UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Dr. A, Nurse A., Dr. C., Nurse D., Dr. F., Dr. G., Therapist I., Dr. J., Nurse J., Dr. M., Nurse N., Dr. O., Dr. P., Technologist P., Dr. S., Nurse S., and Physician Liaison X.,

Plaintiffs,

-against-

KATHY HOCHUL, Governor of the State of New York, in his official capacity, MARY T. BASSETT, Commissioner of the New York State Department of Health, in her official capacity, and LETITIA JAMES, Attorney General of the State of New York, in her official capacity,

Defendants.

NOTICE OF MOTION

1:21-CV-1009

(DNH)(ML)

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law in Support of Defendants' Motion to Dismiss; and upon all prior pleadings and proceedings had herein, defendants Kathy Hochul, Mary T. Bassett, and Letitia James, on a date to be scheduled upon filing by the Clerk of Court, will make a motion, before the Honorable David N. Hurd, United States District Judge, at the United States District Court for the Northern District of New York, Utica, New York, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the Amended Complaint [ECF. No. 40] in its entirety, together with such other or further relief as may be just.

Dated: Albany, New York
April 29, 2022

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants
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TO: Counsel of record (*Via ECF*)

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Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Date: April 29, 2022

Table of Contents

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 4

STANDARD OF REVIEW 6

ARGUMENT 7

POINT I 7

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER THE FREE EXERCISE CLAUSE 7

POINT II 14

THE AMEDNED COMPLAINT FAILS TO STATE A CLAIM UNDER THE EQUAL PROTECTION CLAUSE 14

POINT III 16

THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER THE SUPREMACY CLAUSE 16

CONCLUSION 25

Defendants Kathy Hochul, in her official capacity as Governor of the State of New York, Dr. Mary T. Bassett, in her official capacity as Commissioner of the New York State Department of Health, and Letitia James, in her official capacity as Attorney General of the State of New York (collectively, "Defendants"), respectfully submit this memorandum of law in support of their motion to dismiss the Amended Complaint, ECF No. 40, pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

PRELIMINARY STATEMENT

The COVID-19 pandemic has imposed a deadly toll on New York. COVID-19's public-health harms have been particularly devastating in the healthcare sector, where vulnerable patients and residents face heightened risks of both becoming infected with the virus and experiencing severe health consequences from any such infection. Additionally, the spread of the virus among healthcare workers can lead to a dangerous cycle of staff shortages and deterioration of patient care.

Given these substantial public-health concerns, the New York State Department of Health ("DOH") issued an emergency rule requiring COVID-19 vaccinations for certain healthcare workers, i.e., staff members who, if infected, are likely by reason of their work activities to expose patients, residents, or other personnel to COVID-19. *See* 10 N.Y.C.R.R. § 2.61 ("Section 2.61").

Last fall, the federal government joined in this effort to ensure widespread vaccination of healthcare workers by issuing a regulation requiring Medicare and Medicaid facilities to ensure vaccination of their personnel. On November 5, 2021, the United States Secretary of Health and Human Services issued an interim final rule requiring facilities that receive Medicare and Medicaid funding to ensure that their staff receive the COVID-19 vaccine. *See* 86 Fed. Reg. 61555 (2021). The interim final rule, otherwise known as the "CMS Mandate," requires that covered employers

comply with existing federal law when evaluating requests for exemptions or accommodations from COVID-19 vaccine requirement.

In their Amended Complaint, plaintiffs allege: (1) that Section 2.61 violates the Free Exercise Clause by impermissibly burdening their sincerely held religious beliefs; (2) that Section 2.61 violates the Supremacy Clause of the United States Constitution because it compels employers of health care workers in New York to disregard Title VII's protection against employment discrimination on account of religion; (3) that Section 2.61 violates the Fourteenth Amendment by subjecting plaintiffs to unequal treatment on account of their religious beliefs; (4) that the CMS mandate preempts Section 2.61 as it requires New York to provide a religious exemption to the healthcare worker vaccine requirement; and (5) that New York has unlawfully denied unemployment benefits to plaintiffs on account of their religious beliefs in violation of the Free Exercise Clause.

The Amended Complaint must be dismissed in its entirety pursuant to FRCP 12(b)(6) because it fails to state a claim upon which relief can be granted. First, Section 2.61 does not violate the Free Exercise Clause. The Second Circuit has already expressly rejected plaintiffs' First Amendment claim, holding that Section 2.61 is facially neutral. Further, Section 2.61 is a law of general applicability which satisfies rational basis review.

Second, Section 2.61 does not violate the Supremacy Clause. This claim is based upon plaintiffs' incorrect interpretation of Title VII. As the Second Circuit has already held in this action, "Section 2.61 does not require employers to violate Title VII because, although it bars an employer from granting a religious *exemption* from the vaccination requirement, it does not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." ECF No. 27 at 38.

