STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL
LITIGATION BUREAU

Writer's Direct Dial: (212) 416-8661

October 11, 2023

By ECF
The Honorable Judge William F. Kuntz, II
Eastern District of New York
United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Re: We the Patriots USA, Inc., et al. v. Hochul, et al.; E.D.N.Y., 21-cv-4954 (WFK)

Dear Judge Kuntz:

This Office represents Defendants, Governor Kathy Hochul and New York State Department of Health ("DOH") Commissioner Howard Zucker, M.D., J.D.,[1] in this action wherein Plaintiffs challenge a DOH regulation, 10 NYCRR § 2.61 ("Section 2.61"), which required healthcare workers to be vaccinated against COVID-19. Defendants' motion to dismiss the Complaint for failure to state a claim was filed on March 16, 2022 and is *sub judice*. ECF No. 28. Defendants write to inform the Court that DOH repealed Section 2.61 on October 4, 2023, and it is no longer in effect. Thus, in addition to the grounds for dismissal set forth in Defendants' motion, this action should also be dismissed as moot.

On May 1, 2023, the federal Centers for Medicare and Medicaid Services announced that it would end its requirement that Medicare and Medicaid providers ensure their staff members are fully vaccinated against COVID-19.[2] Ten days later, the federal COVID-19 public health emergency expired.[3] Given the changing trajectory of COVID-19 and changing federal guidance regarding COVID-19 vaccination, DOH reevaluated Section 2.61 and recommended its repeal by the Public Health and Health Planning Council ("Council"), a body within DOH made up of public health officials, medical experts, and others. On September 7, 2023, the Council voted to enact the proposed repeal, and it went into effect on October 4, 2023, upon publication of a notice of adoption in the *New York State Register* (attached as Exhibit A).

The repeal of Section 2.61 moots this action, which is limited to seeking a declaratory judgment and permanent injunction prohibiting DOH from enforcing the vaccine requirement.

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[1] James V. McDonald became DOH Commissioner on June 10, 2023, and should be substituted as a defendant for former Commissioner Zucker pursuant to Federal Rule of Civil Procedure 25(d).
[2]Memorandum from Dirs., Quality, Safety & Oversight Grp. & Survey & Operations Grp., to State Survey Agency Dirs. 2 (May 1, 2023). https://www.cms.gov/files/document/qso-23-13-all.pdf
[3]Medicare and Medicaid Programs; Policy and Regulatory Changes to the Omnibus COVID-19 Health Care Staff Vaccination Requirements, 88 Fed. Reg. 36,485 (June 5, 2023).

"A case becomes moot . . . when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (cleaned up). And a challenge like the one here—asserting constitutional claims against state officials under the *Ex Parte Young* exception to New York's Eleventh Amendment sovereign immunity—plainly becomes moot when state officials can no longer enforce a challenged law because the remedy for such claims is "*prospective* relief that would address an *ongoing* violation of federal law." *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 392 (2d Cir. 2022) (emphasis added).

Defendants here cannot engage in any alleged ongoing violation of federal law because Section 2.61 has been repealed. Prospective injunctive relief cannot be awarded for the same reason: the Rule is no longer being enforced prospectively. Plaintiffs' request for declaratory relief is likewise barred. As the Supreme Court held in *Green v. Mansour*, a federal court cannot declare that a state official's past conduct violated federal law except as part of a grant of prospective relief—relief Plaintiffs cannot obtain here. 474 U.S. 64, 70-73 (1985); *Exxon*, 28 F.4th at 394-95 (declaratory judgment on legality of terminated law enforcement investigation would be improperly retrospective).

Moreover, the Second Circuit has repeatedly found challenges to COVID-19 restrictions to be moot when the legal underpinnings for those restrictions were repealed. *See 36 Apartment Assocs., LLC v. Cuomo*, 860 F. App'x 215, 216-17 (2d Cir. 2021) (challenge to eviction moratorium mooted by expiration of executive order and enactment of related legislation); *see also Dark Storm Indus. LLC v. Hochul*, 2021 WL 4538640, at *1 (2d Cir. Oct. 5, 2021); *Nat'l Rifle Ass'n of Am. v. Hochul*, 2021 WL 5313713, at *1 (2d Cir. Nov. 16, 2021). As in those cases, Plaintiffs' challenge here became moot when the legal basis for the healthcare worker vaccine mandate terminated upon Section 2.61's repeal.

Nor would any exception to the mootness doctrine apply, including the voluntary cessation exception. Repeal of a challenged provision of law "that obviates the plaintiff's claims will be held to moot a litigation, absent evidence that the defendant intends to reinstate the challenged statute after the litigation is dismissed." *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 91 (2d Cir. 2005) (quotation marks omitted). No such evidence exists here. The DOH undertook repeal of Section 2.61 in light of the changed circumstances surrounding COVID-19 and changing federal guidance regarding vaccination requirements. The repeal is plainly unrelated to this litigation—brought more than two years ago—or to other actions asserting similar challenges.

