IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Dr. A., NURSE A., DR. C., NURSE D., DR. F., DR. I., THERAPIST I., NURSE J., DR. M., NURSE M., NURSE N., DR. O., DR. P., DR. S., NURSE S. and **PHYSICIAN LIAISON X.**,	)	
Plaintiffs,	)	
v.	)	Case No. 1:21-cv-1009 (DNH) (ML)
KATHY HOCHUL, Governor of the State of New York, in her official capacity; **HOWARD A. ZUCKER**, 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.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS UNDER RULE 12(B)(6)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

Defendants tellingly fail even to mention that the Second Circuit's decision in *We the Patriots* by its own terms precludes their 12(b)(6) motion. The original Verified Complaint obviously stated a cause of action on which this Court granted preliminary injunctive relief, and in vacating that injunction the Second Circuit was at pains to note that "We ***stress*** that ***we do not now decide the ultimate merits of Plaintiffs' legal claims*** or of the State's defenses; rather, we **make *a limited determination with respect to preliminary relief based on the limited factual record*** presently before this Court." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 273–74 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021) (emphasis added).

In particular, the Second Circuit allowed that "further factual development" could lead to success on the merits as to Plaintiffs' claims that Rule 2.61 is neither generally applicable nor neutral even under the Circuit panel's view of the law. *We the Patriots*, 14 F. 4th at 283 & n. 20, 286. The panel further observed that "this case raises difficult, apparently unusual questions as to imminent irreparable harm" and that "The district courts [sic] can consider the issue, should it be necessary to do so, **upon a determination of the permanent injunction request**, presumably upon further factual development and findings." *Id.* at 295.

Moreover, in later "clarifying" its opinion, the Court once again cautioned that "our opinion addressed only the likelihood of success on the merits of Plaintiffs' claims; it did not provide our court's definitive determination of the merits of those claims." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 368, 371 (2d Cir. 2021).

We the Patriots thus plainly contemplates that this case will proceed further: to a permanent injunction hearing or a decision on motions for summary judgment following appropriate discovery. Defendants' motion is thus pointless—all the more so in view of

supervening facts, cited in the Amended Complaint, which show that Rule 2.61 is a patently irrational policy that could not even survive rational basis review. (*See*, discussion, *infra*.)

Even without further factual development, however, this case is ripe for Supreme Court review on the pure questions of law *We the Patriots* presents in the midst of a circuit split on Free Exercise analysis.[1] Therefore, Plaintiffs' pending petition for certiorari, which the Supreme Court has rescheduled six times, could well result in reversal of the novel Free Exercise analysis on which the entire decision in *We the Patriots* rests. As Justice Gorsuch stated in his 14-page dissent from the Court's non-merits denial of a writ of injunction, he hopes that "today's ruling will not be the final chapter in this grim story." *Dr. A. v. Hochul*, 142 S. Ct. 552, 553-59 (2021) (Gorsuch, J., dissenting).

That the High Court has rescheduled this case so many times indicates the final chapter has yet to be written. Thus, it would serve judicial economy to hold any decision on Defendants' motion in abeyance if it is not denied summarily, as it ought to be in light of *We the Patriots*.

STANDARD OF REVIEW AND BACKGROUND

While Defendants' recitation of the basic standard of review for 12(b)(6) motions (Defs.' Br. at 6) is correct as far as it goes—a minimal threshold readily met by the First Amended Verified Complaint—Defendants omit key additional elaborations of the standard:

First, the Court may consider "documents appended to the complaint or incorporated in the complaint by reference, and… matters of which judicial notice may be taken." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir. 1991). The Declaration of R. Scott French, M.D. (ECF 40-1), appended to and cited repeatedly by the First Amended Complaint (ECF 40 at ¶¶ 27,

[1] Petitioners' Reply Brief at 2-9, *Dr. A. v. Hochul*, No. 21-1143 (U.S.), https://www.supremecourt.gov/DocketPDF/21/21-1143/220292/20220405131554437_Dr.%20A%20Reply%20Brief%20FINAL.pdf.

38, 69, 70, 109, 119, 153, 197, 222, 253 and 263), which incorporates in turn numerous exhibits comprising a total of 732 pages, provides key facts that support denial of this motion, as shown below. And the Court may judicially notice that the State of New York has abandoned its attempt to require a vaccine "booster" under Rule 2.61. As discussed below, this development eliminates any functional public health difference between vaccinated and unvaccinated health care workers because "unboosted" personnel—indeed, even the original vaccinees, *see* French Decl., ¶¶ 17-56—now have virtually no protection against contracting or spreading COVID-19 variants ***and are being allowed to work even if symptomatic***. (*See* Amend. Comp., ¶¶ 25-27, 106, 107, 108, 127, 128, 139, 179, 227, 259, 284, 292). This indisputable failure of the COVID vaccines to prevent infection or transmission—the only rationale for Rule 2.61—is another fact this Court can consider respecting the Rule's lack of general applicability and the lack of any compelling state interest or even a rational basis for the Rule. *See* Amend. Comp., ¶¶ 311, 335, 355).

Second, "the motion may be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004)(cleaned up). As shown below, the Second Circuit's avowedly tentative decision, based on a limited record, ***expressly contemplates*** that even under the Court's clearly erroneous Free Exercise standard, now under Supreme Court review (see Point I), Plaintiffs may well be able to prove a set of facts that negates Defendants' claims that Rule 2.61 is neutral and generally applicable, and that Plaintiffs have suffered no irreparable harm.

Third, "the plaintiff is entitled to all reasonable inferences from the facts alleged…" *Id.* Beyond the Amended Complaint proper, the facts alleged include the appended French

Declaration and its exhibits and the aforementioned supervening facts the Court may judicially notice.

