

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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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., DR. S., NURSE S., and  
PHYSICIAN LIAISON X.,

Plaintiffs,

-v-

1:21-CV-1009

KATHY HOCHUL, Governor of  
the State of New York, in her  
official capacity, JAMES V.  
McDONALD, Acting Commissioner  
of the New York State Department  
of Health, in his official capacity,  
and LETITIA JAMES, Attorney  
General of the State of New York,  
in her official capacity,

Defendants.<sup>1</sup>

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APPEARANCES:

OF COUNSEL:

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CHRISTOPHER FERRARA, ESQ.

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<sup>1</sup> Plaintiffs' operative pleading names as a defendant "Mary T. Bassett, Commissioner of the New York State Department of Health, in her official capacity." Dkt. No. 40. Bassett has since been succeeded in that role by Acting Commissioner James V. McDonald effective January 1, 2023. The Clerk of the Court will be directed to amend the caption accordingly. *See* FED. R. CIV. P. 25(d).

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Ass't Attorneys General

DAVID N. HURD  
United States District Judge

**ORDER STAYING CASE PENDING APPEAL**

On August 26, 2021, the New York State Department of Health adopted an emergency regulation that required “personnel” employed by certain “covered entities” in the healthcare field to be “fully vaccinated” against COVID-19. N.Y. COMP. CODES R. & REGS. tit. 10, § 2.61(c) (2021). As relevant here, § 2.61 did not include any religious exemption language.

On September 13, 2021, plaintiffs<sup>2</sup> filed this 42 U.S.C. § 1983 action against New York State Governor Kathy Hochul (“Hochul”), then-New York State Health Commissioner Howard A. Zucker (“Zucker”), and New York

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<sup>2</sup> This action began with seventeen plaintiffs, but “Technologist P.,” who moved to Florida after being terminated from her job in New York, has withdrawn as a plaintiff. The remaining sixteen plaintiffs are medical professionals with a sincere religious objection to the existing vaccine. They are (or were) employed by hospitals, nursing homes, and other entities that are subject to § 2.61.

State Attorney General Letitia James (“James”). Plaintiffs’ complaint alleged § 2.61 violated their constitutional rights because it forbade employers from considering religious exemptions under certain processes guaranteed by federal law. Plaintiffs sought to enjoin defendants from enforcing § 2.61 “to the extent it categorically requires health care employers to deny or revoke religious exemptions from COVID-19 vaccination mandates.”

On September 14, 2021, this Court issued a temporary restraining order (“TRO”) to that effect, *Dr. A. v. Hochul*, 2021 WL 4189533 (N.D.N.Y.) and, after further briefing, converted the TRO into a preliminary injunction on October 12, 2021, *Dr. A. v. Hochul*, 567 F. Supp. 3d 362 (N.D.N.Y.). However, because “the issues in dispute [were] of exceptional importance to the health and the religious freedoms of our citizens,” the Court recognized that “an appeal may very well be appropriate.” *Id.* at \*10.

Defendants sought emergency relief in the Second Circuit, which heard oral argument and entered an order vacating the preliminary injunction. *We The Patriots USA, Inc. v. Hochul*, 2021 WL 5103443 (2d Cir.). Thereafter, the panel issued an opinion that explained its rationale for granting vacatur. *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir.) (per curiam), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021). Plaintiffs sought rehearing before the

Second Circuit and later applied to the Supreme Court for injunctive relief, which was eventually denied.<sup>3</sup> 142 S. Ct. 552 (mem.) (Dec. 13, 2021).

The Mandate issued on January 18, 2022. Dkt. No. 38. Thereafter, plaintiffs returned to this Court and filed a first amended verified complaint as of right. Dkt. No. 40. Their amended pleading named as defendants Hochul, James, and Health Commissioner Mary T. Bassett (“Bassett”), the public official who assumed office after Zucker’s resignation. *Id.*

Plaintiffs’ amended complaint reasserted the three § 1983 official-capacity claims alleged in the initial pleading; *i.e.*, claims under the Free Exercise Clause, Am. Compl. ¶¶ 295–314, the Supremacy Clause, *id.* ¶¶ 315–24, and the Equal Protection Clause, *id.* ¶¶ 325–41.

Plaintiffs’ amended complaint also added two new claims. In count four, plaintiffs alleged § 2.61 was preempted by a similar regulation issued by the federal government. Am. Compl. ¶¶ 342–48. And in count five, plaintiffs alleged defendants had unlawfully disqualified them from eligibility for State unemployment insurance benefits. *Id.* ¶¶ 349–59.

On January 30, 2022, plaintiffs filed a renewed motion for a TRO and a preliminary injunction based on those two new claims. Dkt. No. 41. This time, plaintiffs sought to enjoin defendants from enforcing (a) § 2.61 “against

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<sup>3</sup> Plaintiffs also petitioned the Supreme Court for certiorari, which was eventually denied as well. 142 S. Ct. 2569 (mem.) (June 30, 2022).

their attempts to seek reinstatement to lost positions under the overriding religious exemption provisions of the [new federal regulation]”; and (b) “the Governor’s unemployment benefits disqualification.”