Third, plaintiffs fail to state a claim under the Fourteenth Amendment. Section 2.61 imposes the same vaccination requirement on all covered employees not medically exempted. Under Section 2.61, similarly situated people are treated similarly, and the classifications are rational. Personnel at covered entities who cannot receive vaccinations for medical reasons are not similarly situated to those for whom that is not true. It is rational to exclude those personnel whose physicians have determined that vaccination would be detrimental to their health from a mandate aimed at furthering public health.

Fourth, the CMS mandate does not preempt Section 2.61. The CMS mandate expressly states that it only preempts those State or local laws which provide *broader* exemptions from the vaccine requirement than are provided under federal law. Section 2.61 does not provide broader exemptions from the vaccine requirement than are provided under federal law. There is no conflict between the CMS mandate and Section 2.61. The CMS Mandate requires employers to establish a process to review requests for exemptions or accommodations from the vaccine requirement to the extent required under existing federal law. Section 2.61 similarly permits covered personnel to seek accommodations under existing federal law, including accommodations based upon sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964. The Second Circuit has already held that Section 2.61 does not prevent an employee from seeking a religious accommodation under Title VII.

Finally, plaintiffs' claim that New York administers unemployment insurance ("UI") benefits in violation of the Free Exercise Clause is meritless. The New York State Department of Labor, which is not a party to this action, is responsible for administering UI and it does not categorically deny unemployment insurance benefits on the basis of religion. Every UI claim is evaluated on a case-by-case basis. Any employee who refuses vaccination and is terminated might

be denied UI benefits, regardless of whether or not that refusal was based on a religious objection or any other reason.

STATEMENT OF FACTS

A. New York's Response to COVID-19 Transmission in the Healthcare Sector

DOH is charged with protecting the public health and supervising and regulating "the sanitary aspects of . . . businesses and activities affecting public health." N.Y. Pub. Health Law § 201(1)(m). Pursuant to this broad mandate, DOH acted swiftly to respond to the increasing risks posed by the Delta variant of the SARS-CoV-2 virus in New York's healthcare sector in August 2021.

On August 26, 2021, the Department of Health's Public Health and Health Planning Council ("PHHPC") adopted an Emergency Regulation under which hospitals, nursing homes, and other "covered entities" must require their personnel to be fully vaccinated against COVID-19. *Prevention of COVID-19 Transmission by Covered Entities*, N.Y. Comp. Codes R. & Regs. tit. 10, § 2.61 (2021).[1] Section 2.61 was most recently renewed on March 22, 2022 and is currently effective until June 19, 2022.

Section 2.61 states that, "[c]overed entities shall continuously require personnel to be fully vaccinated against COVID-19, absent receipt of an exemption . . . . Covered entities shall require all personnel to receive at least their first dose before engaging in activities covered under paragraph (2) of subdivision (a) of this section and that such personnel receive their subsequent dose(s) according to the CDC or CDC's Advisory Committee on Immunization Practices (ACIP)

[1] Public Health Law §§ 225(5), 2800, 2803(2), 3612, and 4010(4) and Social Services Law § 461 authorize the Department (through the PHHPC) to issue and amend regulations pertaining to any matters affecting the security of life or health or the preservation and improvement of public health in the state of New York, including designation and control of communicable diseases and ensuring infection control at healthcare facilities and any other premises.

recommended timeframe." 10 N.Y.C.R.R. § 2.61(c). The regulation covers personnel "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." *Id.* at § 2.61(a)(2). The regulation provides that personnel are exempt from the vaccination requirement "[i]f any licensed physician, physician assistant or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health." *Id.* at § 2.61(d)(1). Section 2.61 does not contain a religious exemption from the vaccine requirement.

B. The CMS Mandate

On November 5, 2021, the United States Secretary of Health and Human Services issued an interim final rule, known as the "CMS Mandate," requiring facilities that participate in the Medicare and Medicaid programs to ensure that their staff are vaccinated against COVID-19. Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination, 86 Fed. Reg. 61555 – 61627 (November 5, 2021).

The CMS Mandate requires that covered facilities "establish and implement a process by which staff may request an exemption from COVID-19 vaccination requirements based on an applicable Federal law." 86 Fed. Reg. 61572. The rule explains that "[u]nder Federal law, including the ADA and Title VII of the Civil Rights Act of 1964 . . . workers who cannot be vaccinated or tested because of an ADA disability, medical condition, or sincerely held religious beliefs, practice, or observance may in some circumstances be granted an exemption from their employer. In granting such exemptions or accommodations, employers must ensure that they

minimize the risk of transmission of COVID-19 to at-risk individuals, in keeping with their obligation to protect the health and safety of patients." *Id.*

The rule also defines the scope of its intended preemption of State and local laws. *Id.* at 61613. The rule states that only "State and local laws that *forbid* employers in the State or locality from imposing vaccine requirements on employees," are preempted because any such State or local rules forbidding vaccine mandates "directly conflict with this exercise of our statutory health and safety authority to *require* vaccinations for staff of the providers and suppliers subject to this rule." *Id.* The rule goes on to explain that "to the extent that State-run facilities that receive Medicare and Medicaid funding are prohibited by State or local law from imposing vaccine mandates on their employees, there is direct conflict between the provisions of this rule (requiring such mandates) and the State or local law (forbidding them)." *Id.* Thus, the rule "preempts the applicability of any State or local law providing for exemptions to the extent such law provides *broader* grounds for exemptions than provided for by Federal law and are inconsistent with this [rule]." *Id.* (emphasis added).

