21-2179

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WE THE PATRIOTS USA, INC., DIANE BONO, MICHELLE MELENDEZ, MICHELLE SYNAKOWSKI

Plaintiffs-Appellants,

v.

KATHLEEN HOCHUL, HOWARD ZUCKER,

Defendants-Appellees,

On Appeal from the United States District Court for the Eastern District of New York, No. 1:21-cv-04954-WFK

BRIEF OF THE PLAINTIFFS-APPELLANTS

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INTRODUCTION

No emergency – no matter how dire – justifies a departure from the liberties guaranteed by the United States Constitution. The past year and a half has tested the United States' commitment to a republic of constitutional liberty. As the fear of the COVID-19's unknown consequences inspired governments to take unparalleled steps in the name of public health, the Constitution became an afterthought. The Supreme Court, however, put a halt to the United States' headlong dash toward a public health state at the end of 2020, reminding states that the Constitution does not go on a holiday during a public health emergency.

Vestiges of the nation's brush with a public health state still persist. This case concerns one of them – a COVID-19 vaccination mandate for New York healthcare workers that forces them to choose between surrendering fundamental constitutional rights and supporting themselves and their families. Three of the Appellants – Diane Bono, Michelle Melendez, and Michelle Synakowski – now face a terrible choice between abandoning sincerely held religious beliefs or being summarily dismissed from the healthcare jobs that they courageously held throughout the COVID-19 pandemic. By New York's own acknowledgement, they have risked their own lives and health to serve their communities as nurses. Their reward is a state-mandated outlawing from a profession that they dearly love and have dedicated their lives to

simply because of their religious beliefs. Meanwhile, New York freely offers individualized secular exemptions to enable others to keep their livelihoods.

The United States Constitution does not permit clear religious discrimination of the kind that New York has subjected the Appellants to here. Thus, the Appellants ask the Court to issue a preliminary injunction staying enforcement of New York State Health Regulation, Title 10, § 2.61.

JURISDICTION

This is an appeal from the denial of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1) in a civil action pending in the United States District Court for the Eastern District of New York. The District Court had federal question jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The Appellants timely filed their notice of appeal on September 12, 2021. APP.28.

STATEMENT OF THE ISSUES

I. Whether the district court erred in denying the Plaintiffs' application for a preliminary injunction staying enforcement of New York State Health Regulation § 2.61.

STATEMENT OF THE CASE

In this case, three New York nurses – Diane Bono, Michelle Melendez, and Michelle Synakowski – and We The Patriots USA, Inc. ("the Appellants") seek declaratory and injunctive relief against New York Governor Kathleen Hochul and

New York State Department of Health Commissioner Howard Zucker ("the Appellees") for promulgating a regulation that requires healthcare workers in New York to receive a COVID-19 vaccination even if they have a religious objection to it or be barred from working in healthcare. The Appellants sought a temporary restraining order and a preliminary injunction in the United States District Court for the Eastern District of New York. Judge William F. Kuntz, II denied their application for a temporary restraining order and a preliminary injunction in a brief minute entry on the district court's docket. This appeal followed.

I. Background.

On August 16, 2021, then-New York Governor Andrew Cuomo promised New York health care workers that the state's coming COVID-19 vaccine mandate for healthcare workers would allow for "limited exceptions for those with religious or medical reasons." APP.21. Governor Cuomo then resigned as New York governor on August 24, 2021, and Appellee Hochul replaced him. On August 26, 2021, the Appellees promulgated New York State Health Regulation, Title 10, § 2.61 with no public notice and comment period. APP.16-18. A The regulation departed drastically from then-Governor Cuomo's promises by eliminating religious exemptions for healthcare workers when it comes to the Appellees' COVID-19 vaccination mandate. APP.16-18.

§ 2.61 covers "any facility or institution included in the definition of 'hospital' … including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers…." APP.16. It applies to

> all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.

APP.17. The regulation requires "[c]overed entities … [to] continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed…." APP.17.

The only exemption that § 2.61 provides is a "medical exemption." APP.17.

II. Vaccines – Ingredients.

The three major COVID-19 vaccines – Johnson & Johnson (Janssen), Pfizer, and Moderna – use cells artificially developed using fetal cells taken from aborted fetuses in the 1970s and the 1980s in their testing or manufacture. *See COVID-19 Vaccines & Fetal Cells*, Michigan Department of Health & Human Services.[1]

[1] https://www.michigan.gov/documents/coronavirus/COVID-19_Vaccines_and_Fetal_Cells_031921_720415_7.pdf

Johnson & Johnson used an aborted fetal cell line to produce and manufacture its vaccine. *Id*. Pfizer and Moderna did not use an aborted fetal cell line to produce and manufacture their vaccines, but they did use an aborted fetal cell line to confirm its efficacy prior to producing and manufacturing it. *Id*.

III. Northwell Health & Appellants Diane Bono & Michelle Melendez.

Appellant Diane Bono is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. APP.30, ¶ 3. She has worked as a nurse for 39 years. She is a practicing Christian and believes in "the sanctity of life, born and unborn." APP.30, ¶ 5. She believes that abortion is morally evil and that its fruits are as well. APP.30, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. APP.30, ¶ 6. On August 23, 2021, she submitted a request for a religious exemption from New York's COVID-19 vaccination mandate to Northwell Health. APP.32. Northwell Health denied her religious exemption on August 31, 2021 and explained why:

> We have received your request dated August 23, 2021 for an accommodation in the form of a religious exemption from New York State's mandate that requires all health care personnel receive their first dose of the COVID-19 vaccine by September 27, 2021. On August 18, 2021, the New York State Department of Health ("DOH") issued this mandate under Section 16 of the Public Health Law. However, on August 26, 2021 the DOH announced that religious exemptions are not permitted under the State mandate. It is for this reason that we are unable to grant your request for a religious exemption.

APP.32.

It then delivered her an ultimatum: "If you choose to not receive your first shot between now and September 27, 2021, you will be non-compliant with the NYS mandate and your continued employment will be at risk." APP.32.

Bono has elected not to comply with the Appellees' mandate because it would violate her religious beliefs. APP.31. Her choice subjected her to the termination of her employment[2] and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. APP.31, ¶ 9.

