STATE OF NEW YORK
SUPREME COURT **COUNTY OF ALBANY**

GREGORY SERAFIN, on behalf of himself and on behalf of all others similarly situated; AZIMA RASIWALA, D.O., on behalf of himself and on behalf of all others similarly situated; KATHLEEN MCGOWAN, on behalf of herself and on behalf of all others similarly situated; DEBORAH CONRAD, on behalf of herself and on behalf of all others similarly situated; RENEE ROGERS, on behalf of herself and on behalf of all others similarly situated; and DAVID DIPIETRO, MEMBER OF THE ASSEMBLY FOR NEW YORK'S 147TH ASSEMBLY DISTRICT, on his behalf in his official capacity and on behalf of similarly situated members of the New York State Legislature,

Petitioners/Plaintiffs,

DECISION and ORDER

Index No. 908296-21
RJI No. 01-21-ST1949

For Judgment Pursuant to Article 78 of the CPLR And the New York State Constitution, Art. I, § 6

-against-

NEW YORK STATE DEPARTMENT OF HEALTH; NEW YORK STATE PUBLIC HEALTH AND HEALTH PLANNING COUNCIL; HOWARD ZUCKER, NEW YORK STATE COMMISSIONER OF HEALTH,

Respondents/Defendants.

(Supreme Court, Albany County Article 78 Term)

Appearances:

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Buffalo, New York 14213

LETITIA JAMES

Attorney General of the State of New York
Attorney for Respondents/Defendants ("Respondents")
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Roger D. McDonough, J.:

Petitioners seeks a preliminary injunction: (1) enjoining and restraining respondents from enforcing/applying 10 NYCRR § 2.61 ("§ 2.61"); and (2) staying the effective dates of the vaccine requirement of § 2.61. Respondents oppose the requested injunctive relief. The underlying proceeding is hybrid in nature, seeking relief under Article 78 and/or declaratory relief.

Procedural Background

Petitioners, via Order to Show Cause, sought a temporary restraining order ("TRO") restraining respondents from applying or enforcing the vaccination requirement in § 2.61 and staying the effective dates of the requirements. This Court (Justice Ryba) partially denied the TRO request, but did restrain respondents from enforcing any requirement preventing the covered entities from considering or granting an application for a religious exemption from § 2.61's vaccination mandate. This Court heard oral argument as to the preliminary injunction on September 30, 2021. The matter is fully submitted as to the preliminary injunction issue.

Background

Petitioner Serafin is a registered nurse employed by the Erie County Medical Center. Petitioner Rasiwala, D.O., is an emergency room physician who works as an independent contractor at Sisters of Charity Hospital. Petitioner McGowan is a physician practice coordinator employed by the Erie County Medical Center. Petitioner Rogers is a Licensed Nursing Home Administrator employed by Absolut Care nursing home. Petitioner DiPietro is a Member of the Assembly for New York's 147th Assembly District. Respondent New York State Department of Health ("NYSDOH") is a state agency responsible for, *inter alia*, public health. Respondent New York State Public Health and Health Planning Council ("Council") is an entity within

NYSDOH that is tasked with advising respondent Commissioner on issues related to the preservation and improvement of public health. The Council's functions also include the approval of regulations related to health codes.

Respondents adopted § 2.61 in late August of 2021. As an emergency rule, § 2.61 went into effect immediately and is effective for 90 days. § 2.61 applies to "covered entities" including the hospitals and nursing homes where the petitioners work. The rule requires certain personnel to be fully vaccinated against COVID-19. § 2.61 further requires that the first dose be received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities.

The rule was promulgated under § 202.6 of the New York State Administrative Procedure Act ("SAPA"). Said section constitutes the emergency rule procedures for SAPA. The notice accompanying the rule cites the following statutes as authority: Public Health Law §§ 225(5), 2800, 2803(2), 3612 and 4010(4), and Social Services Law §§ 461 and 461-e.

