at school but would need those vaccines to complete a rotation at a hospital (Br. at 24), no conflict arises for the simple reason that enrollment in school and participation in a hospital rotation are separate contexts subject to separate regulations.

Petitioners claim that DOH mischaracterizes *Garcia* because the respondent in that case, New York City, has unique public health powers that DOH does not. (Br. at 19-21.) It is true that the Court discussed the Legislature's intent to give New York City a large degree of autonomy over public health matters within city borders. *See* 31 N.Y.3d at 619-20. Nevertheless, the Court concluded that PHL §§ 206, 613, 2164, and 2165 do not forbid vaccine requirements from arising under other statutory authority—a conclusion that does not depend on the government entity imposing the requirements, as long as it has statutory authority to do so. *See id.*

Indeed, the statutes on which DOH relied support other immunization requirements for healthcare workers (R595), some of which have been in place for decades. *See, e.g.,* 10 N.Y.C.R.R. § 405.3(b)(10) (certain healthcare workers must provide proof of immunization against measles and rubella), 2.59 (during flu season, a similar group of healthcare workers must either receive a flu vaccine or wear a mask). In a case upholding § 2.59's validity, the Third Department, citing PHL §§ 225, 2800, 2803, 3612, and 4040, concluded that DOH's rule "falls comfortably within the intent of the underlying legislation." *Matter of Spence v. Shah*, 136 A.D.3d 1242, 1245 (3d Dep't 2016). And so does the Rule that petitioners challenge here.

Petitioners' attempt to reassure the Court that their challenge would not disrupt long-settled practices falls flat. According to petitioners, the immunization requirements for measles and rubella in 10 N.Y.C.R.R. § 405.3(b)(10), unlike the challenged Rule, simply require employees to certify that they are "in compliance with Public Health Law § 2164." (Br. at 30-31.) This makes no sense: PHL § 2164 does not apply to healthcare workers, and 10 N.Y.C.R.R. § 405.3 does not refer back to PHL § 2164. As a practical matter, if prospective healthcare workers in

New York have not been vaccinated for measles or rubella—for instance, because these workers attended school in one of the few jurisdictions that do not impose a vaccine requirement to attend school—10 N.Y.C.R.R. § 405.3(b)(10) requires that they be immunized as adults.

As for *Spence*, petitioners' only response is that 10 N.Y.C.R.R. § 2.59 cannot be read to require vaccines in light of the mask option. (Br. at 28-29.) This is incorrect; covered healthcare personnel were required to choose one option or the other, and the ability to opt out of a vaccine by wearing a mask does not eliminate the compulsory nature of the regulation. Further, the Third Department's reasoning did not turn on whether § 2.59 imposed a "vaccine mandate," but whether a rule compelling a group of healthcare workers to choose between vaccines and masks fell within DOH's broad authority to "consider and implement regulations regarding the preservation and improvement of public health, as well as establishing standards in health care facilities that serve to foster the prevention and treatment of human disease." *Spence*, 136 A.D.3d at 1245. *Spence*'s reasoning applies with just as much force in this context. Therefore, this Court should reach the same result.

B. The Rule Does Not Conflict with the Human Rights Law

Although Supreme Court did not address this issue, petitioners spend much of their brief arguing that the Rule conflicts with an additional statute: Executive Law § 296 (also known as the Human Rights Law), because it leaves employers unable to reasonably accommodate their employees' sincerely held religious beliefs. (Br. at 42-44, 60-66.) Petitioners' argument is indistinguishable from the argument the Second Circuit rejected in *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2569 (2022). There, a district court enjoined enforcement of the Rule on the ground that its absence of a religious exemption placed it into conflict with Title VII. *Id.* at 291; *see also* 42 U.S.C. § 2000e(j) (requiring employers to make reasonable accommodation for employees' religious beliefs).[1] The Second Circuit reversed, holding that regardless of whether the Rule includes language addressed to religion, employers could still "provid[e] an employee with a reasonable accommodation that removes the individual from the scope of the Rule,"

[1] Technically, this was an earlier, emergency version of the Rule. However, there are no material differences between the text of that version and the version challenged here.