STANDARD OF REVIEW

A complaint must contain sufficient factual content to demonstrate that entitlement to relief is plausible, "and a formulaic recitation of the elements of a cause of action will not do." *Bell v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must set forth "more than a sheer possibility that a defendant has acted unlawfully." *Id*. The Court need not accept legal conclusions or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id.*

ARGUMENT

I. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER THE FREE EXERCISE CLAUSE

The Free Exercise Clause states: "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. To "state a free exercise claim, a plaintiff generally must establish that 'the object of [the challenged] law is to infringe upon or restrict practices because of [its] religious motivation,' or that the law's 'purpose…is the suppression of religion or religious conduct.'" *Congregation of Rabbinical College of Tartikov, Inc. v. Vill. of Pomona,* 915 F. Supp. 2d 574, 619 (S.D.N.Y. 2013) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 533 (1993)).

1. *Section 2.61 is a neutral law of general applicability and is supported by a rational basis.*

For over a century, courts have held that mandatory vaccination laws constitute a valid exercise of the States' police powers, and such laws have withstood challenges on various constitutional grounds. In 1905, the Supreme Court held that mandatory vaccination laws do not offend "any right given or secured by the Constitution," and the States' police powers allow imposition of "restraints to which every person is necessarily subject for the common good." *Jacobson v. Commonwealth of Massachusetts,* 197 U.S. 11, 25-27 (1905). In 1922, the Court reaffirmed that States could use their police powers to impose mandatory vaccination. *See Zucht v. King*, 260 U.S. 174, 176 (1922).

Courts have recognized that generally applicable vaccination requirements do not infringe on religious liberties. As the Supreme Court held over seventy years ago, the right to practice one's religion freely "does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 & n.12 (1944). More recently, the Court identified

"compulsory vaccination laws" as among the neutral, generally applicable laws that did not require religious exemptions under the First Amendment. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 889 (1990).

As recently as 2015, the Second Circuit explained that mandatory vaccination "does not violate the Free Exercise Clause." *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). In rejecting the plaintiffs' First Amendment claim, the Second Circuit reasoned that "New York could constitutionally require that all children be vaccinated in order to attend public school" without any religious exemption at all. *Id.*

The right of the free exercise of religion does not relieve an individual or entity of the obligation to comply with a "valid and neutral law of general applicability." *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990). As a result, where an alleged limitation on the exercise of religion "is not the object ... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id*. at 878. *See also Bloomingburg Jewish Educ. Ctr. v. Village of Bloomingburg*, 111 F. Supp. 3d 459, 484 (S.D.N.Y. 2015). Therefore, a law that only incidentally imposes a burden on the exercise of religion need only be supported by a rational basis. *WTC Families for a Proper Burial, Inc. v. City of New York*, 567 F. Supp. 2d 529, 539-540 (S.D.N.Y. 2008) (quoting *Leebart v. Harrington*, 332 F.3d 134, 143 (2d Cir. 2003)).

To determine neutrality, courts look first to the text of the law in question. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* The text of Section 2.61 is neutral and of general applicability. It contains no reference to religion, and applies to every employee of the covered entities who could

"potentially expose other covered personnel, patients or residents to" COVID-19 if infected, unless the employee falls under a limited exemption for individuals for whom a vaccine would be detrimental to their health. 10 N.Y.C.R.R. § 2.61(a)(2), (d).

Further, Section 2.61 is neutral because its object is not to limit or restrict the exercise of religion, but to protect public health and safety by reducing the incidence of COVID-19. Its method of doing so is to vaccinate New Yorkers working in healthcare facilities to protect them, their colleagues, the vulnerable populations that they serve, and the general public.

Finally, the Second Circuit has rejected plaintiffs' contention that certain public comments made by Governor Hochul demonstrate animosity toward religious objectors to the vaccine. *See* ECF No. 27 at 25. The Second Circuit held that the Governor's comments "do not evince animosity towards particular religious practices or a desire to target religious objectors to the vaccine requirement *because of* their religious beliefs. Rather, they suggest that the State wanted more people to obtain the vaccine out of a deep concern for public health, which is a religion-neutral government interest." *Id.*

2. *Though the regulation would pass strict scrutiny, any attempt to invoke that scrutiny would be misplaced.*

Plaintiffs' motion attempts to invoke strict scrutiny, based on their assertion that by omitting an exemption for those with religious objections to vaccination, DOH targeted religion, rendering the regulation not neutral. But *Smith* forecloses any argument that the omission of a religious exemption necessarily constitutes the improper targeting of religion. *See Smith*, 494 U.S. at 879.