Several of the petitioners have submitted affidavits in support of the petition and the injunctive relief. Petitioner Serafin states that he worked in the COVID ICU during the pandemic and tested positive for COVID-19. He notes that after quarantine he returned to working with COVID-19 positive patients, but has not had COVID-19 again. Petitioner Serafin believes that this is due to his natural immunity. Based on this belief he does not believe receiving the vaccine will provide him with any meaningful health benefits. Conversely, he believes there are serious risks to vaccinations. In support he cites personal knowledge of patients who had adverse reactions. Petitioner Serafin indicates that he is unwilling to get the vaccination due to the adverse vaccination reactions. He indicates that because of the vaccine mandate and his position on compliance, he will: (1) be terminated without the possibility of collecting unemployment; and (2) be precluded from working in his chosen profession where he has developed experience and technical competence.

Petitioner Rasiwala is of Islamic faith and would pursue a religious exemption if one was offered. Dr. Rasiwala also faces termination as well as a gap in medical employment that will need to be explained in future pursuits for medical employment. Additionally, Dr. Rasiwala's allergist has recommended against vaccination.

Petitioner Conrad indicates that she worked the front lines at the beginning of the pandemic and often worked with insufficient personal protective equipment. She notes that she personally reported 125 possible adverse vaccine reaction to VAERS concerning hospitalized patients. She further notes that she is working on approximately 20 more reports to VAERS. Petitioner Conrad also describes approximately 100 additional incidents of possible adverse reactions that went unreported to VAERS from her place of employment. Due to the adverse vaccine reactions, she expresses an unwillingness to get vaccinated and speaks of being terrified of the unknown side-effects of vaccination. She indicates that the vaccine mandate will cause her to: (1) be terminated without the possibility of collecting unemployment; and (2) be precluded from working in her chosen profession where she has developed experience and technical competence; and (3) be a major interruption of her medical professional career.

Petitioner McGowan states that she is unwilling to be vaccinated for both religious and medical reasons. She expresses her concern with the FDA's "rushed" approval process for the COVID-19 vaccines. She also notes that she worked throughout the height of the pandemic without being vaccinated. Petitioner McGowan indicates that the vaccine mandate will cause her to: (1) be terminated without the possibility of collecting unemployment; and (2) be precluded from working in her chosen profession where she has developed experience and technical competence; and (3) be a major interruption of her medical professional career.

Petitioner Rogers indicates that she was an essential worker when the pandemic started and worked the front lines. She further indicates that she had COVID-19 in April of 2020 and that she believes her natural immunity is, at a minimum, just as good as the vaccine. Her primary care physician agrees and apparently advised her that she would not benefit from vaccination. Accordingly, she has made the medical decision to not get vaccinated. Petitioner Rogers also cites her concern about the unstudied potential long-term side effects of vaccination. She concludes that the vaccine mandate will cause her to: (1) be terminated without the possibility of collecting unemployment; and (2) be precluded from working in her chosen profession where she has developed experience and technical competence; and (3) be a major interruption of her nursing home administration career.

Respondents provided an affidavit from NYSDOH's Medical Director of the Bureau of

Immunization. Dr. Rausch-Phung indicates that her affidavit is based on her medical expertise, personal experience, review of NYSDOH's records, guidance from the Centers for Disease Control & Prevention ("CDC"), the executive orders issued by New York's Governor, and studies and publications related to COVID-19. She indicates that § 2.61 was adopted based on rational determinations from respondents that the mandate was necessary to immediately address an ongoing and rapidly worsening public health crisis. In particular, she notes the Delta variant's impact in terms of significantly increased transmissibility and the 10-fold increase in COVID-19 cases. Dr. Rausch-Phung also cites to CDC findings that the Delta variant may cause more severe illnesses than previous variants in unvaccinated individuals. Due to the Delta variant's impact, respondents sought to avoid a return to the heights of the pandemic when hospitals were overwhelmed.