Further, this is not a case that would be capable of repetition and likely to evade review. To fall within this narrow exception, the challenged action must be "too short [in duration] to be fully litigated before its cessation," and the complaining party must have a "reasonable expectation that it will be subject to the same challenged action again." *Exxon*, 28 F.4th at 395 (quotation marks omitted). First, this Court and another District Court were able to rule on plaintiffs' preliminary injunction motions within two months after Section 2.61 was promulgated, *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 278 (2d Cir. 2021), and the rule stayed in effect for two more years. Secondly, any professed concern that DOH might reinstate Section 2.61 after its repeal would be nothing other than conjecture. Courts in this Circuit have consistently found that "the threat of COVID-19 measures being reimposed is merely speculative." *Doe v. Franklin Square Union Free Sch. Dist.*, 2023 WL 2632512, at *2 (E.D.N.Y. Mar. 24, 2023) (collecting cases). Additionally,

Section 2.61 was implemented and repealed by statutory rulemaking processes. Plaintiffs are thus not under "constant threat," *Roman Catholic Diocese*, 141 S. Ct. at 68, that the requirement will suddenly spring back into effect. Rather, future vaccination requirements, if any, will be subject to new rulemaking processes and based on different factual circumstances and administrative records.

In summary, the repeal of Section 2.61 has mooted this action. This should provide further basis for its dismissal along with the grounds set forth in Defendants' pending motion to dismiss. Thank you for Your Honor's time and attention to this matter.

Respectfully submitted,

_____/S/_____
Todd A. Spiegelman
Assistant Attorney General

cc: Plaintiffs' counsel (via ECF)

October 4, 2023
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DEPARTMENT OF STATE
Division of Administrative Rules

NEW YORK STATE REGISTER

INSIDE THIS ISSUE:

- Regulations Governing Recreational Fishing for Striped Bass
- Minimum Provisions for Automobile Liability Insurance Policies
- Appointment of Employees and Leave of Absence for Employees in the Professional Service

Notice of Availability of State and Federal Funds
Court Notices

State agencies must specify in each notice which proposes a rule the last date on which they will accept public comment. Agencies must always accept public comment: for a minimum of 60 days following publication in the *Register* of a Notice of Proposed Rule Making, or a Notice of Emergency Adoption and Proposed Rule Making; and for 45 days after publication of a Notice of Revised Rule Making, or a Notice of Emergency Adoption and Revised Rule Making in the *Register*. When a public hearing is required by statute, the hearing cannot be held until 60 days after publication of the notice, and comments must be accepted for at least 5 days after the last required hearing. When the public comment period ends on a Saturday, Sunday or legal holiday, agencies must accept comment through the close of business on the next succeeding workday.

For notices published in this issue:
– the 60-day period expires on December 3, 2023
– the 45-day period expires on November 18, 2023
– the 30-day period expires on November 3, 2023

them to use their own staff and resources as dictated by NYSDOH, impacting other unrelated local health department activities and budgets. In addition, the commenter stated that there could be union and other labor issues as this seemingly allows for a secondment of staff.

RESPONSE: The Department understands the concerns of the commenter; however, pursuant to Public Health Law (PHL) § 206, the Commissioner of Health and the Department have the power and duty to investigate the causes of disease, epidemics, the sources of mortality, and the effect of localities, employments, and other conditions, upon the public health. While local health departments are authorized and have the power to investigate outbreaks within their respective jurisdictions, it is important that the Commissioner of Health has the power to elect to lead investigation in the interest of public health at large. No changes to the proposed regulation were made as a result of these comments.

COMMENT: One commenter recommended to amend 10 NYCRR § 2.12, which is cross-referenced in the proposed regulations in Section 2.6(b). Section 2.12 creates a duty for the head of a private household or the person in charge of any institution or school (among others) to immediately report the name and address of persons with a disease to the local health department "when no physician is in attendance." The commentor strongly recommended that this provision be modified to require such reporting only if directed by NYSDOH or the local health department. This provision has been in place for many years and the commenter does not believe it is complied with, nor reasonable or practicable to do so. They recommended modifying this provision to afford discretion for local health departments to require employer or school reporting of a reportable disease, as appropriate and necessary under the circumstances, but not create a blanket obligation that is not reasonable or practicable under all circumstances.

RESPONSE: Section 2.12 of Title 10 of the NYCRR is outside the scope of the proposed rulemaking; however, the Department understands the commenter's concerns and will consider making the recommended amendments in future rulemaking.