Plaintiffs incorrectly argue that Section 2.61 is not generally applicable because it allows for medical exemptions. Courts have held that a non-religious exemption requires a matching religious exemption only when the non-religious exemption itself runs counter to the purpose of

the underlying restriction; under those circumstances, it would be improper to deny a religious exemption on the ground that it undermines the underlying purpose given that the non-religious exemption does so as well. For example, the policy at issue in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) prohibited police officers from wearing beards in order to maintain uniform appearance. The Third Circuit reasoned that because a medical exemption from the "no beard" policy undermined the defendants' proffered interest in uniformity, there was no basis to deny a religious exemption. *See id*. at 365-66.

Similar reasoning appears in recent Supreme Court orders striking down policies that imposed capacity limitations to reduce the spread of COVID-19. Those policies were found to impose more stringent restrictions on religious services than on similar, secular activities in a manner that allowed secular business, but not religious institutions, to undermine the stated purpose of the policies. For example, the Supreme Court noted that a store in Brooklyn could have "hundreds of people" shopping there while "a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service." *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66-67 (quotation marks omitted); *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

In contrast, DOH's medical exemption furthers its stated interest in promoting the health of (among others) healthcare workers by exempting those for whom a "COVID-19 vaccine is detrimental to" their health. 10 N.Y.C.R.R. § 2.61(d)(1). A contrary rule—requiring individuals to take a vaccine that is harmful to their health—would exacerbate one of the very risks that DOH is attempting to address. Section 2.61 protects those who are medically unable to receive a COVID-19 vaccine by ensuring that their colleagues who can be vaccinated do so, thereby reducing the risk of transmission to those who fall under the medical exemption. Accordingly, because the

"single exception for medical exemptions" furthers the same policy as the vaccination requirement, DOH had no obligation to provide a religious exemption that would undermine that policy. *See W.D. v. Rockland County*, No. 19-civ-2066, 2021 WL 707065, at *26-30 (S.D.N.Y. Feb. 22, 2021); *F.F. v. State*, 194 A.D.3d 80, 84-88 (3d Dep't 2021).

Even if strict scrutiny applied here—and it does not—Section 2.61 would satisfy it. As the Supreme Court has made clear, promoting public health by preventing the spread of COVID-19 is "unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63, 67 (2020).

Moreover, Section 2.61 is narrowly tailored to that end. *Id.* There is "a very direct connection" between vaccination requirements and "the preservation of health and safety." *Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 612 (2018). Section 2.61 focuses on a discrete sector where COVID-19 transmission poses heightened and unacceptable risks: employees in healthcare settings. Transmission of COVID-19 by healthcare workers risks their own personal safety, the safety of their colleagues, the safety of the vulnerable populations they serve; and the safety of the public at large that could be threatened by staffing shortages at healthcare facilities. The rule does not apply to individuals working outside of enumerated entities in the healthcare sector, and it does not apply to employees who pose no risk of exposing colleagues or patients to COVID-19. 10 N.Y.C.R.R. § 2.61(a)(2). These limitations mirror longstanding regulations governing mandatory measles and rubella vaccinations for healthcare workers, which also do not contain a religious exemption. *See* 10 N.Y.C.R.R. § 405.3(10)(i), (ii).

Third, DOH considered but rejected alternative approaches because they would not adequately achieve DOH's goal to promote public health by preventing COVID-19 transmission in healthcare settings. DOH concluded that a testing requirement, for example, would be

impracticable due to its expense and create an unreasonable burden by requiring testing of every person in a healthcare facility every day. *See* ECF No. 47-11 at 13. It is also limited in effect because healthcare personnel could contract and spread COVID-19 between tests. *Id.* A masking requirement, while "helpful to reduce transmission [would] not prevent transmission." *Id.*

Accordingly, Section 2.61 is narrowly tailored to promote public health, and would therefore withstand strict scrutiny even if such analysis applied.

3. *New York's Rules Concerning Unemployment Benefits Do Not Violate the Free Exercise Clause*

None of the defendants are responsible for the administration of unemployment insurance benefits. Determinations of the validity of a claim for an unemployment insurance ("UI") benefits are made by the Commissioner of Labor, not by the Defendants. *See* N.Y. Labor Law § 597. The Commissioner of Labor's determination is reviewable before an independent Referee. *Id.* at § 620. Decisions by the referee can then be appealed to the Unemployment Insurance Appeal Board ("UIAB"). *Id.* at § 621. Decisions by the UIAB can then be appealed to the New York State Supreme Court, Appellate Division, Third Department. *Id.* at § 624. Pursuant to N.Y. Labor Law § 626, this is the exclusive procedure for challenging determinations related to UI.