ARGUMENT

I. THIS COURT SHOULD HOLD DEFENDANTS' MOTION IN ABEYANCE PENDING THE OUTCOME OF THE PETITION FOR CERTIORARI.

Plaintiffs respectfully request that this Court hold Defendants' Motion to Dismiss in abeyance pending the outcome of the appellate process in two separate appeals. First, Plaintiffs have filed a petition for a writ of certiorari in the U.S. Supreme Court seeking reversal of the Second Circuit's vacatur of this Court's preliminary injunction in *We the Patriots v. Hochul*. *See Dr. A. v. Hochul*, No. 21-2566 (U.S. Feb. 14, 2022).[2] Plaintiffs seek reversal of the Second Circuit's holding that Rule 2.61's express allowance for medical exemptions while intentionally excising religious exemptions complies with the Free Exercise Clause. *Id.* The Petition includes a request for review of the Second Circuit's novel opinion that the total number of secular exemptions versus the total number of potential religious exemptions is somehow relevant in determining whether Rule 2.61 is generally applicable ***as to these Plaintiffs***. *Id.* at 29. If Plaintiffs prevail, Defendants' motion will be moot, and this Court's injunction could be reinstated.

The Supreme Court has "Rescheduled" its official conference on the cert petition six times as of today.[3] This is not surprising given that following the denial of Plaintiffs' emergency request for an extraordinary injunction pending appeal, Justice Gorsuch (joined by Justice Alito) issued a comprehensive dissent that dismantled the Second Circuit's constitutional errors before

[2] https://www.supremecourt.gov/DocketPDF/21/21-1143/214131/20220214190128744_PetitionForAWritOfCertiorari.pdf.
[3] https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1143.html.

expressing "hope" that "today's ruling will not be the final chapter in this grim story." *Dr. A. v. Hochul*, 142 S. Ct. 552, 553-59 (2021) (Gorsuch, J., dissenting). Accordingly, prudence dictates holding Defendants' motion in abeyance until the High Court rules on the Petition.

Second, Plaintiffs are currently appealing this Court's denial of Plaintiffs' Renewed Motion for Preliminary Injunction in *Dr. A v. Hochul*, No. 1:21-cv-1009, 2022 WL 548260 (N.D.N.Y. Feb. 23, 2022). The issues on that appeal are whether the CMS Mandate preempts Rule 2.61 and whether Defendants' unemployment benefits scheme violates the First Amendment. *See* No. 22-650 (2d Cir.). Should Plaintiffs prevail, that outcome would also moot Defendants' motion, and an injunction against Rule 2.61 would be in order. And, as noted, *We the Patriots* makes clear that this case is not a vehicle for dismissal but rather requires a more developed record under the Court's novel "numerosity" standard of comparator analysis. (But Plaintiffs stress that no such development is required on what they contend is the correct view, as their cert petition argues.) Holding this motion in abeyance is thus all the more indicated.

II. THE AMENDED COMPLAINT STATES A FREE EXERCISE CLAIM.

Rule 2.61 is neither neutral nor generally applicable and cannot satisfy either strict *or* rational basis scrutiny under the Free Exercise Clause. In those portions of its opinion that Defendants studiously fail to mention, the Second Circuit thrice stressed the need for further "factual development" to determine Rule 2.61's neutrality and general applicability, or lack thereof. *See We the Patriots USA*, 17 F.4th at 283 n.3, 286, 295. Plaintiffs' Free Exercise challenge should therefore be allowed to proceed, ***as the Second Circuit itself envisions.***

A. Vaccine Mandates are not inherently constitutional.

Defendants argue that "mandatory vaccination laws do not offend 'any right given or secured by the Constitution,'" thereby implying that vaccine mandates—including Rule 2.61—

are per se constitutional. (Defs.' Br. 7 (quoting *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905).) Not so.

While Defendants invoke *Jacobson* for their specious theory, they conspicuously omit *Jacobson*'s own clarification that "no rule prescribed by a state . . . shall contravene the Constitution," and that "even if based on the acknowledged police powers of the state, [it] must always yield in case of a conflict . . . [with] the Constitution." *Jacobson*, 197 U.S. at 26. *See, e.g., Zucht v. King*, 260 U.S. 174, 177 (1922) (rejecting challenge to student vaccine mandate, but finding a "substantial constitutional question" as to *application* of the mandate).

Moreover, numerous federal courts have recently held that the application of various COVID-19 vaccine mandates likely violates the Free Exercise Clause. *See, e.g., U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336 (5th Cir. 2022) (Navy's COVID-19 vaccine mandate as applied to Navy Special Warfare plaintiffs), *partially stayed by Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301 (March 25, 2022); *Air Force Officer v. Austin*, No. 5:22-cv-0009, 2022 WL 468799, at *11 (M.D. Ga. Feb. 15, 2022) (similar); *U.S. Navy Seals 1-26 et al. v. Biden et al.*, No. 4:21-cv-01236, 2022 WL 34443 (N.D. Tex. Jan. 3, 2022) (similar); *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 15 F.4th 728, 735 (6th Cir. 2021) (public university's COVID-19 vaccine mandate for student-athletes); *Thoms v. Maricopa Cnty. Cmty. College Dist.*, No. 2:21-cv-01781, 2021 WL 5162538 (D. Ariz. Nov. 5, 2021) (public medical school's vaccine mandate for medical students); *Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021) (vaccine mandate for city employees), *Magliulo v. Edward Via College of Osteopathic Medicine*, 3:31-cv-2304, 2021 WL 3679227 (W.D. La. Aug. 17, 2021) (medical school's vaccine mandate)

In sum, "even in a pandemic, the Constitution cannot be put away and forgotten," *Brooklyn Diocese v. Cuomo*, 141 S. Ct. 63, 68 (2021), just because there is a vaccine mandate.

B. Rule 2.61 is neither generally applicable nor neutral; and further "factual development" is necessary on these issues per *We the Patriots*.