Appellee Michelle Melendez is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. APP.34, ¶¶ 2-3. She is a widowed, single mother with a minor child who depends on her income. She is a practicing Catholic and believes in "the sanctity of life, born and unborn." APP.34, ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. APP.34, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. APP.34, ¶ 6. On August 22, 2021, she submitted a request for a religious exemption from New York's COVID-19

[2] Northwell Health terminated Appellant Bono's employment on September 29, 2021 hours before the Court issued its order granting the Appellants' motion for an injunction pending appeal. In her termination meeting, Northwell Health orally told Appellant Bono that New York State Health Regulation, Title 10, § 2.61 compelled her termination.

vaccination mandate to Northwell Health. APP.36. Northwell Health denied her religious exemption on August 31, 2021 and explained why:

> We have received your request dated August 22, 2021 for an accommodation in the form of a religious exemption from New York State's mandate that requires all health care personnel receive their first dose of the COVID-19 vaccine by September 27, 2021. On August 18, 2021, the New York State Department of Health ("DOH") issued this mandate under Section 16 of the Public Health Law. However, on August 26, 2021 the DOH announced that religious exemptions are not permitted under the State mandate. It is for this reason that we are unable to grant your request for a religious exemption.

APP.36.

Northwell Health, however, did not issue the same direct ultimatum to Melendez as it did to Diane Bono. Melendez, however, believes that, like Bono, she will be terminated on or after September 27, 2021 if she refuses to get a COVID-19 vaccine. APP.35, ¶ 8.

Melendez has elected not to comply with the Appellees' mandate because it would violate her religious beliefs. APP.35, ¶ 9. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. APP.35, ¶ 9.

IV. Appellant Michelle Synakowski.

Michelle Synakowski is a registered nurse employed at St. Joseph's Hospital in New York. APP.38, ¶¶ 2-3. She is a practicing Catholic and believes in "the

sanctity of life, born and unborn." APP.38, ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. APP.38, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. APP.38, ¶ 6. She will not comply with New York's vaccination mandate, and her employer has informed her that it will terminate her employment on September 21, 2021 if she does not receive the vaccine because it must do so under New York State Health Regulation, Title 10, § 2.61. APP.38, ¶¶ 7-8. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. APP.38, ¶ 9.

V. Procedural History

The Appellants filed this action in the U.S. District Court for the Eastern District of New York on September 2, 2021. APP.7. On September 12, they filed an emergency motion for a temporary restraining order and for a preliminary injunction. APP.12. The District Court denied both requests that same day. App.116. The Appellants filed a notice of appeal on September 12, 2021. APP.2. On September 13, 2021, the Appellants moved the District Court for an injunction staying enforcement of § 2.61 pending appeal of its denial of their requests for a temporary restraining order and a preliminary injunction. APP.2-3. The District Court denied the motion that same day. APP.3.

The Appellants then sought an emergency injunction pending appeal from this Court on September 13, 2021. The Court granted their motion on September 29, 2021.

SUMMARY OF THE ARGUMENT

There is no public health exception to the fundamental constitutional rights guaranteed by the United States Constitution. For more than a century, however, states have relied on *Jacobson v. Massachusetts* and its progeny as a "plenary override" to fundamental constitutional rights in their efforts to justify public health regulations without satisfying traditional constitutional scrutiny. Even though the Supreme Court explicitly rejected the "plenary override" doctrine in *Roe v. Wade* and *Planned Parenthood v. Casey*, states still relied on it to justify otherwise unconstitutional regulations in public health emergencies, and courts paid undue homage to *Jacobson* and its progeny's role in modern constitutional jurisprudence.

Over the past year, the Supreme Court has reaffirmed its *Roe* and *Casey* rejections of the "plenary override" doctrine in *Roman Catholic Diocese v. Cuomo* and *Tandon v. Newsom*. These First Amendment Free Exercise Clause cases clearly establish that, even during a public health emergency, a state must satisfy strict scrutiny to burden a fundamental constitutional right – be it enumerated or unenumerated.

New York maintains a blind reliance on *Jacobson*'s "plenary override" doctrine even though its former governor was a party to *Cuomo*. Thus, after promising New York healthcare workers that they could claim religious exemptions to the state's forthcoming COVID-19 vaccination mandate, it abruptly switched course and eliminated religious exemptions without warning through the promulgation of New York State Health Regulation, Title 10, § 2.61.

§ 2.61 unconstitutionally burdens the First Amendment's guarantee of the free exercise of religion. Appellee Hochul's public statements show that its elimination of religious exemptions carries special hostility toward certain religious beliefs, thus violating *Masterpiece Cakeshop v. Colorado Civil Rights Commission*. Its creation of a system of individualized exemptions that categorically bars religious exemptions while allowing comparable secular ones triggers *Cuomo*'s requirement of strict scrutiny for laws that are not generally applicable. § 2.61 then fails strict scrutiny because the Appellees have ignored the myriad of options that they have to more narrowly tailor their vaccination mandate – options that have worked for a year and a half during the COVID-19 pandemic.

§ 2.61 also unconstitutionally burdens the Fourteenth Amendment's guarantees of privacy, medical freedom, and bodily autonomy as established by the Supreme Court in *Roe*, *Casey*, and *Cruzan v. Director, Missouri Department of Health*. Because these rights are fundamental unenumerated constitutional rights,

Roe, *Casey*, and *Cuomo* require the application of strict scrutiny, which § 2.61 fails on the narrow tailoring prong for the same reasons as it does in the Appellants' free exercise claim.

The Appellees' clear violation of the Appellants' constitutional rights have caused them irreparable injury by already effectuating the termination of one of the Appellants' employment and placing the others' livelihoods in danger. If the Court intervenes to issue a preliminary injunction staying enforcement of § 2.61 pending full litigation on the merits, the Appellees will suffer no harm as the New York healthcare system has operated for the last year without interruption or catastrophe under the very precautions that the Appellants ask for. Thus, the Appellants request that the Court issue a preliminary injunction staying enforcement of § 2.61.

ARGUMENT

This appeal presents a single issue for the Court's consideration: whether the district court erred in denying the Appellants' application for a preliminary injunction staying enforcement of New York State Health Regulation, Title 10 § 2.61. The Appellants submit that the district court did err in denying their application for a preliminary injunction because § 2.61 cannot survive scrutiny under the Supreme Court's First Amendment and Fourteenth Amendment precedents.

The Appellants easily satisfy the traditional standard of review for determining whether to grant or deny a preliminary injunction by showing (1) a

likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, (3) the balance of hardships tips in their favor, and (4) the issuance of an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Benihana, Inc. v. Benihana of Toyko, LLC*, 784 F.3d 887, 895 (2d Cir. 2015).

I. Standard Of Review.

Both precedent from the Supreme Court and this Court have long established that the appropriate standard of review for the denial of an application for a preliminary injunction is the abuse of discretion standard. *See Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004); *Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 176 (2d Cir. 2020).

II. The Appellants Show A Likelihood Of Success On The Merits Of Their Claims.

For more than six decades, this Court has held that the Appellants may satisfy the "likelihood of success on the merits" factor if they show "either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation…." *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010). The Appellants make a showing sufficient to warrant a preliminary injunction under either test on both of their claims.