She contends that § 2.61 is necessary to protect New York's frontline healthcare workers and the vulnerable patient populations in certain healthcare sectors like nursing homes. Dr. Rausch-Phung also asserts that the regulation is tailored to focus on healthcare facilities that pose a unique risk of COVID-19 transmission. She cites statistical findings that patient facing healthcare professionals and their household members have threefold and twofold increased risks, respectively, of contracting COVID-19. The Doctor also notes that these types of healthcare workers tend to care for vulnerable individuals who are elderly, sick, possibly immunocompromised, etc. She cites the significant support for vaccine mandates for health care employees from such medical organizations a the American Medical Association, the American Nurses Association, the American Academy of Pediatrics and the Association of American Medical Colleges. In addition to certain federal vaccine mandates related to healthcare, she notes that the CDC has recommended that healthcare personnel all receive COVID-19 vaccination, particularly in vulnerable healthcare settings.

She opines that any staffing shortages attributable to resignations over the vaccine mandates pales in comparison to the potential staffing shortages that could be caused by a deadly outbreak among unvaccinated healthcare personnel. Dr. Rausch-Phung also notes that New York's Governor has put measures in place to address potential healthcare worker staffing shortages. She also notes that § 2.61 has already been successful, in terms of increasing

vaccination rates, as nursing home staff vaccination levels had risen to 92% (for at least one dose) as of September 27th as compared to 71% as of August 24th (prior to the emergency rule). For adult care facilities the numbers were 89% as of September 27th as compared to 77% as of August 24th. Finally, the level for fully vaccinated hospital staff has risen to 85% as of September 27th as compared to 77% as of August 24th. She also advises that, based on preliminary self-reported data, the percentage of hospital staff receiving at least one dose as of September 27th is 92%. The Doctor stresses that time was and is of the essence in terms of the fall and winter weather and the holiday seasons. Additionally, she notes the importance of vaccination during the flu and cold season when similar Covid-19 symptoms could be mistaken for cold and flu.

Dr. Rausch-Phung also points to CDC and FDA findings that serious side effects from the vaccinations have been extremely rare despite the administration of nearly 380 million doses. Similarly, she points to CDC's findings regarding vaccine effectiveness in protecting vaccinated individuals against severe disease and death from the Delta variant and the other known variants. In her affidavit she also focuses and discusses the rarity of specific side effects including: (1) anaphylaxis; (2) vaccine induced thrombosis; and (3) Guillain-Barre Syndrome. Her affidavit also addresses the consideration and rejection of alternatives to the mandate including: (1) acceptable face coverings; and (2) constant testing.

As to religious/philosophical objections, she relies on the AMA's position that such nonmedical exemptions endanger the health of the unvaccinated medical care worker and those with whom the medical care worker comes in contact. Dr. Rausch-Phung also notes that existing regulations for hospitals, nursing homes and other medical entities already require that persons working therein be immune to measles and rubella. Said regulations contain no religious exemption. Additionally, she points to the absence of any religious exemptions from school vaccination requirements.

The Doctor also stresses that § 2.61 is specifically limited to only those medical and healthcare personnel who have direct contact with other covered personnel, patients and residents. Finally, she cites multiple medical studies that refute the proposition that natural immunity is equal to or greater than the immunity afforded by the vaccines.

Preliminary Injunction Standard

Petitioners bear the burden of showing: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is not granted; and (3) a balance of equities in its favor (*see*, STS Steel, Inc. v Maxon Alco Holdings, LLC, 123 AD3d 1260, 1261 [3rd Dept. 2014]). The "likelihood of success" standard does not require conclusive proof (*see*, Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604, 605 [2nd Dept. 2004]). Irreparable harm requires an injury for which money damages are insufficient (*see*, DiFabio v Omnipoint Communications, Inc., 66 AD3d 635 [2nd Dept. 2009]). Additionally, the petitioners must establish that such harm is neither remote nor speculative (*see*, Golden v Steam Heat, 216 AD2d 440, 442 [2nd Dept. 1995]). Finally, the moving party must show that the irreparable injury it will suffer is greater than the harm caused to the opposing party via imposition of the temporary relief (*see*, Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Dev. Corp., 70 A.D.2d 1021, 1022 [3rd Dept. 1979]).