Defendants wrongly argue that Rule 2.61 is neutral and generally applicable and thereby subject only to rational basis scrutiny—which it fails in any event. (See Point II. B. 4, *infra*.) On the contrary, for reasons similar to those already acknowledged by this Court, *see Dr. A v. Hochul*, No. 1:21-cv-1009, 2021 WL 4734404 (N.D.N.Y., Oct. 12, 2021), Rule 2.61 lacks both neutrality and general applicability and must undergo *strict* scrutiny, which it cannot pass.[4] At the very least, the Second Circuit held that further "factual development" is necessary here—a point Defendants entirely ignore. Their motion should be denied for this reason alone.

1. Rule 2.61 is not generally applicable.

Rule 2.61 is plainly non-generally applicable given its express authorization of innumerable *medical* exceptions while categorically prohibiting religious exemptions. Both categories pose equal risks to Defendants' professed interest in preventing the spread of COVID-19 among healthcare workers (which the vaccines have failed to do anyway). Additionally, Defendants' elimination of a booster-shot requirement—***a supervening fact not before the Second Circuit***—creates a comparable *de facto* exemption for the vaccinated-but-not-boosted, who pose the same ***or even greater*** risk of contracting and spreading the virus. *See* Amend. Comp., ¶¶ 27, 38, 69, 65-77, 109, 119, 153, 197, 222, 253 and 263); French Decl., ¶¶ 17-56. This is why the Second Circuit held that further "factual development" is necessary before Rule 2.61 could finally be deemed generally applicable. Plaintiffs are entitled to prove, and this Court is free to find, that the effect of a greater number of religious than medical exceptions would be "too insignificant to render the exemptions incomparable." *We the Patriots*, 17 F.4th at 286.

[4] Plaintiffs acknowledge that the Second Circuit later rejected some of these arguments on appeal, *see We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021), but reiterate them here to preserve the issues for further appeal.

Here the State would have to show that, ***on a hospital-by-hospital basis***, the number of religious exemptions in a given hospital actually poses a greater risk than the number of medical exemptions ***when the vaccinated themselves are already transmitting the virus***. If the State cannot prove this, then even under *We the Patriots*, Rule 2.61 fails general applicability because it "treat[s] *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (Apr. 9, 2021) (emphasis in original). Further, the question of comparability "must be judged against the asserted government interest that justifies the regulation"—here, supposedly limiting the spread of COVID-19 in healthcare. That assessment must include activities that "*could* . . . present[] similar risks" of "spread[ing] COVID-19." *Id.* (cleaned up)(emphasis added). Rule 2.61's medical exemptions, and the de facto exception for un-boosted healthcare workers spreading the virus, plainly "*could* present similar risks."

As to medical exemptions, it must be remembered that the Rule's stated rationale is "a concerning national trend of increasing circulation of the SARS-CoV-2 Delta variant," and that unvaccinated healthcare personnel "have an unacceptably high risk of both acquiring COVID-19 and transmitting the virus to colleagues and/or vulnerable patients or residents."[5] But as the Amended Complaint alleges, and as facts provable at trial would show, Defendants *accept* that risk for those in need of medical exemption. 10 N.Y.C.R.R. § 2.61(d)(1). As Justice Gorsuch opined: "[A]llowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones." *Dr. A v. Hochul*, 142 S. Ct. 552, 556 (2021) (Gorsuch, J., dissenting).

[5] Rule 2.61, Regulatory Impact Statement, "Needs and Benefits," pp. 10-11 of 25 (emphasis added), https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2021-08-26/docs/revised_proposed_regulation.pdf.

Defendants argue that medical exemptions are not comparable because they further their interest "in promoting the health of . . . healthcare workers," since "requiring individuals to take a vaccine that is harmful to their health [] would exacerbate one of the very risks that [Defendants are] trying to address." (Defs.' Br. 10.) But that argument contradicts Rule 2.61's explicit assertion that *all* unvaccinated healthcare workers have an "*unacceptably high risk*" of both contracting and spreading COVID-19 to colleagues and vulnerable patients.[6] Thus, Defendants have "made a value judgment that secular (i.e., medical) motivations for [being unvaccinated] are important enough to overcome [their] general interest in [protecting healthcare workers and patients from COVID-19], but that religious motivations are not." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999). Such a secular value judgment "must survive heightened scrutiny." *Id.*

The Second Circuit responded to this concededly "reasonable [] proposition" by asserting that "as an epidemiological matter, the number of people seeking exemptions" is a key "factor[] that the State must take into account in assessing the relative risks to the health of healthcare workers and the efficacy of its vaccination strategy in actually preventing the spread of the disease." *We the Patriots*, 17 F.4th at 286, 287. The Second Circuit also noted that "[t]he record before us contains only limited data regarding the prevalence of medical ineligibility and religious objections," *id.* at 287, and that "these differences may, *after factual development*, be shown to be ***too insignificant to render the exemptions incomparable***," *id.* at 286 (emphasis added). Thus it held that based on "the *limited evidence* now before us," *id.*, and "[w]ith a record as *undeveloped* on the issue of comparability as that presented here, we cannot conclude that" Rule 2.61 is "*per se* not generally applicable . . . so as to support a preliminary injunction *at this*

[6] Id.

time," *id.* at 287 (emphasis added).

And indeed here, Plaintiffs can plausibly show that even if the statewide aggregate number of potential religious exemptions far outpaces medical exceptions, the proper comparison must be on a *medical facility by medical facility basis*. Further, concerning the comparability assessment after "factual development," even under *We the Patriots* the evidence may well show that at the medical facilities that employ these Plaintiffs, there is no material difference in the number of medical versus religious exemptions from vaccination. And at any rate, given the waning effectiveness of COVID-19 vaccines, *see* Amend. Comp., ¶¶ 27, 38, 69, 65-77, 109, 119, 153, 197, 222, 253 and 263); French Decl., ¶¶ 17-56, a greater amount of religious than medical exemptees at any given facility will not disproportionately "dilute" workforce immunity given the minimal to non-existent difference between the unvaccinated and vaccinated (especially the unboosted) at this stage of the pandemic.