First, the Appellants show a strong likelihood of success on their First Amendment claim for three reasons: (1) the Supreme Court has expressly overruled *Jacobson v. Massachusetts* and its progeny as well as this Court's decision in *Philips v. New York*, (2) New York State Health Regulation, Title 10, § 2.61 cannot survive strict scrutiny because it targets certain religious beliefs with special disabilities in violation of the First Amendment, and (3) Supreme Court precedent does not permit the Appellees to justify an individualized exemption process that violates the First Amendment with a comparative, collective impact analysis.

Second, the Appellants demonstrate a strong likelihood of success on their Fourteenth Amendment claim because (1) the Supreme Court has expressly overruled *Jacobson v. Massachusetts* and its progeny and (2) New York State Health Regulation, Title 10, § 2.61 unduly burdens their fundamental constitutional right to refuse state-mandated medical treatment.

A. The Appellants demonstrate a strong likelihood of success on their First Amendment claims.

1. The Supreme Court has expressly overruled *Jacobson v. Massachusetts* and its progeny as well as this Court's decision in *Philips v. City of New York*. In the alternative, the Supreme Court has implicitly overruled *Jacobson v. Massachusetts* and its progeny.

Over the past year and a half, the Supreme Court has drastically reshaped the constitutional limitations on state police power when it comes to public health. Its decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020) now

operates as binding precedent and clearly establishes that states' public health regulations meet the same constitutional requirements as any other exercise of the police power, eliminating the "safe harbor" that its prior precedents established.

Before its decision in *Cuomo*, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and its progeny controlled a state's exercise of its police power in a public health emergency. As recently as May 2020, the Supreme Court denied an application for injunctive relief against a California executive order that limited attendance at churches. *See South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613(Mem) (2020). Even though the Court did not formally explain its denial, Chief Justice Roberts penned a brief concurrence explaining that the Court's precedent in *Jacobson* required the Court to defer to policymakers even when First Amendment claims were at stake during a public health emergency. *Id*. at 1613 (Roberts, C.J., concurring).

This Court reached a similar decision in *Philips v. City of New York*, 775 F.3d 538 (2d Cir. 2015). Even though it acknowledged that *Jacobson* did "not specifically control" the First Amendment free exercise claim,[3] it held that one of *Jacobson*'s progeny – *Prince v. Massachusetts*, 321 U.S. 158 (1944) – offered controlling dicta that parents did not have the "liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Philips*, 775 F.3d at 543

[3] *See Philips*, 775 F.3d at 543.

(quoting *Prince*, 321 U.S. at 166-67) (internal quotation marks omitted). Thus, the Court found that *Jacobson* and *Prince* established that mandatory vaccination did not violate the First Amendment. *Id*. at 543.

These precedents established a "safe harbor" for state public health regulations. To successfully dock in the "safe harbor," state governments would assert that a public health emergency compelled stringent regulations, which they often supported by data rehearsing death tolls and hospitalizations. *See, e.g.*, *Agudath Israel of America v. Cuomo*, 980 F.3d 222, 224 (2d Cir. 2020).

These precedents lost their controlling weight in *Cuomo*. There, the Supreme Court considered an executive order imposed by then-New York governor Andrew Cuomo that allowed health officials in New York to establish red zones to contain outbreaks of COVID-19.[4] *Cuomo*, 141 S.Ct. at 65-66. Governor Cuomo's order limited religious assemblies at churches and synagogues to fewer than ten people while allowing "essential" businesses to admit as many people as they wished. *Id*. at 66. The Supreme Court applied its well-established First Amendment precedents on "neutrality" and "general applicability" and concluded that Governor Cuomo's executive order violated the First Amendment because it singled religious establishments out for far harsher treatment than secular establishments, thus

[4] *See Agudath Israel of America v. Cuomo*, 980 F.3d 222, 224-25 (2d Cir. 2020) (containing a slightly more detailed description of the executive order considered by the Supreme Court).

requiring the application of the Court's strict scrutiny test which compelled the conclusion that the restrictions were unconstitutional. *Id*. at 67. The *Cuomo* order did not mention *Jacobson v. Massachusetts* or its progeny.

Justice Gorsuch, however, reprised Chief Justice Roberts' *South Bay* concurrence by offering more insight into how the Supreme Court treated *Jacobson* via a concurrence. Justice Gorsuch explained that *Jacobson* predated modern tiers of scrutiny, but did not "depart from normal legal rules during a pandemic…." *Id*. at 70 (Gorsuch, J. concurring). He also pointed out that Henning Jacobson did not raise a First Amendment challenge or even a challenge claiming a fundamental unenumerated right. *Id*. at 70-71 (Gorsuch, J. concurring). Thus, like Chief Justice Roberts' *South Bay* concurrence, Justice Gorsuch's *Cuomo* concurrence offered critical insight into how the Supreme Court treated *Jacobson* and its progeny in *Cuomo*.

The Supreme Court then converted its *Cuomo* order into binding precedent instead of a summary ruling by granting a writ of certiorari before judgment in *Harvest Rock Church, Inc. v. Newsom*, 141 S.Ct. 889(Mem) (2020) and adopting *Cuomo* as its opinion. This conversion firmly establishes that *Cuomo* supersedes *Jacobson*, its progeny, and this Court's *Philips* decision in cases presenting

challenges to public health regulations.[5] Thus, the Court should reject any attempts by the Appellees to use *Jacobson*, its progeny, or the Court's *Philips* decision to escape any meaningful constitutional scrutiny of § 2.61.

In the alternative, if the Court concludes that the Supreme Court's adoption of *Cuomo* in *Harvest Rock* is not express enough to support a finding that *Jacobson*, its progeny, and *Philips* do not control the Appellants' First Amendment claim, the Supreme Court's precedents over the last century provide ample support to reach the same conclusion without a Supreme Court opinion expressly saying so.

The Fourteenth Amendment represented a drastic shift in American constitutional law. Before its ratification, the Supreme Court had clearly established that the Founders did not intend for the Bill of Rights to apply to state governments. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Thus, the states enjoyed a greater measure of sovereignty than they did after the ratification of the Fourteenth Amendment. In the thirty years before the ratification of the Fourteenth Amendment, there were strong political movements – mainly the abolition movement – that sought to subject state sovereignty to the individual rights protections guaranteed by the Bill of Rights. *See* Michael Kent Curtis, *The Bill of Rights As A Limitation On State Authority: A Reply To Professor Berger*, 16 Wake Forest L. Rev. 45 (1980).

[5] At the very least, *Cuomo* replaces *Jacobson* and its progeny in First Amendment cases. The Appellants argue *supra* that it also replaces *Jacobson* and its progeny in Fourteenth Amendment cases asserting fundamental unenumerated rights.