A preliminary injunction is a form of "drastic relief" and accordingly should be issued cautiously (*see*, Rural Community Coalition, Inc. v Village of Bloomingburg, 118 AD3d 1092, 1095 [3rd Dept. 2014]). A preliminary injunction ruling does not constitute "law of the case" nor does it represent an ultimate adjudication on the merits (*see*, Id.).

Discussion

Petitioners raise several arguments in opposition to the rule, including: (1) the absence of a religious exemption to the vaccination requirement; (2) the absence of an exception for individuals with natural immunity due to prior COVID-19 vaccinations; (3) the absence of any legal recourse for individuals who suffer an adverse reaction attributable to the vaccination mandate; and (4) the failure to properly evaluate and consider findings from the Vaccine Adverse Event System ("VAERS") regarding safety problems with licensed vaccines.

Based on these arguments, petitioners have set forth four causes of action. The first seeks a declaratory judgment holding that § 2.61 is void because it lacks a statutory basis. Specifically, petitioners are arguing that § 2.61 was illegally adopted as an emergency rule because it lacked the requisite statutory authority. The second seeks a declaratory judgment holding that § 2.61 is unconstitutional because it violates the separation of powers inherent in the New York State Constitution. Petitioners maintain that respondents have usurped the Legislature's powers to

make critical policy decisions and/or engage in legislative enactments. The third cause of action seeks a declaratory judgment holding the vaccination requirement violates petitioners' substantive due process rights. Specifically, they argue that § 2.61 unconstitutionally interferes with their property rights in their employment as well as their liberty rights to practice in their chosen profession. The fourth seeks a declaratory judgment holding the vaccination requirement violates petitioners' procedural due process rights. This cause of action is basically a reiteration of the first cause of action. Specifically, petitioners argue that the use of SAPA's emergency rule procedures resulted in an unconstitutional denial of their opportunity to be heard.

Likelihood of Success

First and Second Causes of Action-Violation of SAPA/Separation of Powers

Petitioners argue that § 2.61 represents a promulgated rule that exceeds the power granted to respondents by the Legislature. As such, petitioners maintain that it was wholly illegal for respondents to proceed under SAPA's emergency rule provisions. As to the statutes cited in the notice for § 2.61, petitioners argues that Public Health Law § 4010(4) only applies to hospices and § 2803(2) only applies to the more mundane, financial aspects of hospital operations. Petitioners contend that the only statute that even plausibly provides statutory authority is Public Health Law § 225(5). In their second cause of action, petitioners reiterate that § 2.61 represents a promulgated rule that exceeds the power granted to respondents by the Legislature. Accordingly, petitioners maintain that § 2.61 is a violation the doctrine of separation of powers.

The petitioners maintain that § 225(5) is too broad and lacking in standards or limitations to constitute the requisite legislative authority for respondents to implement the vaccination mandate. Petitioners contend that § 225(5) simply lacks any specific directive as to the issues of vaccine mandates and employment requirements for the covered entities. Similarly, petitioners assert that the § 2.61 represents a critical policy decision that is solely within the power of the Legislature. Petitioners further argue that § 2.61 represents improper lawmaking because respondents constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns. In support, petitioners cite respondents' decision to exclude certain healthcare settings from § 2.61. Finally, petitioners stress that the decisions to not include a religious exemption is a wholly separate example of respondents' overreach into the area of

critical policy decisions.

Petitioners also place great weight on the expiration of the Governor's legislatively enacted emergency powers related to the COVID-19 pandemic. They note that these powers expired, at the latest, as off the expiration of the state of emergency on June 24, 2021. Absent these expired powers, petitioners contend that there is simply no valid statutory authority related to the COVID-19 pandemic. Finally, petitioners note that the Legislature has deliberately chosen not to act in this area with the exception of delegating authority during the state of emergency period.