such as telemedicine or private office or lab space. *Id.* at 292. The Second Circuit stressed that an accommodation, which permitted one to continue working in a manner that complied with the Rule, was not synonymous with an exemption from the Rule altogether. *Id.*

In petitioners' view, *We The Patriots* has no persuasive value here because the alleged conflict was with Title VII, rather than the Human Rights Law. (Br. at 70.) But courts apply the same standards to claims under Title VII and the Human Rights Law. *Margerum v. City of Buffalo*, 24 N.Y.3d 721, 731 (2015). Insofar as petitioners highlight that the Human Rights Law requires that an employer who denies an accommodation make a stronger showing of hardship than Title VII would demand, petitioners fail to explain why this matters to their challenge when they rest on the theory that the Rule is invalid because it prevents employers from even considering requests for religious accommodations. Just as in *We The Patriots*, nothing in the Rule prevents an employer from granting a reasonable accommodation that balances the employee's religious beliefs with the employer's needs and obligation to comply with DOH regulations.

For similar reasons, there is no validity to petitioners assertion that the Rule conflicts with the Human Rights Law by preventing employers from consulting the "best available *current* science" when considering requests for religious accommodations. (Br. at 43-44 (emphasis in original), 61-62, 64-66.) Healthcare employers can and should decide requests for accommodations upon considering the best available information about the maintenance of a safe working environment. What these employers cannot do—and what Executive Law § 296(10) has never allowed them to do—is *exempt* employees from DOH regulations because they disagree with DOH about the underlying science. *See We The Patriots*, 17 F.4th at 292.

Petitioners protest that removing them from direct contact with patients and colleagues is not a reasonable accommodation. (Br. at 70-71.) Again, however, *We The Patriots* has an answer: "an employer need not offer the accommodation the employee prefers." 17 F.4th at 292 (quotation omitted). Petitioners also insist that the fact that they all lost their jobs demonstrates that reasonable accommodations are functionally unavailable. (Br. at 72-73.) With one exception, however, none of the petitioners alleged that they ever tried to seek a religious accom-

modation. Still, because petitioners raise a facial challenge to the Rule, the outcomes of their individual attempts to obtain accommodations are no substitute for industry-wide evidence with respect to the critical question whether "no set of circumstances exists under which the [Rule] would be valid." *See generally United States v. Salerno*, 481 U.S. 739, 745 (1987). Consequently, this Court should "decline to draw any conclusion about the availability of reasonable accommodation based solely on surmise and speculation." *We The Patriots*, 17 F.4th at 293.

POINT II

THE RULE COMPLIES WITH THE SEPARATION-OF-POWERS

Supreme Court misguidedly conflated its separation-of-powers analysis with its analysis of whether the Rule conflicted with the Public Health Law. Although petitioners largely avoid this misstep by offering independent reasons why they believe each factor under *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), shows that the Rule offends the separation of powers, those reasons are unpersuasive.

As to the first *Boreali* factor, i.e., whether the agency weighed competing policy interests, petitioners assert that DOH impermissibly entered the realm of legislating in light of the "sheer number of people"

the Rule affects. (Br. at 38-40.) But the supposedly analogous regulation on which petitioners rely, the sugary-drinks cap in *Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, affected anyone in New York City who wanted to buy such drinks from a retailer. 23 N.Y.3d 681, 690 (2014). The Rule here affects only healthcare workers at facilities that qualify as "covered entities," and then only if those workers "engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." 10 N.Y.C.R.R. § 2.61(a)(1) & (a)(2). In other words, the rule is "limited in scope" to a subset of an industry that DOH already regulates, which is strong evidence that DOH acted within its sphere. *Garcia*, 31 N.Y.3d at 613.

Petitioners also assert that DOH acted outside its grant of authority by weighing public health against religious rights. (Br. at 38-39.) Yet the Rule does not mention religion at all. Petitioners' reasoning places DOH and every other state agency in a Catch-22: address religion and be accused of venturing into social policy matters outside the agency's delegated authority, or decline to address religion and *still* be

accused of venturing into social policy, on the basis that the silence means the agency found other considerations to "outweigh" religion. Rather than adopt reasoning that threatens to make a separation-of-powers violation out of innumerable regulations, the more sensible inference from the Rule's lack of a religious exemption is that, by declining to carve out exceptions based on considerations unrelated to health, DOH "closely tailored" the Rule to its statutory mission to protect the public health by regulating the healthcare industry. *See Spence*, 136 A.D.3d at 1245.