The framers of Fourteenth Amendment were abolitionists, and they intended to achieve the subjugation of state sovereignty to individual rights protections through the Fourteenth Amendment. *Id*.

The main author of the Fourteenth Amendment, Representative John Bingham, elaborated on the Fourteenth Amendment after its ratification, referencing *Barron v. Baltimore* by name:

> Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizensof the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendment to the Constitution of the UnitedStates.

Id. at 85 (quoting Cong. Globe, 42d Cong., 1st Sess. App. 84 (1871)). Furthermore, another author of the Fourteenth Amendment, Senator Jacob Howard, explained that its Privileges or Immunities Clause guaranteed unenumerated rights like the Art. IV, Sec. 2 Privileges and Immunities Clause did. *See* Randy E. Barnett & Evan Bernick, *The Privileges or Immunities Clause Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L.R. 499, 500 (2019). Senator Howard explained that the Fourteenth Amendment was intended to protect unenumerated rights of the kind defined in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 123). *Id*. at 500 (citing Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard)).

The Supreme Court declined to adopt the clear interpretation of the Fourteenth Amendment's Privileges or Immunities Clause as a vehicle for incorporation of the Bill of Rights or the development of unenumerated constitutional rights in *The Slaughter-House Cases*, 83 U.S. 36 (1873). Throughout the late 1800s, the Supreme Court repeatedly rejected arguments aimed at achieving the Fourteenth Amendment's original purpose of incorporating the Bill of Rights against the states. *See, e.g.*, *United States v. Cruikshank*, 92 U.S. 542 (1876). The Supreme Court did not recognize incorporation as a constitutional doctrine until 1925 in *Gitlow v. New York*, 268 U.S. 652 (1925), and it did not recognize unenumerated rights as protected by the Fourteenth Amendment until *Lochner v. New York*, 198 U.S. 45 (1905). Additionally, the Supreme Court did not even discuss modern constitutional scrutiny doctrines until 1938 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), and it did not apply a form of scrutiny other than rational basis review until *Korematsu v. United States*, 323 U.S. 214 (1944).

Thus, when the Supreme Court decided *Jacobson*, it had not given full force and meaning to the precise nature of the Fourteenth Amendment. The controlling jurisprudence at the time meant that the Supreme Court did not examine unenumerated rights or enumerated rights guaranteed by the Fourteenth Amendment because it did not interpret the Fourteenth Amendment as protecting

either form of individual rights. Even more notably, Henning Jacobson did not even attempt to assert claims under the Bill of Rights or some sort of unenumerated rights theory within the Fourteenth Amendment, relying wholly on the argument that the Fourteenth Amendment protected a form of generalized liberty.

The incorporation of the First Amendment's Free Exercise Clause against the states and the Supreme Court's application of its Free Exercise Clause doctrines in *Cuomo* and *Harvest Rock* clearly establish that *Jacobson* and *Prince* do not create a "safe harbor" for state public health regulations to escape First Amendment scrutiny. Instead, traditional First Amendment principles control the method of analysis. As for the First Amendment claim here, traditional First Amendment principles require strict scrutiny. *See Cuomo*, 141 S.Ct. at 66-67; *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (Apr. 9, 2021).

2. New York State Health Regulation, Title 10, § 2.61 cannot survive strict scrutiny because it targets certain religious beliefs with special disabilities in violation of the First Amendment.

New York State Health Regulation, Title 10, § 2.61 violates the First Amendment's Free Exercise Clause in two ways. First, it fails "the minimum requirement of neutrality" to religion required by *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) and the "generally applicable" requirement of *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith,* 494 U.S. 872, 884 (1990).

Second, the Appellees cannot meet their burden to show that § 2.61 satisfies strict scrutiny. *Cuomo*, 141 S.Ct. at 67.

Addressing the "minimum requirement of neutrality" first, the First Amendment's Free Exercise Clause "forbids subtle departures from neutrality and covert suppression of particular beliefs." *Hialeah*, 508 U.S. at 534 (internal citations and quotation marks omitted). In other words, the Free Exercise Clause prohibits masked government hostility toward religion as well as overt hostility. *Id*. at 534. The Supreme Court enumerated a non-exhaustive list of factors relevant to assessing government neutrality in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1731 (2018). These factors included "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." *Id*. at 1731 (internal citations and quotation marks omitted).

While little historical background or legislative or administrative history is publicly available at this point in this case, the specific series of events leading to the enactment of § 2.61 and Appellee Hochul's subsequent public comments raise serious questions on the merits of whether New York acted with hostility toward religious beliefs such as those held by the Appellants.

Before the enactment of § 2.61, New York state authorities led by then-Governor Andrew Cuomo promised healthcare workers that they would be allowed to keep their religious exemptions under any vaccine mandate, saying on August 16, 2021 that "[t]he State Department of Health will issue Section 16 Orders requiring all hospital, LTCF, and nursing homes to develop and implement a policy mandating employee vaccinations, with limited exceptions for those with religious or medical reasons."[6] Governor Cuomo resigned shortly after making that promise, and Appellee Hochul replaced him as New York's governor on August 24, 2021.[7] On August 26, 2021, New York's Public Health and Planning Council issued an emergency regulation mandating COVID-19 vaccinations for healthcare workers while eliminating the religious exemption that then-Governor Cuomo had promised healthcare workers that they would keep.[8]

New York officials remained silent on why the abrupt change occurred under Appellee Hochul's administration. Weeks later, Appellee Hochul offered explanations, including "I'm not aware of a sanctioned religious exemption from any organized religion. In fact, they're encouraging the opposite. They're

[6] https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-vaccination-mandate-healthcare-workers
[7] https://apnews.com/article/cuomo-last-day-governor-660e489dbb90037fd0d44d79efc1e6a8
[8] https://www.natlawreview.com/article/new-york-issues-emergency-regulation-mandating-covid-19-vaccination-health-care

encouraging their members – everybody from the pope on down is encouraging people to get vaccinated"[9] and

> We are not through this pandemic. I wished we were but I prayed a lot to God during this time and you know what - God did answer our prayers. He made the smartest men and women, the scientists, the doctors, the researchers - he made them come up with a vaccine. That is from God to us and we must say, thank you, God. Thank you. And I wear my "vaccinated" necklace all the time to say I'm vaccinated. All of you, yes, I know you're vaccinated, you're the smart ones, but you know there's people out there who aren't listening to God and what God wants. You know who they are.
>
> I need you to be my apostles. I need you to go out and talk about it and say, we owe this to each other. We love each other. Jesus taught us to love one another and how do you show that love but to care about each other enough to say, please get the vaccine because I love you and I want you to live, I want our kids to be safe when they're in schools, I want to be safe when you go to a doctor's office or to a hospital and are treated by somebody, you don't want to get the virus from them. You're already sick or you wouldn't be there.[10]

Appellee Hochul's public comments stand as the only explanation from a New York official as to the policy reasons for the sudden reversal in New York's COVID-19 vaccination mandate policy.[11] Her remarks doom § 2.61 as a constitutional

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[9] https://www.wxxinews.org/post/hochul-says-religious-exemption-not-legitimate-excuse-avoid-covid-19-vaccine. The article's quoted portion differs slightly from the audio version of Hochul's actual remarks. Appellants' counsel quote the audio version of Hochul's actual remarks found in this article.