In support of their contention that New York has a "rule" which categorically denies unemployment insurance benefits on the basis of religion, Plaintiffs cite the "Unemployment Insurance Top Frequently Asked Questions" page of the Department of Labor's ("DOL") website. New York State Department of Labor, *Unemployment Insurance Frequently Asked Questions* (February 11, 2022), https://dol.ny.gov/unemployment-insurance-top-frequently-asked-

questions.[2] Question 6 on this page asks: "If a worker refuses to get vaccinated, will they be eligible for UI benefits?" *Id.* In response to that question, DOL offers the following guidance:

> Like all UI claims, eligibility will depend on the circumstances as each claim is unique and reviewed on a case-by-case basis. Workers in a healthcare facility, nursing home, or school who voluntarily quit or are terminated for refusing an employer-mandated vaccination will be ineligible for UI absent a valid request for accommodation because these are workplaces where an employer has a compelling interest in such a mandate, especially if they already require other immunizations. Similarly, a public employee who works in a public setting and is subject to a local government mandate to submit proof of vaccination or negative testing may be disqualified from the receipt of UI if they refuse to get vaccinated or tested. In contrast, a worker who refuses an employer's directive to get vaccinated may be eligible for UI in some cases, if that person's work has no public exposure and the worker has a compelling reason for refusing to comply with the directive.

Id.

Nothing in DOL's guidance suggests that religious objectors to the vaccine are uniquely or categorically targeted for the denial unemployment insurance benefits. *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878 (1990) (where an alleged limitation on the exercise of religion "is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended"). To the contrary, DOL's guidance applies to all employees who resign or are terminated for refusing vaccination, whether that refusal was based upon a religious objection or for any other reason.

DOL's guidance also states that eligibility is reviewed on a case-by-case basis. DOL's guidance acknowledges that there are employees who may remain eligible for UI benefits despite refusing vaccination if their "work has no public exposure and the worker has a compelling reason for refusing to comply with the directive." *Id.* Finally, as this Court has already held, plaintiffs'

[2] Plaintiffs previously raised their claim about UI benefits in their application for an emergency stay to the Supreme Court. *Dr. A., et al. v. Hochul*, et al., No. 21A145, Emergency Application for Writ of Injunction or, in the Alternative, Petition for Writ of Certiorari and Stay Pending Resolution (November 12, 2021). Plaintiffs' application was denied.

claim is pure speculation as it lacks any allegations establishing that the plaintiffs were actually denied unemployment benefits because they are religious objectors to the vaccine. ECF No. 49 at 16.

II. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER THE EQUAL PROTECTION CLAUSE

Plaintiffs allege that Section 2.61 violates the Equal Protection Clause of the Fourteenth Amendment in that it "specifically targets plaintiffs' sincerely held religious beliefs for discriminatory and unequal treatment as compared with the medical exemptions" allowed by the regulation and "permits the State to treat Plaintiffs differently from similarly situated healthcare workers solely on the basis of Plaintiff's sincerely held religious beliefs." ECF No. 40 at ¶¶ 327-28. As stated above, Section 2.61 imposes the same vaccination requirement on all covered employees not medically exempted. Plaintiffs argue that by creating a medical exemption, but not a religious exemption, they are being targeted, which defies basic logic and the test under the Equal Protection Clause.

To reconcile the requirements of the Equal Protection Clause with the practical reality that most legislation classifies for one purpose or another, the Court has stated that it will uphold a law that neither burdens a fundamental right nor targets a suspect class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (citing *Heller v. Doe*, 509 U.S. 312, 319-320 (1993)).

Plaintiffs' argument that Section 2.61 makes classifications on the basis of religion is not supported by the facts or prevailing caselaw. Section 2.61 does not categorize individuals on the basis of religion, nor did DOH's decision to repeal the non-medical exemption target religion. The regulation, as amended, simply places all personnel at covered entities without a medical exemption on equal footing, a result that does not offend equal protection. *See Princ*e, 321 U.S. at

171; *Zucht*, 260 U.S. at 176-77 (no equal protection violation where all children were prohibited from attending school without vaccinations, and explained that "in the exercise of the police power reasonable classification may be freely applied, and that regulation is not violative of the equal protection clause merely because it is not all-embracing").

The Supreme Court has repeatedly found that a rational basis review in equal protection analysis "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *see also, e.g., Dandridge v. Williams*, 397 U.S. 471, 486 (1970). Nor does it authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*). For these reasons, a classification that neither burdens a fundamental right nor targets a suspect class is accorded a strong presumption of validity. *See, e. g., Beach Communications*, 508 U.S. at 314-15; *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462 (1988); *Hodel v. Indiana*, 452 U.S. 314, 331-332 (1981); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (*per curiam*).