With respect to the second *Boreali* factor, i.e., whether DOH wrote on a "clean slate," petitioners contend that it is not enough that PHL § 225 permits DOH to regulate any matter that relates to public health. (Br. at 41.) They ignore that DOH also relied on statutes that grant it authority over a more concrete aspect of public health: safety and sanitary standards within healthcare facilities. *See, e.g.*, PHL § 2803(2)(a)(v). In addition to vaccine requirements, DOH has filled in the interstices of this authority with such common-sense measures as employee handwashing at nursing homes, 10 N.Y.C.R.R. § 415.19(b)(4), and maintenance of personal protective equipment at hospitals, *id.* § 405.11(g). As to DOH's observation that the Rule is one among the many requirements

it "routinely establishes . . . for personnel who work in health care and residential facilities" it regulates (R588), petitioners have no response.

Petitioners similarly ignore the length of time that DOH has exercised its standard-setting authority unimpeded. Indeed, the immunization requirement for rubella has been in place for over 42 years. 3 N.Y. Reg. 6, 6 (Jan. 14, 1981). "Where an agency has promulgated regulations in a particular area for an extended time without any interference from the legislative body, we can infer, to some degree, that the legislature approves of the agency's interpretation or action." *Greater N.Y. Taxi Ass'n v New York City Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 612 (2015). Because the Legislature has long tolerated extensive DOH regulation over the covered entities and the personnel within, DOH could hardly have written on a "clean slate" by adding COVID-19 to a list of diseases for which a group of healthcare workers already must be immunized. *See Garcia*, 31 N.Y.3d at 614.

Petitioners fare no better on the third *Boreali* factor, failing to identify a single bill that specifically addresses a COVID-19 vaccine for healthcare workers. The "mere fact that the Legislature has enacted specific legislation in a particular field does not necessarily lead to the

conclusion that broader agency regulation of the same field is foreclosed." *See Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 29 N.Y.3d 202, 225 (2017). Thus, neither petitioner's list of "COVID bills" (*see* R148-164) nor their asserted "history of legislative agony over religious exemptions" to the vaccine requirements for enrollment at school (Br. at 45-46), shed any light on whether the Legislature has ever debated the topic of required COVID-19 vaccines for certain healthcare workers, much less that DOH acted on its own after the Legislature tried and failed to reach agreement on that issue.

With respect to the fourth *Boreali* factor, i.e., whether DOH relied on special competence, it does not matter whether DOH has competence to balance public health needs against "important religious and liberty rights" (Br. at 47), because DOH conducted no such balancing when it determined that New York's healthcare system would be better off if certain healthcare workers were fully vaccinated against COVID-19. To the extent petitioners attempt to defend Supreme Court's conclusion that DOH "failed to utilize this expertise" because vaccines do not stop COVID-19 transmission, a court's disagreement with an agency's conclusions does not mean the agency neglected to utilize its technical

competence in the first place. *See Spence*, 136 A.D.3d at 1245-46 (preventing the spread of infectious disease in healthcare settings "implicated scientific and medical issues within DOH's expertise"). For the reasons set forth in DOH's opening brief (at 33-34) and in Point III *infra*, the inferences that Supreme Court drew were misguided in any event.

Separation-of-powers principles do not require that the Legislature give agencies "rigid marching orders" before they may promulgate regulations. *Matter of LeadingAge N.Y., Inc. v Shah*, 32 N.Y.3d 249, 260 (2018). Petitioners' reasoning that DOH cannot require anyone to receive a vaccination unless "specially authorized" by statute (Br. at 18) would invalidate not only the challenged Rule, but many other regulations as well, thereby causing "far-reaching and harmful consequences for [DOH's] ability to enforce longstanding public health rules and protocols." *We The Patriots*, 17 F.4th at 287.