[10] https://www.governor.ny.gov/news/rush-transcript-governor-hochul-attends-service-christian-cultural-center

[11] During oral argument on September 29, 2021 on the Appellants' motion for an injunction pending appeal in this case, Appellants' counsel and the Court discussed whether Appellee Hochul's comments constituted a violation or an attempted violation of the U.S. District Court for the Northern District of New York's

matter. The Supreme Court has established that what the pope or any other religious leader says is irrelevant when it comes to the religious beliefs that government must respect: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981). Nor are the Appellants required to make their religious beliefs "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id*. at 714. In other words, Appellee Hochul's disagreement with their religious beliefs and her actions in targeting them through § 2.61 is precisely the type of conduct that the First Amendment prohibits.

The only publicly available evidence on why New York's policy on whether healthcare workers could keep their religious exemptions changed is Appellee Hochul's replacement of former Governor Cuomo and her public comments. Those public comments clearly establish the complete lack of neutrality in the enactment of § 2.61, and they merit the issuance of a preliminary injunction.

Turning to the "generally applicable" requirement, "[a] law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*

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temporary restraining order. Appellants' counsel represented to the Court that Appellants would never seek to restrain Appellee Hochul's speech as a private citizen, but maintained that she spoke in her official capacity. The transcript provided by Appellee Hochul's own office shows that she spoke in an official capacity and made official policy promises related to other issues in the same speech.

v. City of Philadelphia, 141 S.Ct. 1868, 1877 (Jun. 17, 2021). "A law also lacks general applicability if it permits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id*. While it is true that all laws are somewhat selective, the Supreme Court has held that specific "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542 (1993). Thus, if § 2.61 treats any comparable secular activity more favorably than religious exercise, the Appellees must satisfy strict scrutiny. *Tandon*, 141 S.Ct. 1296 (citing *Cuomo*, 141 S.Ct. at 67-68).

In the context of the COVID-19 pandemic, *Cuomo* and *Tandon* both establish that "comparability" examines whether secular and religious activities pose the same risks to spreading COVID-19. *Cuomo*, 141 S.Ct. at 67; *Tandon*, 141 S.Ct. at 1296. No question exists that an unvaccinated person poses a risk of contracting and spreading COVID-19. COVID-19 will not walk up to an unvaccinated person, tap them on the shoulder, and ask them why they are not vaccinated before infecting them. It will not ask them why they are not vaccinated before it turns them into pollinators. In other words, unvaccinated individuals who assert a religious exemption pose the same risks that unvaccinated individuals who assert a medical

exemption do. Thus, § 2.61's allowance of the latter, but not the former, fails the general applicability analysis required by *Cuomo*, *Tandon*, and *Fulton*.[12]

§ 2.61 cannot survive strict scrutiny. Under a strict scrutiny analysis, the Appellees must show that § 2.61 is narrowly tailored to further a compelling government interest. *Reed v. Town of Gilbert, Ariz*., 576 U.S. 155, 172 (2015). It fails on both elements.

First, the Appellees likely will claim a compelling interest in preventing the spread of COVID-19 and its variants in the healthcare community. They, however, undermine the compelling nature of their interest by allowing healthcare workers to claim medical exemptions from their COVID-19 vaccination mandate. Once again, COVID-19, and the spread of COVID-19, will not inquire as to a healthcare worker's reasons for being exempt from the Appellees' COVID-19 vaccination requirement. By allowing medical exemptions, the Appellees have failed to state a compelling interest strong enough to infringe on the Appellants' First Amendment rights.

Second, § 2.61 fails the narrow tailoring prong, which requires it to show in this context that "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than

[12] At least one circuit court has concluded that allowing medical exemptions, but not religious exemptions, violates the Free Exercise Clause in a non-emergency context. *See Fraternal order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999).

those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too." *Tandon*, 141 S.Ct. at 1297 (citing *Cuomo*, 141 S.Ct. at 69-70).

The Appellees willingly provide accommodations to healthcare workers claiming medical exemptions, but mandate the termination of healthcare workers claiming religious exemptions and then bar them from working in healthcare until they bow to the COVID-19 vaccination mandate. Even if the Appellees could constitutionally impose stricter requirements on healthcare workers who receive religious exemptions, the Appellees had many ways to limit their risk to public health. The Appellees could have required all exempt healthcare workers to work only with low-risk populations in the healthcare system. It could have required them to submit to regular COVID-19 testing, masking, and other restrictions.

They chose to do none of these things and completely ignored the fact that healthcare workers such as the Appellants delivered quality and safe healthcare throughout the COVID-19 pandemic without being vaccinated. Last year, the Appellees categorically lauded the Appellants as heroes. This year, they are trying to fire them with no consideration of how they can accommodate them. The First Amendment requires narrow tailoring, and the Appellees have not made any good-faith efforts to narrowly tailor § 2.61.

§ 2.61 does not comply with the First Amendment, and it remains hopelessly incompatible with the Supreme Court's precedents in *Cuomo*, *Tandon*, and *Fulton*. Additionally, Appellee Hochul's public comments have established that § 2.61 bears the hallmarks of the special hostility to certain religious beliefs that the Supreme Court expressly forbade in *Masterpiece Cakeshop*. Thus, the Appellants have shown both that they are likely to prevail on the merits and that there are sufficiently serious questions going to the merits as to require a preliminary injunction.

3. Supreme Court precedent does not permit the Appellees to justify an individualized exemption process that violates the First Amendment with a comparative, collective impact analysis. In the alternative, the Appellees must show that religious exemptions eliminates herd immunity.

During oral argument on September 29, 2021 on the Appellants' motion for an injunction pending appeal, the Court noted the "precious few facts" that the parties have presented in this appeal,[13] and it inquired of the Appellees whether the possibility that religious exemptions would far exceed medical exemption should impact this case's outcome. The Appellees argued that this possibility does affect this case's outcome, and they assured the Court that they would provide data to support that argument. Supreme Court precedent, however, forecloses this comparative, collective impact analysis completely. In the alternative, the Appellees

[13] The Court did acknowledge that the speed with which the litigation has occurred has impacted both parties' ability to effectively assemble data for its consideration.

must do more than claim that religious exemptions vastly outnumber medical exemptions. Instead, they must show that the number of religious exemptions eliminates herd immunity.