Beyond medical exemptions, the required factual development must consider the supervening fact that, despite Rule 2.61's requirement that healthcare personnel be "continuously" vaccinated, Amend. Comp., ¶¶ 23-24, Defendants have abandoned the requirement of a booster shot.[7] As the Amended Complaint alleges, (ECF 40, ¶¶ 65-77) the evidence would show that the *non*-boosted vaccine-effectiveness rate against the now-dominant Omicron variant is as low as *0% to 20%*—which "represents no effective protection." (ECF 40-1, French Decl. ¶¶26-27.) And this Court may judicially notice the CDC's admission that

[7] Jamie DeLine, "Booster shot will no longer be mandated for NYS healthcare workers," ABC News-10, March 17, 2022, https://www.news10.com/news/booster-shot-will-no-longer-be-mandated-for-nys-healthcare-workers/.

"*anyone* with Omicron infection, *regardless of vaccination status* or whether or not they have symptoms, can spread the virus to others."[8,9]

Further, "data from Denmark and . . . Ontario indicate that vaccinated people have ***higher*** rates of Omicron infection than unvaccinated people." (ECF 40-1, French Decl., Ex. 14, pp. 142 of 732; *see also* ECF 40, Amend. Comp. at ¶72.) Yet as Plaintiffs aver without contradiction in their Amended Complaint, Governor Hochul allows COVID-infected "fully vaccinated" healthcare workers to work. (ECF 40, Amend. Comp. ¶¶67, 74-75 (noting CDC policy to the same effect; *see also id.* at ¶¶128, 153, 178, 203, 228 (numerous "fully vaccinated" colleagues have nonetheless contracted COVID).

In light of these facts, Plaintiffs can plausibly show that the presence of medical exemptees; the vaccinated but un-boosted; and indeed ***even the boosted*** in healthcare facilities undermines Rule 2.61's policy because as applied it allows comparable activities that "could . . . present[] similar risks" of "spread[ing] COVID-19." *Tandon*, 141 S. Ct. at 1296.

2. Rule 2.61 is not neutral.

Defendants further argue that Rule 2.61 is neutral because it allegedly "contains no reference to religion," has benign COVID-19-prevention purposes, and is not undermined by "certain public comments made by Governor Hochul" evincing religious targeting. (Defs. Br. 9.)

---

[8] CDC, COVID-19, *Omicron Variant: What You Need to Know*, Mar. 29, 2022 (emphasis added),https://www.cdc.gov/coronavirus/2019-ncov/variants/omicron-variant.html#:~:text=The%20Omicron%20variant%20spreads%20more,spread%20the%20virus%20to%20others.

[9] Defendants will doubtless assert in reply that COVID vaccines insure "mild symptoms" and thereby help prevent staffing shortages. But it was Rule 2.61, not religious exemptions thereto, that forced *tens of thousands* of healthcare workers out of the New York healthcare system. Supreme Court Allows Vaccine Mandate for New York Health Care Workers - The New York Times (nytimes.com) Moreover, such a tenuous assertion is a matter to be proved at trial, whereas Plaintiffs aver that COVID vaccines are now *contributing* to the spread of illness and even death from the virus, *see* French Decl. ¶¶ 55-56, and at least are not stopping it. *Id.* ¶¶14-56.

Defendants are wrong on all counts.

A regulation is not a neutral burden on religion if it discriminates against religious practices on its face or in its real operation. *Cent. Rabbinical Cong. of U.S. & Canada v. New York City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 185 (2d Cir. 2014). "[T]he specific series of events leading to the enactment of the official policy in question" is relevant in detecting neutrality. *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 211 (2d Cir. 2012). Other "[f]actors relevant to th[is] assessment . . . include 'the historical background… the legislative or administrative history, [and] ***contemporaneous statements*** made by members of the decisionmaking body.'" *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1722 (2018) (quoting *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993)) (emphasis added).

Defendants entirely ignore that the first iteration of Rule 2.61—via the Health Commissioner's August 18, 2021 Order—provided that covered entities "*shall grant a religious exemption* . . . subject to a reasonable accommodation by the employer" (Amend. Comp. ¶22) (emphasis added), and that Defendants *intentionally* eliminated the religious exemption from the final rule, days later, while maintaining medical exemptions. (*Id.*). Thus, Defendants *singled out* religion for disfavored treatment. *See, e.g., Trinity Lutheran Church v. Comer*, 137 S. Ct. 2021, 2022 (2017) ("singl[ing] out the religious" for disfavored treatment triggers strict scrutiny).

Although the Second Circuit *preliminarily* rejected similar arguments in denying Plaintiffs' first Motion for Preliminary injunction, it acknowledged that ***"[t]his is another area in which factual development can be expected to shed more light*** on the circumstances surrounding the creation of both the [August 18] Order and the [August 26] Rule and validate or

disprove Plaintiffs' allegations." *We the Patriots*, 17 F.4th at 283 n.20. Accordingly, it would be error to dismiss Plaintiffs claim of non-neutrality on the face of the pleading.

On this point, Defendants gloss over Governor Hochul's statements that Defendants "left off [religious exemptions] in our regulation intentionally"; that Plaintiffs "aren't listening to God and what God wants"; and that there is allegedly no "sanctioned religious exemption from any organized religion." (ECF 40, Am. Cmplt. ¶¶37-38; *see also* Governor Hochul Holds Q&A Following COVID-19 Briefing (Sept. 15, 2021).[10]) Although the Second Circuit held that these comments do not undermine Rule 2.61's neutrality, *see We the Patriots*, 17 F.4th at 284, nonetheless Justice Gorsuch (joined by Justice Alito) opined that these comments were "extraordinary" and "practically exude[] suspicion of those who hold unpopular religious beliefs," *Dr. A v. Hochul*, 142 S. Ct. at 555 (Gorsuch, J., dissenting from non-merits denial of injunction pending appeal). Given this "merits preview" of how at least two Justices of the Supreme Court would rule on this issue, *see Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring), and the fact the Supreme Court has "rescheduled" Plaintiffs' certiorari petition six times, it would be inappropriate to dismiss Plaintiffs' lack-of-religious-neutrality claim regarding Hochul's statements before the Supreme Court has decided the Petition.