POINT III

A RATIONAL BASIS SUPPORTS THE RULE

Petitioners claim that a COVID-19 vaccine requirement is irrational because the vaccines do not "stop transmission." (Br. at 52, 58,

67.) They decline to meaningfully confront DOH's publicly stated position that vaccine effectiveness is measured not simply by the degree to which it reduces disease transmission, but also the degree to which it reduces the severity of infections. (R596-597.) Even as to the issue of transmission, however, petitioners engage in a linguistic sleight-of-hand by equating "stop transmission" with "no effect on transmission." It is axiomatic that there is no vaccine in existence that prevents transmission of a communicable disease 100% of the time. (R596.)

Like Supreme Court, petitioners claim that DOH itself admitted that the vaccine is not effective. (Br. at 12, 17, 47, 49, 51-52, 58, 67.) But DOH said no such thing. On the contrary, DOH adopted the Rule because it expected the vaccine to reduce the total number of COVID-19 infections (R574) and thereby "decrease[s] transmission" (R596). Nor did the CDC recommend that healthcare providers should "stop differentiating between vaccinated and unvaccinated employees when assessing prevention and mitigation measures." (Br. at 43.) The actual recommendation was narrower: that employers relax restrictions as to both vaccinated and unvaccinated employees who were exposed to COVID-19, but asymptomatic. (R813.) In the same guidance, the CDC continued to

recommend that employers "[e]nsure any COVID-19 vaccine requirements for [personnel] are followed, and where none are applicable, encourage [them] to remain up to date with all recommended COVID-19 vaccine doses." (R814.)

Petitioners resort to challenging DOH's determinations about the vaccine's effectiveness as "thoroughly at variance with the consensus of the scientific community." (Br. at 50-53.) DOH made clear, however, that its conclusions were driven by empirical data that vaccines reduce the severity of COVID-19 infections, and were the safest way to protect against the Omicron variant that comprised the majority of infections at the time the Rule was promulgated. (R596-597.) In litigation as well, DOH offered multiple studies and data compilations in defense of the Rule. (*See* R643-649, 652, 660-669, 676-683, 690-764, 813-820.) Petitioners may believe that their own studies are more reliable, or even argue they represent the "consensus." (*See* Br. at 2, 10, 43, 50-51, 54.)[2]

---

[2] In their brief, petitioners rely on studies first published in 2023 that they did not cite below (Br. at 11, 51, 55, 65), but DOH had no opportunity to address this information before Supreme Court or in responding to comments in support of the Rule. This Court should therefore disregard those studies. *See People v. Emery*, 204 A.D.3d 944,

(*continued on the next page*)

But a difference in opinion—particularly on novel and rapidly evolving scientific issues—does not establish that DOH's well-supported approach is irrational. *See Spence*, 136 A.D.3d at 1246 (concluding that the record contained sufficient scientific evidence to support the challenged DOH regulation); *see also Matter of Thompson Water Works Co., Inc. v. Diamond*, 44 A.D.2d 487, 490 (4th Dep't 1974) ("even where divergent expert views exist," it is not for courts conducting rational-basis review "to determine which scientific view is correct").

Similar reasons defeat petitioners' argument that natural immunity is a superior alternative to a COVID-19 vaccine. (Br. at 11-12, 54.) At the time DOH adopted the Rule, the scientific evidence indicated that natural immunity, *combined* with the vaccine, strengthen immunity even further. (R596-597.) Moreover, people cannot develop natural immunity to COVID-19 unless they first become infected. Even accepting petitioners' unsubstantiated insistence that they already have natural immunity, it is eminently rational for DOH to determine that it is safer for covered healthcare workers to receive the vaccine than to risk

---

945 (2d Dep't) (declining to rely on academic studies not submitted to the trial court in the first instance), *lv. denied*, 38 N.Y.3d 912 (2022).

infection without the benefit of vaccine protection from a disease that has killed over 1 million people in the United States. (R590, R597.) As the Second Circuit has already concluded, the Rule is a "reasonable exercise of the State's power to enact rules to protect the public health." *See We The Patriots*, 17 F.4th at 290.