Supreme Court precedent clearly establishes that systems of individualized exemptions are just that: systems of individualized exemptions. *Cuomo*, 141 S.Ct. at 67; *Tandon*, 141 S.Ct. at 1296. As discussed above, the inquiry into comparability for purposes of "general applicability" examines the risks posed by an individual secular exemption compared to another individual religious exemption, not by comparing the collective impact of religious exemptions to the collective impact of secular exemptions. *Cuomo*, 141 S.Ct. at 67; *Tandon*, 141 S.Ct. at 1296. To compare collective impact is to depart from the Supreme Court's established precedents on "general applicability." Thus, the Court should not accept an invitation to engage in such a departure.

Nor should the Court accept an invitation to engage in the same departure in the "narrow tailoring" prong of the strict scrutiny analysis. Both *Tandon* and *Cuomo* establish that the proper "narrow tailoring" analysis is to look at the nature of the individual activity at issue and determine whether it is more dangerous than a comparable secular activity. *Tandon*, 141 S.Ct. at 1297; *Cuomo*, 141 S.Ct. at 69-70. These precedents do not permit the comparison of the collective impact of religious

and medical exemptions, and the Court should reject any invitation by the Appellees to contort strict scrutiny into something that it is not.

As discussed above, individuals who do not receive a vaccination for religious or medical reasons pose the same risks and undermine the Appellees' interest in the same way. The same reasonable precautions and accommodations have worked for unvaccinated healthcare workers throughout the COVID-19 pandemic. They will continue to work in the hands of capable professionals. The law does not permit the faithful to be singled out because they are more numerous than those suffering from medical conditions.

In the alternative and without conceding their argument that Supreme Court precedents preclude a comparative, collective impact analysis, the Appellants submit that the "narrow tailoring" prong of the strict scrutiny analysis governs any comparison of collective impacts. The "narrow tailoring" prong is the only part of the *Tandon* framework that permits a "dangerousness" analysis and would be remotely consonant with the arguments that the Appellees will likely submit.

Because their arguments would be subject to a strict scrutiny analysis, the Appellees bear the burden of proof to establish a sufficient factual justification for why the collective impact of religious exemptions would be more dangerous than the collective impact of medical exemptions. *Reed*, 576 U.S. at 172. They cannot carry this burden simply by citing statistics that show religious exemptions would

far outnumber medical exemptions because such a simplistic comparison says nothing about the dangerousness of allowing the former.

Instead, the Appellees must carry their burden under the concept that they, the Center for Disease Control and Prevention (CDC), and the World Health Organization (WHO) have bandied about for the last year and half with ambiguity: herd immunity. The WHO defines herd immunity as "the indirect protection from an infectious disease that happens when a population is immune either through vaccination or immunity developed through previous infection."[14]

The WHO's latest prognostication on herd immunity came almost a year ago, and it stated that no studies have effectively established what percentage of a population must become immune to reach herd immunity.[15] It, however, pointed to herd immunity against measles requiring 95% of a population to be vaccinated and polio requiring 80%.[16]

United States officials, including Dr. Anthony Fauci, have attempted to pin down a number for herd immunity, but they have consistently moved the goalpost, increasing that number when it has become politically convenient for them to do

[14] https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19
[15] https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19
[16] https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19

so.[17] When the pandemic first began, Dr. Fauci consistently told the United States that it needed to achieve a 60-70% herd immunity threshold.[18] At the end of 2020, he gradually increased his prognostication until he reached 85%.[19] At the same that he moved these prognostications up, Dr. Fauci practically staked his fortune on the fact that COVID-19 would not require the same herd immunity threshold as measles: "I'd bet my house that Covid isn't as contagious as measles."[20]

The Appellees have made many of their public health decisions during the COVID-19 pandemic based on their collaborations with the CDC. They obviously do not believe that herd immunity for COVID-19 needs to be 100% or they would not allow for medical exemptions in New York's healthcare system. They, however, have not even tried to publicly define where the herd immunity threshold lies before imposing a religiously hostile regulation on the Appellants on the basis that their collective exercise of religion will endanger public health.

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[17] Dr. Fauci acknowledged that he deliberately moved the goalposts for political reasons in comments to the media: "When polls said only about half of all Americans would take a vaccine, I was saying herd immunity would take 70 to 75 percent…. Then, when newer surveys said 60 percent or more would take it, I thought, 'I can nudge this up a bit,' so I went to 80, 85." *See* https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

[18] https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

[19] https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

[20] https://www.nytimes.com/2020/12/24/health/herd-immunity-covid-coronavirus.html

As of this brief's filing, the CDC's data shows that 71.4% of New York's population has received at least one COVID-19 vaccination and that 63.8% have been fully vaccinated.[21] Thus, by Dr. Fauci's early pandemic numbers before he politicized his science, New York has achieved some version of herd immunity.

The numbers become more fatal to the Appellees' case when just healthcare workers are considered. As of September 29, 2021, the Appellees' own data showed that 87% of New York healthcare workers received a COVID-19 vaccine series, meaning that they took more than one vaccination.[22] This number exceeds Dr. Fauci's highest and most political prognostication by 2%. In other words, New York has achieved herd immunity against COVID-19 among healthcare workers, thus obviating the need for it to deny religious exemptions to healthcare workers.

Percentages on religious exemptions versus medical exemptions in the employment context and their relation to herd immunity is hard to find because the Appellees do not require private employers to report such data to them.[23] From what the Appellants can glean from publicly reported data, numbers can vary wildly. For example, in Washington state, about 6% of its public employees requested religious

[21] https://covid19vaccine.health.ny.gov/covid-19-vaccine-tracker
[22] https://covid19vaccine.health.ny.gov/hospital-worker-vaccinations
[23] If they do, the Appellees do not make that data public to the best of the undersigned's knowledge.

exemptions in response to its COVID-19 vaccination mandate.[24] To the contrary, the Los Angeles Police Department saw about 21% of its employees request a religious exemption in response to its COVID-19 vaccination mandate.[25] At a private regional health system in Arkansas, about 5% of its staff requested religious and medical exemptions.[26]

The data that the Appellants can locate plainly indicates a level of herd immunity to COVID-19 among New York's healthcare workers. Even if religious exemptions greatly exceed medical exemptions as reflected in some examples above, New York has not articulated a policy position on herd immunity that is different than Dr. Fauci's. Thus, it cannot carry its burden under strict scrutiny to show that religious exemptions collectively pose a far more dangerous threat to its public health policies than medical exemptions.