3. Rule 2.61 cannot satisfy strict scrutiny.

Defendants argue that even if Rule 2.61 is not neutral or generally applicable, it still satisfies strict scrutiny. But Defendants are plainly wrong—and, as already shown, ***the Second Circuit did not hold otherwise*** in vacating this Court's well-bottomed Preliminary Injunction while calling for "factual development" at a final hearing. Rather, the Second Circuit held merely

[10] https://www.governor.ny.gov/news/video-rough-transcript-governor-hochul-holds-qa-following-covid-19-briefing.

that Rule 2.61 satisfies rational basis scrutiny, while leaving to this Court the final say on strict scrutiny. *We the Patriots*, 17 F.4th at 290.

Defendants argue that they have an "unquestionably [] compelling interest" in preventing COVID-19. (Defs.' Br. at 11 (quoting *Brooklyn Diocese*, 141 S. Ct. at 67).) But the Supreme Court has clarified that government cannot "rely on broadly formulated interests" and that the issue "is not whether the [government] has a compelling interest in enforcing its [policy] generally, but whether it has such an interest in *denying an exception*" to that policy. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881-82 (2021) (emphasis added) (cleaned up).

Defendants do not even assert a "properly narrowed" interest, *id.* at 1881, and thus have waived any argument on that key point. Even setting aside Defendants' waiver, their allowance for numerous medical exemptions and their abandonment of the booster requirement, ***even as vaccinated healthcare personnel readily spread the virus***, confirms the lack of any compelling interest in categorically prohibiting these few Plaintiffs from even applying for religious exemptions. A law "cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. 2234; *see also Fulton*, 141 S. Ct. at 1882 ("a system of exceptions . . . undermines the [government's] contention that its . . . policies can brook no departures"). Especially given the manifest ineffectiveness of COVID vaccines in preventing viral spread, Defendants "must do more than assert that certain risk factors are always present in [religious activity], or always absent from other secular activities the government may allow." *Tandon*, 141 S. Ct. at 1296. This they cannot do, as Plaintiffs are entitled to show at a merits hearing.

As to narrow tailoring, Defendants ignore their obligation to "show[] that [the challenged rule] is the *least restrictive means*" of achieving a compelling interest. *Thomas v. Review Bd. of*

Indiana Emp. Security Div., 450 U.S. 707, 718 (1981) (emphasis added). Defendants "must *demonstrate* that alternative measures imposing lesser burdens on religious liberty would fail to achieve [their] interests." *Agudath Israel of America v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (emphasis added). Defendants merely assert that they "considered but rejected alternative approaches" such as testing and masking because these alternatives allegedly "would not adequately achieve [their] goal . . . by preventing COVID-19 transmission in healthcare settings." (Defs.' Br. 11-12.) But as noted, the CDC itself acknowledges that vaccines do not prevent COVID-19 transmission either.[11] And, as this Court previously held—a holding the Second Circuit did not dispute insofar as it applied only rational basis review—Defendants can provide "no adequate explanation" for "why the 'reasonable accommodation' that must be extended to a medically exempt healthcare worker under § 2.61 could not similarly be extended to a healthcare worker with a sincere religious objection." *Dr. A*, 2021 WL 4734404, at *9. "Nor have [D]efendants explained why they chose to depart from similar [] mandates issued in other jurisdictions that include the kind of religious exemption that was originally present in the August 18 Order"—including specific mandates in Illinois and California. *Id.*

Rule 2.61 easily fails the least-restrictive-means test and thus strict scrutiny. Once again, nothing in the Second Circuit's decision precludes that final determination by this Court.[12]

4. Rule 2.61 also fails rational basis scrutiny.

A law fails rational basis review if it lacks "a rational relationship to a legitimate government objective." *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (internal quotations omitted). "[W]hile rational basis review is indulgent and respectful, it is not meant to

[11]CDC, *supra* n. 8.

[12] Defendants also argue that Rule 2.61 satisfies the Equal Protection Clause, but Plaintiffs' Equal Protection claim succeeds for the same reasons as their Free Exercise claim. *See Does 1-6 v. Mills*, 16 F.4th 20, 35 (1st Cir. 2021).

be toothless." *Id.* (internal quotation omitted). In light of the now widely accepted fact that COVID-19 vaccines do not prevent infection or transmission of COVID-19 to others,[13] and the fact Defendants have abandoned the booster requirement while allowing even vaccinated but COVID-infected personnel to perform in-person care (Am. Cmplt., ¶¶ 25-27, 106, 107, 108, 127, 128, 139, 179, 227, 259, 284, 292), Rule 2.61 also easily fails rational basis review.

Rule 2.61's express purpose was to remedy the "unacceptably high risk" that unvaccinated persons in healthcare settings have "of both *acquiring*" and "*transmitting*" COVID-19 to patients and staff.[14] Rule 2.61 even defines covered "personnel" as those who "could potentially *expose* other covered personnel, patients, or residents to the disease." 10 N.Y.C.R.R. § 2.61(a)(2) (emphasis added). But Plaintiffs allege, and can prove, that even boosted vaccinees have virtually no protection against contracting or spreading COVID-19 and its variants. (French Decl. ¶¶ 17-56.) Defendants' categorical permission for even non-boosted vaccinated personnel to continue performing in-person services, while categorically forbidding Plaintiffs from doing the same, is now unquestionably irrational. While COVID-19 vaccination may have once had a rational connection to Defendants' goal of preventing patients and staff from being "exposed" to COVID-19, that connection has since vanished. Rule 2.61's "vaccine mandate" has been reduced to a ceremonial observance ***and may be exacerbating transmission of the virus,*** (French Decl. 40-1, ¶¶ 52-57), and the staffing shortage it was meant to prevent.[15]

---

[13] CDC, *supra* n.6.

[14] Rule 2.61, Regulatory Impact Statement, "Needs and Benefits," pp. 10-11 of 25 (emphasis added), https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2021-08-26/docs/revised_proposed_regulation.pdf.