Respondents contend that controlling case law holds that they were not required to include a religious exemption in § 2.61. Specifically, they note the longstanding principles that constitutional religious freedoms simply do not include the freedom to expose the community to communicable diseases. Further, they rely on the absence of any religious exemption in existing regulations as to measles and rubella in healthcare settings.

They also stress that the promulgation of § 2.61 satisfies the standard of review this Court must utilize in considering SAPA compliance. Specifically, they contend that respondents' determination that an emergency existed was in no way irrational, arbitrary or capricious. Further, respondents rely upon the information provided in the notice of the emergency adoption as to the increase in COVID-19 cases, emergence of the Delta variant, the dangers posed by unvaccinated individuals and the effective and safe nature of the vaccines. Respondents also cite in detail how § 2.61 complies with every requirement set forth in SAPA § 202(6)(d).

As to the separation of powers issue, respondents maintain that the factors set forth in the Boreali decision favor respondents in this matter (Matter of Boreali v Axelrod, 71 NY2d 1 [1987]). They argue that respondents adopted an across the board requirement as opposed to weighing competing or special interests unrelated to the public health goal. Respondents further note that there is no evidence of the Legislature ever voting and rejecting any legislation barring religious exemptions from vaccine mandates for healthcare workers. Additionally, respondents contend that they are simply executing policy decisions already articulated by the Legislature via a comprehensive statutory scene. In particular, respondents rely upon Public Health Law § 225 which empowers the Council to issue regulations concerning the control of communicable

diseases and ensuring infection control at healthcare facilities and other premises. Respondents also contend that the Governor's former emergency powers related to the ability to issue certain Executive Orders as opposed to any curtailment of respondents' statutory authority to issue rules and regulations. Based on the foregoing, and the Legislature's previous determination to eliminate exemptions to vaccine requirements for schoolchildren, respondents argue that § 2.61 was promulgated within a statutory scheme and is consistent with pre-existing legislative policy decisions.

As to the third factor, respondents again note that there is no prior legislative bill (at any stage of the legislative proceeding) concerning a vaccine mandate for healthcare workers. The respondents also contend that § 2.61 represents the implementation of legislatively-expressed policies while responding to a public health crisis that was directly impacting regulated healthcare and nursing home entities. Finally, respondents note that petitioners have conceded that the fourth factor weighs in respondents' favor.

Finally, in terms or the irrational/arbitrary and capricious standard, respondents argue that § 2.61 was the result of a thorough and well-reasoned determination to protect New York's public health in response to the COVID-19 spread and the impact of the Delta variant.

In reply, petitioners again stress that § 2.61 lacks any specific statutory authority for a vaccine requirement. Petitioners review each cited statute in detail and point out that none of them speak to requiring the covered entities mandating vaccines for their employees. Similarly, petitioners argue that the caselaw cited by respondents does not support a finding that statutory authority for the vaccine requirement exists here. In sum, petitioners maintain that respondents have exceeded their authority by enacting their preferred public policy without any statutory backing from the Legislature.

As to the Boreali factors, petitioners contend that the critical determination is whether respondents have engaged in law-making regarding a critical policy decision. Petitioners note that the exclusion of a substantial proportion of New Yorker from working in entire sectors of the economy based on vaccination status is clearly a critical policy decision.

The Court has not been persuaded as to petitioners' likelihood of success as to either of their first and second causes of action. As a subset of these findings, the Court concludes that

petitioners are unlikely to succeed on their claim that the lack of a religious exemption renders § 2.61 unconstitutional or in any way illegal. § 2.61 is neutral, has general applicability and respondents have proffered a sufficiently rational basis for its promulgation (*see*, F.F. v State, 194 AD3d 80, 84 [3rd Dept. 2021]). Accordingly, the Court finds that petitioners are unlikely to succeed on their claims as they pertain to the religious exemption. As such, no preliminary injunction will be issued as to the lack of the religious exemption, and the TRO on the issue is therefore lifted.