[24] https://apnews.com/article/joe-biden-health-religion-los-angeles-arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d
[25] https://apnews.com/article/joe-biden-health-religion-los-angeles-arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d
[26] https://apnews.com/article/joe-biden-health-religion-los-angeles-arkansas-3ba53f2f00e1ab7105d7d128f2b1e65d

B. The Appellants demonstrate a strong likelihood of success on their Fourteenth Amendment claims.

1. The Supreme Court has expressly overruled *Jacobson v. Massachusetts* and its progeny, and it implicitly overruled it in the last 70 years of its substantive due process jurisprudence.

As discussed above, the Supreme Court has expressly overruled *Jacobson* in *Cuomo*. Justice Gorsuch's concurrence makes clear that it overruled *Jacobson* when it comes to scrutinizing regulations infringing on both rights contained in the Bill of Rights and fundamental unenumerated rights. *Cuomo*, 141 S.Ct. at 70-71 (Gorsuch, J. concurring). Even if the *Cuomo* did not expressly overrule *Jacobson* in the fundamental unenumerated rights context, the Supreme Court has done so implicitly over the last 70 years of its substantive due process jurisprudence.

First, in 1973, the Supreme Court held that a woman possesses a fundamental unenumerated constitutional right to privacy in deciding whether to have an abortion. *Roe v. Wade*, 410 U.S. 113, 154 (1973). While the Supreme Court cited *Jacobson* for the proposition that a woman's right to privacy in her decision to obtain an abortion was not unlimited, it abandoned *Jacobson*'s deference to state public health policy decisions and held that Texas's public health policy choice – life begins at conception – could not avoid a strict scrutiny analysis when it came to its regulation of a woman's right to get an abortion.[27] *Id*. at 162. Thus, the Supreme

[27] *See* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, forthcoming in Buffalo L.R., Vol. 70, pp. 59-66 (Sept. 24, 2021) (discussing *Roe*'s

Court discarded *Jacobson*'s deference[28] to state officials' public health decisions in favor of a far more stringent analysis when a fundamental unenumerated constitutional right was at stake.

The Supreme Court further solidified this doctrinal shift in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). The *Casey* Court stated that its "cases since *Roe* accord with *Roe*'s view that a State's interest in the protection life falls short of justifying any plenary override of individual liberty claims." *Casey*, 505 U.S. at 857 (citing *Jacobson*, 197 U.S. at 24-30). *Casey*'s reiteration of *Roe*'s treatment of *Jacobson* even more clearly establishes that *Jacobson* may have never functioned as an escape valve for state public health regulations to avoid ordinary constitutional scrutiny, and, if it ever did, that it no longer did.

Roe's and *Casey*'s reworking of *Jacobson* came full circle in *Lawrence v. Texas*, 539 U.S. 558 (2003). The CDC described HIV/AIDS as a global pandemic in 2006,[29] and it was treated as a global pandemic since the 1980s.[30] According the CDC's statistics in 2018, gay and bisexual men accounted for 69% of new HIV diagnoses.[31] Despite HIV/AIDS being declared a global pandemic and the increased

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inconsistency with *Jacobson*). Professor Blackman's article is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906452

[28] *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905).

[29] https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5531a1.htm

[30] Michael H. Merson, *The HIV-AIDS Pandemic at 25 – The Global Response*, N. Engl. J. Med. (2006). https://www.nejm.org/doi/full/10.1056/nejmp068074

[31] https://www.cdc.gov/hiv/statistics/overview/ataglance.html

risk of the spread of HIV/AIDS among gays and bisexuals, the Supreme Court clearly established that states' police power does not permit them to criminalize homosexual intimacy, which is protected as a fundamental unenumerated right under the Fourteenth Amendment.[32] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Neither *Jacobson* nor its progeny made an appearance in *Lawrence*, and the Supreme Court did not discuss any public health concerns that state officials might have in its opinion at all, let alone with the deference found in *Jacobson* or its progeny.

Thus, *Cuomo, Tandon, Roe, Casey*, and *Lawrence* stand for an unmistakable proposition. *Jacobson* and its progeny do not create a "plenary override" or an escape valve for a public health regulation to escape strict constitutional scrutiny when it burdens a fundamental unenumerated constitutional right.

2. New York State Health Regulation, Title 10, § 2.61 Violates The Appellants' Fourteenth Amendment Rights To Privacy, Medical Freedom, And Bodily Autonomy.

The Supreme Court unequivocally established a fundamental right to privacy in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments in *Roe v. Wade* and prior decisions. *See Roe v. Wade*, 410 U.S. 113, 152-53 (1973). While its precedents only covered matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, the *Roe* Court refrained from

[32] Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

confining it to just those areas. *Id*. at 152-53. The *Roe* Court then elaborated on the medical nature of the decision that a woman must make on whether to elect an abortion:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

Id. at 153.

The Supreme Court then reaffirmed its decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) and described the choice on whether to get an abortion as one of the "most intimate and personal choices that a person may make in a lifetime, choices central to personal dignity and autonomy." *Id*. at 851. Although the *Casey* Court located the right to an abortion under a Fourteenth Amendment liberty theory, it did not cast doubt on *Roe's* formulation of the right as a right to privacy. *Id*. at 852-853.

These decisions establish the decision to terminate a pregnancy is inherently a private medical decision. While the *Roe* Court cited *Jacobson* for the proposition that the fundamental right to privacy did not completely remove conduct from state regulation, it held that states could only regulate the right when its interest became compelling and its regulations must be narrowly tailored. *Roe*, 410 U.S. at 154-56. In other words, *Roe* required state regulations to survive strict scrutiny.

If the right to elect a medical procedure to terminate the life of another being is a fundamental constitutional right, the right to decline a vaccination or other medical treatment is also a fundamental constitutional right with similar roots in the Supreme Court's precedents. *See Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (holding that there is a fundamental constitutional right to refuse medical treatment); *see also Winston v. Lee*, 470 U.S. 753 (1985) (considering a criminal defendant's interest in his own medical decisions when prosecutors sought a court order to force him to undergo surgery to retrieve a bullet for evidence). The only difference between the two is that the former actually terminates the life of another being while the latter only poses a risk of infection to other human beings. Like the right to abortion, the right to decline a vaccination is not an unlimited right, but one that is entitled to be protected by strict scrutiny.

As discussed previously, § 2.61 cannot survive strict scrutiny because there are ways where the Appellees can tailor their "solutions" for preventing the spread

of COVID-19 while respecting the Appellants' rights – i.e., restricting them to working with low-risk patients while testing often and wearing the same personal protective equipment that they did throughout the entire COVID-19 pandemic. Thus, the Appellants are likely to prevail on the merits of this claim.