[15] Supreme Court Allows Vaccine Mandate for New York Health Care Workers - The New York Times (nytimes.com) (noting that New York's healthcare system lost tens of thousands of healthcare professionals following the implementation of Rule 2.61).

II. PLAINTIFFS STATE PLAUSIBLE SUPREMACY CLAUSE CLAIMS.

Plaintiffs plead that Rule 2.61 is separately preempted by both Title VII and the CMS Mandate. (ECF 40, Amend. Comp. Counts II and IV, ¶¶ 315-324 and 342-348, respectively.) Defendants note that the Supremacy Clause has no implied private right of action. Defs. Br. at 16, citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015). But Defendants entirely ignore, and thus concede, *Armstrong*'s additional holding that laws contravening the Supremacy Clause can be enjoined under federal courts' *equitable powers*. *See Armstrong*, 575 U.S. at 327-28; *see also Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 73 (2d Cir. 2019) ("If the Supremacy Clause means anything, it means that a state is not free to enforce [state] laws preempted by federal law," and "[l]awsuits invoking the Supremacy Clause are one of the main ways of ensuring that this does not occur"), *cert denied*, 140 S. Ct. 2508 (2020).

A. Title VII.

As to Plaintiffs' Title VII-based preemption claim, Defendants argue there is no conflict preemption because Title VII merely requires "reasonable *accommodations*" for religious exercise to the extent they would not impose an "undue hardship" on employers, whereas Plaintiffs "seek a religious *exemption*, which is distinct from an accommodation under Title VII." (Defs.' Br. 17-18 (emphasis added).) Defendants say that Rule 2.61 does not require the denial of "reasonable *accommodation* requests under Title VII" because the Rule applies only to some employees (i.e., those who perform in-clinic work), and not others (i.e., generally those

who can work remotely)—the latter of which allows for an "accommodation." (*Id.* at 18 (emphasis in original).)[16]

But this wordplay is found nowhere in Title VII. Nothing in Title VII provides that a "reasonable accommodation" cannot include in-person work with masking, social distancing, testing, etc. if requested by an employee—even if the government calls it an "exemption." Title VII provides that if a reasonable religious accommodation is requested, the employer *must* grant it "unless [the] *employer* demonstrates" that the accommodation would be an "undue hardship." 42 U.S.C. § 2000e(j). Plaintiffs do not seek "a blanket religious exemption without regard to the hardships faced by the employer," Defs.' Br. 18, but merely the federally protected *opportunity* to *apply* for an in-person religious exemption (i.e., accommodation) from their employers, as to which their employers—not Defendants—must have the ultimate say under federal law.

Here *multiple* Plaintiffs' requests for religious exemption (i.e., accommodation) were granted by their employers, and thus there was no "demonstrate[ion]" of an "undue hardship." (*See* ECF No. 40, Am. Cmplt. ¶¶90, 149, 173, 188, 216, 237-239, 257, 279, 291.) Yet Rule 2.61 prohibits precisely those accommodations, posing a direct "obstacle to the achievement of federal" objectives under Title VII. *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010). This is all the more clear from the fact Rule 2.61 authorizes medical "exemptions" for in-person work. The Supreme Court has held that Title VII gives *religious* practices "*favored* treatment" and "requires otherwise neutral policies to give way to the need for an accommodation." *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 773 (2015). Here Plaintiffs' religious objections are not even afforded *equal* treatment under Rule 2.61.

[16] Plaintiffs acknowledge that the Second Circuit rejected Plaintiffs' Title VII arguments in *We the Patriots*, 17 F.4th at 290-294, but they are constrained to reiterate them here to preserve them for further appellate review, if necessary, including another petition for certiorari.

B. CMS Mandate.[17]

Defendants also argue that the supervening CMS Mandate, which the Second Circuit did not address, likewise does not preempt Rule 2.61. But while there is a general presumption against preemption, the "relative importance [of state law] is not material when there is a conflict with a valid federal law," in which case "federal law must prevail." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Here the CMS Mandate plainly preempts Rule 2.61.

As to conflict preemption, Defendants assert that Plaintiffs "misconstrue the CMS Mandate as requiring that States provide religious 'exemptions' to COVID-19 vaccine requirements," since the CMS Mandate requires "only a *process* by which staff may request an exemption . . . based on *applicable federal law*." (Defs.' Br. 19 (emphasis added).) So, Defendants' theory goes, because such exemptions are pursuant only to Title VII, the Second Circuit's decision in *We the Patriots* rejecting Plaintiffs' Title VII-based conflict-preemption claim dooms Plaintiffs' claim here. (Id. at 19-20.) On the contrary, it is Defendants who misconstrue the CMS Mandate, which creates unambiguous federal regulations explicitly requiring that covered healthcare workers like these Plaintiffs be allowed to seek in-person religious "exemptions" from their employers within the rubrics of Title VII.

The CMS Mandate creates new federal regulations that impose specific and unambiguous federal-law duties on covered employers to allow religious exemptions from mandatory COVID-19 vaccination. Specifically, the Code of Federal Regulations now provides that hospitals, for

[17] Plaintiffs acknowledge that this Court previously held that "plaintiffs have failed to establish that they are likely to succeed on the merits of this conflict preemption claim," *Dr. A*, 2022 WL 548260, at *4, but Plaintiffs suggest that they have at least pled a factually "plausible" claim that survives a motion to dismiss even if preliminary injunctive relief has been denied. This Court is free to reconsider its prior analysis at the final hearing stage. *See Esposito v. Suffolk Cnty. Cmty. Coll.*, 517 F. Supp. 3d 126, 133-34 (E.D.N.Y. 2021) ("A district court . . . possesses the inherent authority to *sua sponte* reconsider its own interlocutory orders **before they become final**.")(cleaned up).

example, "must" establish a process by which *covered staff* (i.e., those who have "direct contact with patients and [covered] staff") "may request an *exemption* . . . based on applicable Federal law," 42 C.F.R. § 482.42(g)(2), (g)(3)(i), (ii), (vi) (emphasis added), including an "exemption . . . because of . . . sincerely held religious beliefs," 86 Fed. Reg. 61555, 61568 (Nov. 5, 2021).