COMMENT: One commenter suggested amending Section 2.6(d)(1) by adding a new subparagraph (v) to allow the State Commissioner of Health to elect to lead investigation and response activities where: "A local health authority requests that the State Health Commissioner lead the investigation due to jurisdictional concerns, lack of regulatory/oversight authority, or absent the resources necessary to conduct or continue an investigation." The commenter stated that the proposed regulation fails to provide a regulatory pathway for a local health department to request the Health Commissioner lead the investigation. In these events, local health departments respond to the best of their ability, but resource and staffing barriers may impede this process and State assistance or takeover as lead in those situations may be warranted.

RESPONSE: Where a local health department declares a state of emergency due to a communicable disease outbreak, there is an avenue to request aid from the Governor, and in alignment with the Governor, the Health Commissioner. Pursuant to Executive Law § 24(7), in cases where the chief executive of the county where the local state of emergency is declared determines that the disaster is beyond the capacity of the local government to meet adequately and State assistance is necessary to amplify local efforts to save lives and protect property, public health and safety, or to avert or less the threat of a disaster, the chief executive may request the Governor to provide assistance. No changes to the proposed regulation were made as a result of these comments.

NOTICE OF ADOPTION

Removal of the COVID-19 Vaccine Requirement for Personnel in Covered Entities

I.D. No. HLT-26-23-00001-A

Filing No. 797

Filing Date: 2023-09-18

Effective Date: 2023-10-04

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Repeal of section 2.61; amendment of sections 405.3, 415.19, 751.6, 763.13, 766.11, 794.3 and 1001.11 of Title 10 NYCRR; amendment of sections 487.9, 488.9 and 490.9 of Title 18 NYCRR.

Statutory authority: Public Health Law, sections 225, 2800, 2803, 3612, 4010; Social Services Law, sections 461 and 461-e

Subject: Removal of the COVID-19 Vaccine Requirement for Personnel in Covered Entities.

Purpose: To remove the COVID-19 Vaccine Requirement for Personnel in Covered Entities.

Text or summary was published in the June 28, 2023 issue of the Register, I.D. No. HLT-26-23-00001-P.

Final rule as compared with last published rule: No changes.

Text of rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of Program Counsel, Reg. Affairs Unit, Room 2438, ESP Tower Building, Albany, NY 12237, (518) 473-7488, email: regsqna@health.ny.gov

Initial Review of Rule

As a rule that does not require a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2028, which is no later than the 5th year after the year in which this rule is being adopted.

Assessment of Public Comment

The New York State Department of Health (Department) received one comment regarding the proposed repeal of the COVID-19 vaccination requirement for personnel in covered entities. This comment and the Department's response are summarized below.

Comment: The New York City Department of Health and Mental Hygiene urged the Department not to repeal the COVID-19 vaccination requirement for personnel in covered health care facilities and to instead amend the regulation to require personnel in covered entities to be "up to date with their COVID-19 vaccination and wear a mask if they are not, during such times as the State Commissioner of Health determines COVID-19 to be prevalent." The New York City Department of Health and Mental Hygiene stated that such an amendment would reduce the risk of COVID-19 transmission to patients, many of whom may be at increased risk for severe COVID-19 outcomes; help protect health care infrastructure; and align COVID-19 health care setting vaccination requirements with those for influenza.

Response: The Department carefully considered amending the regulation to require personnel to be "up to date" on COVID-19 vaccinations, rather than "fully vaccinated." However, this change was not made because of the likelihood of continued changes to federal COVID-19 vaccine recommendations and the uncertainty of such recommendations in the future. The Department also considered allowing personnel to wear a well-fitting face covering in lieu of being vaccinated against COVID-19. However, this option was ultimately not chosen because of unknowns surrounding future trends in COVID-19 case rates and because of the likely continuing evolution of federal vaccine recommendations. Unlike influenza, COVID-19 has not completely established a seasonality and requiring health care facilities to track both influenza and COVID-19 vaccination status and/or mask wearing for all personnel would create significant logistical challenges for healthcare facilities. By repealing the regulation, health care facilities will be able to determine on their own whether to implement a COVID-19 vaccination requirement or a face-covering requirement. The Department is continually monitoring the spread and mutations of COVID-19 and will keep these comments in mind should future rulemaking on the matter be necessary. No changes to the proposed regulation have been made as a result of these comments.

NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Health publishes a new notice of proposed rule making in the NYS *Register.*

Hospital and Nursing Home Personal Protective Equipment (PPE) Requirements

I.D. No.	Proposed	Expiration Date
HLT-23-22-00001-P	May 19, 2022	September 6, 2023

Department of Labor

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Minimum Wage Increases for 2024-2026

I.D. No. LAB-40-23-00036-P

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following proposed rule:

Proposed Action: Amendment of Parts 141, 142, 143, 146 and 190 of Title 12 NYCRR.

Statutory authority: Labor Law, sections 21(11), 652 and 673