III. The Appellants Will Suffer Irreparable Harm If The Court Does Not Reverse The Trial Court's Denial Of A Preliminary Injunction.

To show irreparable harm, the Appellants must show that, absent a preliminary injunction, they will "suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Id.* at 118-19. Courts will presume that a movant has established irreparable harm in the absence of injunctive relief when the movant's claim involves the alleged deprivation of a constitutional right. *Am. Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). In particular, the Supreme Court has stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Appellants here are entitled to the presumption of irreparable harm without injunctive relief because they have alleged that they will be wholly deprived

of their constitutional rights to the free exercise of religion, privacy, bodily autonomy, and medical freedom.

The Appellants also show, absent a preliminary injunction, actual harm that is irreparable and caused by § 2.61 because they will be terminated and barred from working as healthcare professionals in New York unless they receive COVID-19 vaccinations in violation of their religious beliefs. No amount of money will repair the damage caused by such terminations and the subsequent bar for the Appellants to reenter the healthcare field in New York during the pendency of this litigation.

IV. The Balance of Hardships Weighs Decidedly In Favor Of The Appellants.

For more than a year and a half, healthcare workers in New York have safely delivered health care to patients during the COVID-19 pandemic. They have not suddenly lost their ability to be professional and deliver safe care to patients. Nor have hospitals lost the ability to make operational decisions regarding on how to maximize the protection of patients while respecting the Appellants' religious beliefs. In other words, a COVID-19 vaccination is no magic antidote.

While the Appellees have mandated that all healthcare workers receive a COVID-19 vaccination, they will not suffer a substantial injury if a portion of New York's healthcare workers go unvaccinated, but follow the Appellees' other health guidelines as they have done throughout the COVID-19 pandemic. The Appellees also have other options to protect their interests while the Appellants pursue their

appeal like requiring unvaccinated healthcare workers to only work with certain low-risk populations. Rather than create a system of reasonable accommodation, they have created a system of unreasonable termination.

The Appellees also argued in their opposition to the Appellants' motion for an injunction pending appeal that § 2.61's mandate is necessary to prevent staffing shortages and overstrained emergency rooms if healthcare workers suddenly experience a COVID-19 outbreak. The Appellees' argument misstates what § 2.61 actually does. By forcing healthcare workers to choose between their jobs and taking a COVID-19 vaccination against their religious beliefs and personal conclusions, the Appellees will actively create a staffing shortage as people with religious exemptions and other objections to taking COVID-19 vaccines will be terminated rather than comply with § 2.61's mandate. In other words, the Appellees have created the very staffing shortage that they claim to be trying to avoid.

Thus, the Appellees cannot claim in good faith that they will suffer a substantial injury. The past year and a half show otherwise.

To the contrary, the Appellants show serious hardships. They have dedicated a substantial portion of their lives to building careers in healthcare. They depend on their careers in healthcare to support their families. Each of them will be terminated under § 2.61 because they will not take a COVID-19 vaccination because of their religious beliefs. APP.30-31, APP.34-35, APP.38-39. Just prior to the underlying

case beginning, Appellants Bono and Melendez each received letters from their employer informing them that § 2.61 required the denial of their requests for a religious exemption from New York's prior COVID-19 religious exemption and their termination on or after September 27, 2021 if they did not receive a COVID-19 vaccination. APP.32-33, APP.36-37. Appellant Synakowski's employer informed her that § 2.61 required them to revoke her religious exemption and terminate her by September 21, 2021 if she did not receive a COVID-19 vaccination. APP.38.

Just before the Court issued a temporary injunction pending appeal on September 30, 2021, Appellant Bono's employer terminated her, citing § 2.61. § 2.61 operates against her even after her dismissal, barring her from obtaining other employment in her career field unless she violates her religious beliefs by receiving the COVID-19 vaccination. APP.31.

In other words, § 2.61 upends decades of work and achievement for the Appellants and destroys their best chance to support their families simply because they will not violate their religious beliefs. Their plight is no abstract hardship. § 2.61 has caused them tremendous hardship, and it will continue to do so unless this Court issues a preliminary injunction. To the contrary, the Appellees will suffer no hardship if the Court issues a preliminary injunction.

V. The Issuance Of A Preliminary Injunction Is In The Public Interest.

The rights to religious freedom, privacy, and medical freedom are enshrined in the U.S. Constitution. The right to be free from religious discrimination is enshrined in Title VII of the Civil Rights Act and New York state law. The repeated efforts that society has made to articulate the public's supreme interest in protecting religious freedom cannot be clearer. The effort that it has made to secure privacy and medical freedom is also clear.

While protecting the public health is undoubtedly an important public interest, it can only go so far. As the Supreme Court specified in *Roman Catholic Diocese of Brooklyn v. Cuomo*, "even in a pandemic, the Constitution cannot be put away and forgotten." 141 S.Ct. 63, 68 (2020). This principle has held especially true in the context of the Supreme Court's First Amendment cases concerning religion where it has required state Appellees to show that "public health would be imperiled" by less restrictive measures. *Id*. at 68.

Here, the Appellants have proposed less restrictive measures. The Appellees cannot rebut them, and a preliminary injunction serves the public interest by allowing for "a serious examination of the need for such a drastic measure" as the one that the Appellees have imposed on New York healthcare workers. *Id*. at 68.

CONCLUSION

As the Supreme Court's precedents clearly establish, there is no "plenary override" to constitutional liberties even in a public health emergency. When a state's public health regulations burden fundamental constitutional rights, they must pass muster under a strict scrutiny analysis. New York State Health Regulation, Title 10, § 2.61 violates multiple fundamental constitutional rights, and it cannot pass muster under strict scrutiny. The Court should reject the Appellees' invitation to create a public health exception or a "plenary override" to the liberties guaranteed by the United States Constitution and should issue a preliminary injunction staying the enforcement of § 2.61 until its constitutionality can be determined after the rigorous examination ensured by adversarial litigation.

Dated: October 4, 2021

Respectfully Submitted,

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I hereby certify that:

1. This brief complies with the type-volume limitation of Local R. 32.1 because it contain 10,305 words, excluding the parts of the brief exempted by Fed. R. App. P. 32, as determined by the word counting feature of Microsoft Word 2016.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32 and the typestyle requirements of Fed. R. App. P. 32 because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font.

Dated: October 4, 2021

/s/ Cameron L. Atkinson /s/
Cameron L. Atkinson

CERTIFICATE OF SERVICE

I hereby certify that, on October 4, 2020, an electronic copy of the foregoing Brief Of The Plaintiffs-Appellants was filed with the Clerk of the Court using the ECF system and thereby served upon all counsel appearing in this case.

/s/ Cameron L. Atkinson /s/
Cameron L. Atkinson