But according to the Second Circuit, Rule 2.61 allows an employer only to "*accommodate—not exempt*—employees with religious objections, by . . . remov[ing] them from the Rule's definition of 'personnel.'" *We the Patriots*, 17 F.4th at 370 (emphasis in original). Thus, Rule 2.61 poses a direct obstacle to the duty imposed on healthcare employers by the CMS Mandate to at least consider in-person religious ***exemptions***. *See St. Louis Effort for Aids v. Huff*, 782 F.3d 1016, 1017 (8th Cir. 2015) (Missouri law regulating newly created positions under the Affordable Care Act "interfere[d] with federal law by preventing" them "from performing their federally required duties" outlined in the C.F.R.).

Defendants argue that the CMS Mandate expressly states that it intends to preempt only state and local laws that "that *forbid* employers . . . from imposing vaccine *requirement*s on employees," or that "provide[] *broader* grounds for exemptions than provided for by Federal law." (Defs.' Br. at 21 (quoting 86 Fed. Reg. 61613 (emphasis added).) But Defendants entirely ignore the CMS Mandate's primordial statement of "intent, consistent with the Supremacy Clause . . . [to] preempt[] *inconsistent* State and local laws . . . [that] prevent . . . providers and suppliers from complying with the *requirements of this IFC*." 86 Fed. Reg. 61568 (emphasis added). And that includes the requirement that *covered* staff who have "direct contact with patients," *e.g.*, 42 C.F.R. § 482.42(g)(2), (3)(i)-(ii), may "request and receive *exemption* from vaccination because of . . . sincerely held religious beliefs." *Id.* at 61568-69 (emphasis added). *See also Tantaros v. Fox News Network, LLC*, 12 F.4th 135, 142 (2d Cir. 2021) ("[T]he clearest

indicator of legislative intent is the statutory text," and courts must "giv[e] effect to the plain meaning thereof") (internal quotations omitted).

Indeed, in *conflict* preemption analysis, courts "are required to consider the entire scheme of the federal [regulation]," and "conflicts that are implied by operation of state law are of *no less force* than that which is expressed." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Here, the operation of the CMS Mandate plainly conflicts with Rule 2.61, since the newly amended Code of Federal Regulations under the CMS Mandate *requires* Medicaid- and Medicare-participating facilities to *permit* Plaintiffs to at least apply for a religious *exemption* to perform in-person work. *See* 42 C.F.R. § 482.42(g)(2), (g)(3)(i), (ii), (vi); *see also Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 154 ("The conflict does not evaporate because the [federal] Board's regulation simply *permits*, but does not *compel*, federal savings and loans to include due-on-sale clauses in their contracts ….").

While this Court previously suggested that the likely remedy for this quandary would be "filing a properly exhausted Title VII claim," the Second Circuit has already held, as this Court acknowledged, that Rule 2.61 "does not require employers to violate Title VII." *Dr. A*, 2022 WL 548260, at *5. Thus, Plaintiffs apparently have no Title VII claims against their employers based on Rule 2.61—unless and until the Supreme Court intervenes—since Courts in this Circuit are now apparently bound to hold that Title VII merely requires the availability of "accommodations" by removing employees from the scope of the Rule (which Rule 2.61 concededly allows), but not "exemptions" in the form of in-person work (which Rule 2.61 categorically forbids). *See We the Patriots*, 17 F.4th at 370.

And more to it, Plaintiffs' claim is that the CMS Mandate creates a religious exemption process that is *partially independent* of Title VII. That's because, as noted, the CMS Mandate

creates new provisions in the Code of Federal Regulations that *independently require* covered employers to refrain from imposing COVID-19 vaccination on "staff" who have "direct contact with patients," if those staff "have pending requests for, or [] have been granted, exemptions." *See, e.g.*, 42 C.F.R. § 482.42(g)(2), (3)(i); *see also Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153-54 (federal regulations no less pre-emptive than statutes "when the . . . regulations [are] intended to pre-empt state law").

It would be absurd (and constitutionally problematic) to say, therefore, that the Code of Federal Regulation's further requirement that the "exemption" "process" be "based on applicable Federal law," *e.g.*, 42 C.F.R. § 482.42(g)(3)(iv)—i.e., Title VII—somehow means employers must *ignore* their preceding and *textually explicit* obligation to *refrain* from applying the mandate to *in-person covered staff who are seeking exemptions*, simply because these exemption requests are *religious*. *See United States v. Venturella*, 391 F.3d 120, 126-27 (2d Cir. 2004) (courts should "construe statutes so as to avoid results glaringly absurd"). Rather, the "based-on-applicable-Federal-law" clause simply means that as to requests for *religious* exemptions, employers should consider such requests under the normal rubrics of Title VII (i.e., whether the person's asserted conflict is *sincerely religious*, and whether in-person work with masking, testing, etc., would actually be an "undue hardship" on the employer). The CMS Mandate gives Plaintiffs a right to enter into that process, whereas Rule 2.61 categorically forbids it.

Further, the CMS Mandate also "occupies the field" given that its 73-page "federal scheme is so pervasive as to displace any state regulation in that field." *Steel Inst. of New York v. New York City*, 716 F.3d 31, 36 (2d Cir. 2013) (cleaned up). Indeed, the CMS Mandate expressly seeks to correct and centralize "an inconsistent patchwork of requirements and laws" across states and localities. 86 Fed. Reg. 61566, 61584. Thus, as Defendants admit (Defs.' Br. 23), it

brings "the Federal Government into a field that traditionally ha[s] been occupied by the States." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992), which cuts *in favor* of (not against) finding field preemption. The scope of the mandate is also pervasive, with detailed implementation processes and documenting requirements, and it applies to a far wider scope of employers than those covered by Rule 2.61. *See* 86 Fed. Reg. 61616; *and compare* 10 N.Y.C.R.R. § 2.61(a)(1)&(2) (employers covered by Rule 2.61) *with* 86 Fed. Reg. 61566 (employers covered by CMS Mandate). Accordingly, field preemption (alongside conflict preemption) is manifest here.