Such a classification does not violate the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *See Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Here, the mandatory vaccination requirement, and the decision to repeal the non-medical exemption with the goal of achieving higher immunization rates in response to a public health crisis, rationally further legitimate state interests. Under Section 2.61, similarly situated people are treated similarly, and the classifications are rational. Personnel at covered entities who cannot receive vaccinations for medical reasons are not similarly situated to those for whom that is not true. It is rational to exclude those personnel whose physicians have

determined that vaccination would be detrimental to their health from a mandate aimed at furthering public health.

Accordingly, Plaintiffs fail to demonstrate a likelihood of success on their Equal Protection Clause claim.

III. THE AMENDED COMPLAINT FAILS TO STATE A CLAIM UNDER THE SUPREMACY CLAUSE

1. *The Supremacy Clause does not create a cause of action.*

The Supremacy Clause is not "the source of any federal rights" or any private cause of action, but a "rule of decision" that courts should not give effect to state laws that conflict with federal law, and it "certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (citing *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 107 (1989)). The Court reasoned in *Armstrong* that reading a private right of action into the Supremacy Clause would be "strange" given the Constitution's "silen[ce] regarding who may enforce federal laws in court, and in what circumstances they may do so," and that the result of permitting a private right of action would be to "significantly curtail [Congress's] ability to guide the implementation of federal law." *Id.* at 325–26. Plaintiffs' claim under the Supremacy Clause fails for this reason alone.

2. *Title VII does not preempt Section 2.61.*

Plaintiffs argue that the Court may exercise its equitable powers to enjoin the enforcement of Section 2.61 because it is preempted by federal law under Title VII. Federal law preempts state law (1) where Congress "preempt[s] state law by so stating in express terms"; (2) where "the scheme of federal regulation is sufficiently comprehensive to make the reasonable inference that Congress 'left no room' for supplementary state regulation"; and (3) only where there is an actual conflict between the two because compliance with both is "a physical impossibility" or because

state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280 (1987). In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause, the court's "sole task" is to "ascertain the intent of Congress." *Id.* (citations omitted). "Pre-emption is not to be lightly presumed." *Id.* (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Moreover, it is presumed that the State's regulation "of matters related to health and safety" are valid under the Supremacy Clause. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

Title VII does not preempt Section 2.61. First, Title VII does not express an intent to "occupy the field" of regulation encompassed by Section 2.61. 42 U.S.C. § 2000h-4 ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field . . . nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.").

Second, Section 2.61 does not expressly sanction a practice that is unlawful under Title VII or is inconsistent with the purpose of Title VII. *See California Fed. Sav. & Loan Ass'n*, 479 U.S. 272 at 284. Title VII requires employers to accommodate religious beliefs, practices, or observances only to the extent that doing so would not impose "undue hardship" on the employer. *See* 42 U.S.C. § 2000e(j) ("religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."). Plaintiffs seek a religious exemption, which is

distinct from an accommodation under Title VII. To the extent Plaintiffs seek an accommodation, Section 2.61 is silent and does not implicate Title VII at all, as discussed below.

Third, there is no "actual conflict" between Title VII and Section 2.61. Compliance with both Title VII and Section 2.61 is not a "physical impossibility," nor does Section 2.61 pose any obstacle to accomplishing the objectives of Congress in enacting Title VII. "An accommodation is said to cause an undue hardship whenever it results in 'more than a de minimis cost' to the employer." *Baker v. The Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006) (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977)). Failure to accommodate an employee's sincerely held religious beliefs is not a *per se* violation of Title VII.

Section 2.61 requires vaccinations for all "personnel" of the covered entities. As defined by the regulation, "personnel" are those persons "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." 10 N.Y.C.R.R. § 2.61(a)(2). Section 2.61 does not require covered entities to deny reasonable *accommodation* requests under Title VII, including those based on sincerely held religious beliefs. However, as stated above, an employer is not required, under Title VII, to provide a religious accommodation when doing so would cause an undue hardship. Section 2.61 does not bar an employer from providing a reasonable accommodation to covered personnel by, for example, modifying their work activities so that they do not potentially expose other covered personnel, patients, and residents to the disease. Nor does Title VII require that an employer provide a blanket religious exemption without regard to the hardships faced by the employer. *See Robinson* v. *Children's Hospital Boston*, No. 14-CV-10263, 2016 WL 1337255, at *8 (D. Mass. Apr. 5, 2016) (rejecting employee's failure to accommodate claim under Title VII where religious exemption to influenza vaccination would "cause or increase safety risks or the

risk of legal liability for the employer"). Title VII does not entitle employees to a religious exemption—it only requires that employers make reasonable accommodation so long as it can be provided by the employer without undue hardship. Section 2.61 does not conflict with Title VII.