The Court also finds that petitioners are unlikely to succeed as to their SAPA challenge. The promulgation of the rule, the rule and the supporting documentation adequately supports the necessity of the immediate adoption of the rule for the preservation of New York's public health, safety and general welfare (SAPA § 202(6)). The record also reflects that the rule was promulgated during the continuing and significant impact of the Delta variant and only after FDA approval of the Pfizer vaccine. Additionally, § 2.61 was promulgated at a time when the federal government was advising that a condition of participating in Medicare and Medicaid programs would be requiring nursing homes to mandate the COVID-19 vaccination for workers. Further, respondents' expert's affidavit asserts the threats from the Delta variant to the impacted workers and entities as well as the success of the vaccines in combating these threats. Accordingly, the Court finds that respondents clearly satisfied the requirements of SAPA § 202(6) as to the necessity for the immediate adoption of an emergency rule.

Additionally, again as to the likelihood of success issue, the Court finds that Public Health Law § 225(5) provides sufficient statutory authority for the promulgation of § 2.61. The remaining cited statutes, to varying degrees, only serve to buttress respondents' compliance with the emergency rule statutory requirements set forth in SAPA § 202(6). Specifically, Public Health Law § 225(5) broadly authorizes respondent Council to deal with any matters affecting the improvement of public health in the state of New York. More specifically, the statute authorizes the Council to establish regulations for the maintenance of hospitals for communicable diseases as well as to establish regulations regarding the methods and precautions to be observed in addressing premises that have been vacated by persons suffering from a communicable disease. Public Health Law § 2800 specifically authorizes NYSDOH to exercise

comprehensive responsibility related to hospitals and related services in terms of the prevention, diagnosis or treatment of human disease. Additionally, respondents have adequately established that Public Health Law §§ 2803, 3612 and 4010 authorizes promulgation of rules and regulations to establish minimum standards for the covered entities as to the care and services provided to patients/residents. In sum, the Court finds that the full statutory scheme embodied in the cited Public Health Law sections provides adequate statutory authority to satisfy SAPA's emergency procedure requirements for § 2.61 (*see*, Matter of Hague Corp. v Empire Zone Designation Bd., 96 AD3d 1144, 1145-1146 [3rd Dept. 2012]).

Moreover, the Court concludes that all four factors proffered and discussed in Boreali support the legality of respondents' promulgation of § 2.61. As to the first factor, respondents have adequately established that § 2.61 does not represent a balancing of competing interests between, for example, the public health and any particular industry or group (*see*, Garcia v New York City Dept. of Health & Mental Hygiene, 31 NY3d 601, 612-613 [2018]). Rather, the Court finds that respondents adequately balanced the relevant costs, benefits and considerations according to their preexisting obligations set forth by the Legislature in the Public Health Law. As to the second factor, for the reasons cited above in discussing statutory authority, the Court finds that respondents adequately established that they were executing policy decisions already articulated by the Legislature concerning public health, communicable diseases and the covered entities (*see*, Matter of Spence v Shah, 136 AD3d 1242, 1245-1247 [3rd Dept. 2016). Analysis of the third factor also supports respondents' positions. Respondents have adequately established the absence of any prior legislative attempt concerning vaccine mandates for healthcare workers. Accordingly, there is wholly insufficient proof that respondents have acted in an area where the Legislature repeatedly, or ever, tried and failed to reach agreement in the face of substantial public debate (Boreali v Axelrod, *supra* at 12-14). Finally, as noted above, the fourth factor is not in dispute. Based on the foregoing, and regardless of the particular weight affixed to any of the four factors, the Court finds that the relevant Boreali analysis adequately supports respondents' promulgation of § 2.61.

Consideration of petitioners' separation of powers claim overlaps with the Boreali factors and its consideration of whether a state agency acted beyond its delegated powers (*see*, Greater

N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 25 NY3d 600, 608 [2015]). Based on the Court's analysis of the Boreali factors and the relevant arguments on this issue, the Court finds respondents' promulgation of § 2.61 did not cross into the enactment of outright legislation (*see*, Matter of Spence v Shah, *supra* at 1246).