III. DEFENDANTS' DENIAL OF UNEMPLOYMENT BENEFITS VIOLATES THE FREE EXERCISE CLAUSE.[18]

Unemployment benefits programs present a quintessential *system of individualized exemptions*, and government "may not refuse to extend that system to cases of 'religious hardship' without a compelling reason." *Employment Division v. Smith*. 494 U.S. 872, 883-84 (1990). That is, if the denial of unemployment benefits imposes a substantial burden on one's religion, *regardless of whether there was religious targeting*, that denial must survive strict scrutiny. *See Fulton*, 141 S. Ct. at 1877 ("A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," including in unemployment benefits programs.)

Accordingly, Defendants miss the point when they argue that Plaintiffs' claims here are entirely speculative because none have "actually been denied unemployment benefits because they are religious objectors to the vaccine." (Defs.' Br. 14.) Strict scrutiny applies, regardless of

[18] Again, Plaintiffs acknowledge that this Court previously held that Plaintiffs are not likely to succeed on this claim, *see Dr. A. v. Hochul*, 2022 WL 548260, at *6, but again respectfully request that this Court exercise its inherent authority to reconsider its preliminary analysis, particularly under the plausibility standard at issue here.

the official motive for the denial, whenever the burden of a system of individualized exemptions falls on religion. *See also, e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (denial of unemployment benefits for refusing to work on Saturdays "forces [plaintiff] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand").

Here, as Defendants acknowledge, healthcare workers "terminated for refusing an employer-mandated vaccination *will be ineligible for* [unemployment benefits] absent a *valid* request for *accommodation*." (ECF 40, Am. Cmplt. ¶63 (emphasis added).)[19] Further, "a worker who refuses an employer's directive to get vaccinated may be eligible for [unemployment benefits] in some cases, *if* that person's work has no public exposure . . . ."[20] Both provisions necessarily exclude these religiously motivated Plaintiffs, who sought in-person work that involved public exposure. *See Dr. A*, 142 S. Ct. at 554 (Gorsuch, J., dissenting) ("healthcare workers who refuse a vaccine are 'ineligible'" for unemployment benefits under this guidance).

Thus, it is irrelevant that the policy does not "uniquely or categorically target" "religious objectors" and "applies to all employees who… refus[e] vaccines." (Defs.' Br. 13.) Because Defendants distribute unemployment benefits "on a case-by-case basis," refusing to extend benefits to Plaintiffs, whose *religious convictions* forbid vaccination, must satisfy strict scrutiny. *Smith*, 494 U.S. at 884.

---

[19] *See also* N.Y. State Governor's Office, *Governor Hochul Releases Comprehensive Plan to Address Preventable Health Care Staffing Shortage* (Sep. 25, 2021), https://www.governor.ny.gov/news/preparation-monday-vaccination-deadline-governor-hochul-releases-comprehensive-plan-address; *see also* N.Y. State Department of Labor, *Unemployment Insurance Frequently Asked Questions* (Question 6), https://dol.ny.gov/unemployment-insurance-top-frequently-asked-questions (last visited June 2, 2022).

[20] (Question 6) (emphasis added), https://dol.ny.gov/unemployment-insurance-top-frequently-asked-questions.

Defendants argue that Plaintiffs needed to sue the Commissioner of Labor, but Governor Hochul announced this rule on September 25, 2021,[21] and Plaintiffs seek to enjoin all those acting in concert with her. (ECF 40, Am. Cmplt. at 72.) Additionally, Plaintiffs need not exhaust their state administrative remedies, because this claim is a § 1983 action for which exhaustion is not a prerequisite. *Patsy v. Bd. of Regents of Fl.*, 567 U.S. 496 (1982).

Finally, even if no Plaintiff has yet been denied unemployment benefits, pre-enforcement challenges lie where there is even a "credible threat" of enforcement. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014); *see also id.* at 158 ("It is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.") (cleaned up). The plain language of Defendants' policy makes clear that Plaintiffs "*will be ineligible*" insofar as they did not make "valid requests" for "accommodations" (i.e., to be removed from the scope of Rule 2.61), and their work involved "public exposure." Accordingly, Nurse N.'s application for unemployment, pending since October 2021, has been held up by the Department of Labor and the Department of Education, which is "examining" her claim as the licensing body, in an obvious prelude to denial. Amend Comp., ¶ 231. Plaintiffs have easily stated a plausible First Amendment claim against Defendants' denial of unemployment benefits.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss.

[21] https://www.governor.ny.gov/news/preparation-monday-vaccination-deadline-governor-hochul-releases-comprehensive-plan-address (providing that DOL guidance clarifies "that workers who are terminated because of refusal to be vaccinated are not eligible for unemployment insurance absent a valid doctor-approved request for medical accommodation").

Respectfully submitted,

/s/ Christopher Ferrara
CHRISTOPHER A. FERRARA, ESQ.
(Bar No. 51198)
Special Counsel
THOMAS MORE SOCIETY
148-29 Cross Island Parkway
Whitestone, Queens, New York 11357
Telephone: (718) 357-1040
cferrara@thomasmoresociety.org
Counsel for Plaintiffs

/s/ Michael McHale
MICHAEL G. MCHALE
(Bar No. 701887)
Counsel
THOMAS MORE SOCIETY
10506 Burt Circle, Ste. 110
Omaha, NE 68114
402-501-8586
mmchale@thomasmoresociety.org
Counsel for Plaintiffs

Stephen M. Crampton
Senior Counsel
THOMAS MORE SOCIETY
309 W. Washington, S
Chicago, IL 60606
(312) 782-1680
scrampton@thomasmoresociety.org
Counsel for Plaintiffs