3. *The CMS Mandate does not preempt Section 2.61.*

Federal law preempts state law (1) where Congress "preempt[s] state law by so stating in express terms"; (2) where "the scheme of federal regulation is sufficiently comprehensive to make the reasonable inference that Congress 'left no room' for supplementary state regulation"; and (3) only where there is an actual conflict between the two because compliance with both is "a physical impossibility" or because state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 280 (1987). "Pre-emption is not to be lightly presumed." *Id.* (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Moreover, it is presumed that the State's regulation "of matters related to health and safety" are valid under the Supremacy Clause. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

There is no actual conflict between the CMS Mandate and Section 2.61. Plaintiffs misconstrue the CMS Mandate as requiring that States provide religious "exemptions" to COVID-19 vaccine requirements. However, the language of the CMS Mandate contains no such requirement. The CMS Mandate requires that covered "providers and suppliers . . . establish and implement a process by which staff may request an exemption from COVID-19 vaccination requirements *based on an applicable federal law*." 86 Fed. Reg. 61572 (emphasis added). The CMS Mandate, therefore, requires that covered employers establish a *process* by which employees may "request an exemption from . . . COVID-19 vaccination requirements based on an applicable federal law, such as the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights

Act of 1964." *Id.* The CMS Mandate observes that there are "some circumstances" where an employer "*may* be required by law to offer accommodations for some individual staff members," but does not impose any requirement that an employer provide any "exemption" or accommodation beyond what is required by federal law. *Id.* (emphasis added).

Under Section 2.61, covered personnel can request that their employers provide accommodations under applicable federal law. Section 2.61 does not require employers to violate the CMS Mandate, nor does Section 2.61 stand as an obstacle to the objectives of the CMS Mandate. Under both provisions, employers must comply with federal law, including Title VII. The Second Circuit rejected Plaintiffs' argument that Title VII conflicts with Section 2.61, holding that "Section 2.61 does not require employers to violate Title VII because, although it bars an employer from granting a religious *exemption* from the vaccination requirement, it does not prevent employees from seeking a religious *accommodation* allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." ECF No. 27 at 38. The Second Circuit further explained that "Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer – in this case, a blanket exemption allowing them to continue working at their current positions unvaccinated." *Id*. While the CMS Mandate uses both the words "exemption" and "accommodation," it instructs covered employers to follow applicable federal law in evaluating whether an "exemption" or "accommodation" is required. There is no logical interpretation of the CMS Mandate that would require employers to provide the sort of blanket "exemption" Plaintiffs seek because federal law does not require it.

Under Section 2.61, employers must also follow federal law in evaluating accommodation requests. As the Second Circuit has already held in this case, "Section 2.61's text does not foreclose all opportunity for Plaintiffs to secure a reasonable accommodation under Title VII." *Id*.

Under Title VII, an employer "must offer a *reasonable* accommodation that does not cause the employer an undue hardship." *Id.* Such a reasonable accommodation may include assigning an employee to remote work, but Section 2.61 does not foreclose other forms of reasonable accommodation, so long as accommodation does not involve activities that could potentially expose others to COVID-19. *See* 10 N.Y.C.R.R. § 2.61(a)(2).

Further, Section 2.61 does not fall within the scope of the State and local laws that the CMS Mandate intends to preempt. Under the CMS Mandate, "State and local laws that *forbid* employers in the State or locality from imposing vaccine requirements on employees directly conflict with this exercise of our statutory health and safety authority to *require* vaccinations for staff of the providers and suppliers subject to this rule." 86 Fed. Reg. 61613 (emphasis added). The CMS Mandate goes on to explain that "to the extent that State-run facilities that receive Medicare and Medicaid funding are *prohibited* by State or local law from imposing vaccine mandates on their employees, there is direct conflict between the provisions of this rule (requiring such mandates) and the State or local law (forbidding them)." *Id.* Thus, the CMS Mandate "preempts the applicability of any State or local law providing for exemptions to the extent such law provides *broader* grounds for exemptions than provided for by Federal law and are inconsistent with this [rule]." *Id.*

Section 2.61 does not provide *broader* grounds for exemption from the vaccine requirement than the CMS Mandate. The CMS Mandate's preemption scheme is directed toward those State and local laws which would either prohibit vaccine mandates altogether, or would broaden the pool of individuals who are exempt from their requirements beyond what is permitted by the Mandate. Section 2.61 does not fall within that scheme.

Further, the CMS Mandate does not "occupy the field" of regulation encompassed by Section 2.61. "Field preemption occurs 'where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law.'" *New York City Health & Hosps. Corp. v. Wellcare of N.Y.*, 801 F. Supp. 2d 126, 141 (S.D.N.Y. May 10, 2011) (quoting *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010)).