Relatedly, petitioners assert that the rule irrationally permits healthcare workers who received vaccinations in 2020 or 2021 to continue working, but not workers who are unvaccinated but possess natural immunity resulting from a recent COVID-19 infection. (Br. at 55.) Particularly given DOH's well-informed view that natural immunity is a *supplement* to, rather than substitute for, the immunity the vaccine confers (R596-597)), this was a permissible instance of line-drawing that does not render the rule irrational, even if petitioners can hypothesize circumstances where that line might render the Rule over-inclusive. *See Bay Park Ctr. for Nursing & Rehab. v. Shah*, 111 A.D.3d 1227, 1230 (3d Dep't 2013).

Petitioners further assail DOH's stated interest in preventing staffing shortages, claiming that the Rule caused more of a detrimental impact on staffing than the pandemic itself. (Br. at 56-57.) In actuality,

healthcare workers and the vulnerable patients they serve are those whom COVID-19 hit hardest. (*See* R609.) The vaccine requirement has proven highly effective—by one count, 99% of hospital staff were vaccinated by the end of 2022. (R610.) Those healthcare workers that left their jobs upon choosing to remain unvaccinated may ultimately decide to receive the vaccine and return to the healthcare workforce. The same cannot be said for those who became infected and either died or experienced severe and prolonged complications. Thus DOH has publicly stated, in response to the same concerns about the Rule's effect on the labor force, that any short-term job losses were justified by the long-term benefits. (R590.) This determination was rational.

Departing from their defense of Supreme Court's reasoning, petitioners maintain that the Rule was also irrational because DOH declined to explain why a religious exemption "was removed." (Br. at 66-67.) Because the Rule has never included a religious exemption, petitioners presumably are referring to the "Order of Summary Action" issued by the DOH Commissioner under PHL § 16, that directed general hospitals and nursing homes to require most personnel to be fully vaccinated against COVID-19. As discussed in *We The Patriots*, this order

was not itself a regulation, but an immediate stop-gap measure that was taken pending the development of the Rule. Petitioners rely on *Matter of Uniform Firefighters of Cohoes, Local v. Cuevas*, 276 A.D.2d 184 (3d Dep't 2000), but that decision merely reiterates the settled proposition that agencies must explain different determinations they reach on the same facts. *Id.* at 187. It does not hold that DOH must justify differences between an emergency order under PHL § 16 and a regulation.

In any event, even if an earlier version of the Rule *had* included a religious exemption, it would have been largely redundant because the United States and New York Constitutions already codify the right to freely exercise one's religion. So whether or not the Rule includes a religious exemption, if petitioners believed that their free exercise rights entitled them to one, they could bring an as-applied constitutional challenge seeking an injunction against enforcement of the Rule. *See, e.g.*, *A.H. by Hester v. French*, 985 F.3d 165, 184 (2d Cir. 2021) (granting injunction in as-applied challenge). Although petitioners now suggest that the Rule offends religious rights (Br. at 7-8, 60), they did not raise

such a claim before Supreme Court.[3] Having declined to do so, they cannot use their claim that the Rule lacks a rational basis as a vehicle to raise a free exercise claim by implication.

Finally, in responding to DOH's request for a declaratory judgment, petitioners miss the point. It does not matter whether DOH abandoned its motion to dismiss. (Br. at 68-69.) An action for a declaratory judgment necessarily ends with a declaration, either that petitioners have shown the challenged Rule to be invalid, or they have not. *Matter of Spence v. Dep't of Ag. & Mkts.*, 154 A.D.3d 1234, 1238 (3d Dep't 2017), *aff'd*, 32 N.Y.3d 991 (2018). Petitioners have not shown the challenged Rule to be invalid. Accordingly, DOH was entitled to a declaration to that effect.

[3] The Second Circuit held that the Rule does not violate the Free Exercise Clause because it is neutral and generally applicable. *We The Patriots*, 17 F.4th at 290.

CONCLUSION

This Court should reverse Supreme Court's judgment, declare that petitioners have not shown 10 N.Y.C.R.R. § 2.61 to be outside the scope of DOH's delegated authority or to lack a rational basis, and dismiss the petition.

Dated: April 27, 2023
Albany, New York

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants

By: _____
JONATHAN D. HITSOUS
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2017
Jonathan.Hitsous@ag.ny.gov

JEFFREY W. LANG
Deputy Solicitor General
JONATHAN D. HITSOUS
Assistant Solicitor General
of Counsel

PRINTING SPECIFICATIONS STATEMENT

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

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 4,474.