On January 31, 2022, the Court denied plaintiffs’ request for a TRO but ordered briefing on the renewed request for a preliminary injunction. Dkt. No. 44. After full briefing, that motion was denied on February 23, 2022. *Dr. A. v. Hochul*, 586 F. Supp. 3d 136 (N.D.N.Y.). Among other things, the Court emphasized that plaintiffs could not “demonstrate irreparable harm in the wake of the Second Circuit’s decision in this litigation.” *Id.* at 145.

Plaintiffs took an appeal to the Second Circuit. Dkt. No. 53. That appeal has been briefed but remains pending. *Dr. A v. Hochul*, 22-650. On April 29, 2022, with the appeal unresolved, defendants moved under Federal Rule of Civil Procedure (“Rule”) 12(b)(6) to dismiss plaintiffs’ first amended verified complaint in its entirety. Dkt. No. 59. According to defendants, plaintiffs five constitutional claims fail as a matter of law. *Id.*

Plaintiffs opposed. Dkt. No. 65. In so doing, they noted that the Second Circuit’s prior panel opinion suggested “further factual development” might lead to success on one or more of their claims. *Id.* Plaintiffs also argued that this Court should hold defendants’ motion in abeyance pending the outcome of their second appeal, since a favorable result might well lead to an injunction against § 2.61. *Id.* Defendants have replied. Dkt. No. 68.

Upon review, this matter will be stayed pending the disposition of plaintiffs’ pending appeal before the Second Circuit.<sup>4</sup> *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 96 (2d Cir. 2012) (“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” (cleaned up)); *see also Off-White LLC v. AEUNZN*, 2023 WL 199483, at \*1 (S.D.N.Y. Jan. 17, 2023) (“The power to stay proceedings can be exercised *sua sponte*.”).

Defendants insist that continued delay is unwarranted because the law governing plaintiffs’ constitutional claims is well-settled. But as Oliver Wendell Holmes, Jr., once opined, “[t]he life of the law has not been logic: it has been experience.” And the experience of the last few years of pandemic litigation strongly counsels in favor of a more cautious approach. Indeed, the Court has thus far deferred resolution of the motion to dismiss—which was filed last spring—in the hope that the Second Circuit would act quickly on plaintiffs’ latest appeal.

That has not happened. It is true, as defendants contend, that the Second Circuit’s forthcoming decision on plaintiffs’ appeal might not shed much light

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<sup>4</sup> In determining whether to grant a stay, courts generally consider: (1) the plaintiffs’ interest in proceeding expeditiously balanced against the prejudice of a delay; (2) the interests of and any burden on the defendants; (3) the interest of the courts; (4) the interests of non-parties; and (5) the public interest. *Loftus v. Signpost Inc.*, 464 F. Supp. 3d 532, 526 (S.D.N.Y. 2020).

on the law applicable to plaintiffs' underlying constitutional claims. But the Second Circuit's prior panel opinion certainly did. *We The Patriots USA, Inc.*, 17 F.4th 266. Thus, it remains likely that "a higher court is close to settling an important issue of law bearing on the action." *Off-White LLC*, 2023 WL 199483, at \*1 (cleaned up).

Defendants' motion to dismiss will also be denied without prejudice. No matter the result on appeal, out of an abundance of caution the Court would have wanted supplemental briefing from the parties to help it confirm whether or not the latest Second Circuit opinion added anything to the plausibility analysis that takes place on a motion to dismiss. In other words, a second round of briefing would have been appropriate even if, as defendant argues will happen, the Circuit rejects plaintiffs' arguments outright.

This approach means that discovery into plaintiffs' claims continues to be delayed. Dkt. No. 61. This delay will prejudice plaintiffs. However, sending the parties to discovery on one or more claims that might fail to pass muster under 12(b)(6) would also be burdensome to defendants, who are all public officials. Although the parties' interests might be closely balanced against

each other, the Court, the public, and non-parties all have a fairly strong interest in proceeding cautiously with this litigation.<sup>5</sup>

Therefore, it is

ORDERED that

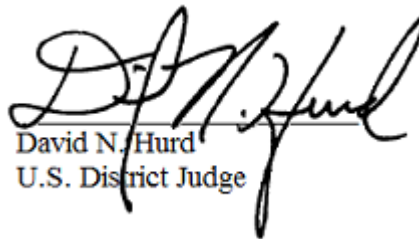
1. The Clerk of the Court is directed to SUBSTITUTE defendant “James V. McDonald, Acting Commissioner of the New York State Department of Health, in his official capacity” in place of named defendant “Mary T. Bassett, Commissioner of the New York State Department of Health, in her official capacity”;

2. Defendants’ motion to dismiss (Dkt. No. 59) is DENIED without prejudice to renew; and

3. This matter is STAYED pending the outcome of plaintiffs’ appeal.

IT IS SO ORDERED.

Dated: February 9, 2023  
Utica, New York.



David N. Hurd  
U.S. District Judge

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<sup>5</sup> The Court notes that enforcement of § 2.61 appears to have been enjoined by Supreme Court, Onondaga County, on unrelated state law grounds. *Medical Professionals for Informed Consent v. Bassett*, Index No. 008575/2022, NYSCEF Doc. No. 87 (Jan. 13, 2023). Defendants have sought a stay of the trial court’s Order, which is being briefed at the Fourth Department. CA 23-00161.