As Plaintiffs concede, "[t]here is a strong presumption against preemption when states and localities 'exercise[] their police powers to protect the health and safety of their citizens.'" *Steel Inst. of N.Y. v. City of New* York, 716 F.3d 31, 36 (2d Cir. 2013) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *see also Medical Society of New York v. Cuomo*, 976 F.2d 812, 816 (2d Cir. 1992) ("The regulation of public health and the cost of medical care are virtual paradigms of matters traditionally within the police powers of the state."). Section 2.61 is unquestionably an exercise of New York's police power to protect the health and safety of its citizens. Therefore, there is a strong presumption that the CMS Mandate does not preempt Section 2.61.

Moreover, the presumption against preemption is particularly strong in the context of Medicaid and Medicare, which are jointly administered by the state and federal governments through a "cooperative program of shared financial responsibility." *Rebaldo v. Cuomo*, 749 F.2d 133, 139 (2d Cir. 1984).

Nothing in the language of the CMS Mandate implies an intent to "occupy the field" of regulation pertaining vaccine requirements for healthcare workers. To the contrary, the CMS Mandate expressly contemplates the continued existence of State and local laws that impose vaccine requirements for healthcare workers. 86 Fed. Reg. 61556 ("We note that entities not covered by this rule may still be subject to *other State* or Federal COVID-19 vaccination

requirements . . . .") (emphasis added). The Supreme Court's recent decision upholding the CMS Mandate similarly recognizes that state laws requiring vaccination are "a common feature of the provision of healthcare in America." *Biden v. Missouri*, 142 S. Ct. 647, 653 (2022).

The CMS Mandate preempts only those State or local laws that afford broader exemptions from the vaccine requirement than are permitted under federal law. 86 Fed. Reg. 61613 ("This rule would pre-empt *some* State laws that prohibit employers from requiring their employees to be vaccinated for COVID-19.") (emphasis added). The CMS Mandate applies only to an enumerated list of "Medicare and Medicaid-certified providers." *Id.* at 61556. By contrast, Section 2.61 is not limited to such Medicare or Medicaid-certified facilities and applies to a wider group of "covered entities" within New York as defined by the New York Public Health Law. *See* N.Y. Public Health Law §§ 2801, 3602, 4002. The CMS Mandate does not foreclose New York from regulating those entities.

Finally, this Court has already rejected plaintiffs' contention that the CMS Mandate preempts Section 2.61. In denying plaintiffs' renewed attempt to obtain a preliminary injunction, this Court held that "the text of the CMS Mandate" does not "explicitly require the availability of exemptions for religious objectors." ECF No. 49 at 12. Further, the Court held that "the CMS Mandate does not preempt the field of healthcare vaccination requirements." *Id.* at 13. In accordance with these holdings the Court should dismiss the Amended Complaint for failure to state a claim.

4. *Title VII does not preempt Section 2.61 under the* Chevron *Doctrine*

Plaintiffs allege that Title VII preempts Section 2.61 under the *Chevron* deference standard. Courts apply the *Chevron* deference framework to evaluate judicial challenges to "an agency's construction of a statute which it administers." *Chevron, U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 842

(1984). The *Chevron* analysis involves two steps. First, the Court determines "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Second, if the statutory language is "silent or ambiguous," the Court proceeds to "step two" where "the question for the court is whether the agency's answer is based on a permissible construction of the statute" at issue. *Id*. at 843.

Plaintiffs' argument that Title VII preempts Section 2.61 under the *Chevron* framework is meritless. First, the CMS Mandate does not contain any sort of "interpretation" of Title VII that would be subject to review under the *Chevron* framework. The CMS Mandate references Title VII only to note that it is among the federal laws that employers must comply with when considering accommodation requests. Nothing in the language of the CMS Mandate purports to offer an interpretation of Title VII. The CMS Mandate refers to the existence of certain requirements under Title VII, but it does not interpret, modify, or supplement them in any way.

Moreover, this action does not involve a challenge to the administering agency's interpretation of Title VII. CMS is not the federal agency that administers Title VII. Rather, Title VII is administered by the Equal Employment Opportunity Commission ("EEOC"). *See* 42 U.S.C. §§ 2000e-4, 2000e-5(a). The CMS Mandate explicitly refers employers to the EEOC Compliance Manual on Religious Discrimination for guidance on how to evaluate and response to requests for religious accommodations to the COVID-19 vaccination requirement. 86 Fed. Reg. 61572. The Compliance Manual refers to religious "accommodations," not exemptions, and explains that an employer need not provide a religious accommodation when doing so would pose an undue hardship. *See* U.S. Equal Employment Opportunity Commission Compliance Manual on

Religious Discrimination, available at: https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

CONCLUSION

For the reasons discussed above, the Amended Complaint should be dismissed in its entirety and with prejudice.

Dated: Albany, New York
April 29, 2022

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