Finally, respondents have made a detailed showing as to their rational basis for promulgating § 2.61. Conversely, petitioners have not shown by clear and convincing evidence that § 2.61 is both arbitrary and capricious (Matter of Consolation Nursing Home v Commissioner of N.Y. State Dept. of Health, 85 NY2d 326, 331-332 [1995]). In particular, the Court finds that respondents have relied upon a multitude of documented medical studies and findings in support of the promulgation of § 2.61 (*see*, Id. at 332).

Based on all of the foregoing, and after a review of the causes of action through the exacting prism of the preliminary injunction standard, the Court finds that petitioners have not adequately established a likelihood of success as to the first and second causes of action.

Third Cause of Action-Substantive Due Process

As to substantive due process, petitioners point to their right to work in their chosen professions as the very essence of the liberty and property interests protected by the Constitution. Additionally, they contend that respondents cannot persuasively establish that § 2.61 constitutes reasonable governmental interference. In support, they note the absence of any study or data cited by respondents in support of the reasonableness of the rule. Petitioners further argue that, at a minimum, this matter should be remanded to respondents with a directive that respondents consider all of the relevant expert literature and explain how the rule reasonably interferes with constitutional rights.

Respondents argue that petitioners' claims do not implicate a protected fundamental right. Alternatively, respondents contend that even if § 2.61 does violate due process as to petitioners' individual rights, those rights do not supercede New York's interest in protecting the health of the public. Respondents also assert that § 2.61 specifically cited the data demonstrating the risks associated with the Delta variant, unvaccinated individuals and the ongoing COVID-19 situation.

In reply, petitioners focus on Dr. Rasiwala's inability to practice as an emergency room doctor and petitioner Rogers' inability to work in a nursing home as clear implications of liberty

rights in practicing their profession.

Assuming *arguendo*, that petitioners have adequately established protected rights in their employment and pursuit of their professions, the Court finds that petitioners have not met their heavy burden of showing that respondents' promulgation of this emergency rulemaking rises to the level of "arbitrary, conscience-shocking or oppressive in a constitutional sense" (*see*, Cunney v Bd. of Trustees of Vill. of Grand View, N.Y., 660 F.3d 612, 626 [2nd Cir. 2011]).

Accordingly, the Court finds that petitioners have not adequately established their likelihood of success as to the third cause of action.

Fourth Cause of Action-Procedural Due Process

Petitioners advise this Court that it must find procedural due process violations here. Initially, they again note that § 2.61 implicates both the liberty and property concepts of due process. Accordingly, they argue that respondents were obligated to afford them their constitutionally protected opportunity to be heard. Petitioners contend that respondents wilfully prevented this exercise of constitutional rights by circumventing the public notice and hearing provisions required in the standard rule making process.

Respondents argue that substantive due process is not implicated here because petitioners have not been completely prohibited from engaging in their respective chosen professions. Specifically, respondents note that petitioners may seek employment in non-covered entities or employment where they are not placing fellow staff, patients or residents at risk of contracting COVID-19.

In reply, petitioners again stress that their liberty rights were impacted without any public hearings or notice and comment period.

The Court finds that petitioners did not sufficiently establish a likelihood of success as to their procedural due process claim. Preliminarily, the Court notes that respondents have complied with the SAPA emergency procedures which authorize the dispensing of the public notice and comment periods. There is no present challenge to the constitutionality of SAPA before this Court. Additionally, petitioners' showings were simply too speculative and conclusory as to their potential loss of employment, ability to work in non-covered entities and issues of accommodation including whether their employers would accommodate their

unvaccinated status during the time period governed by § 2.61.

Based on all of the foregoing, the Court concludes that petitioners are unlikely to succeed on the merits as to their fourth cause of action.

Irreparable Harm

In support of their petition, petitioners point to their prospective, and perhaps now realized, loss of employment along with their inability to practice their chosen profession. Conjoined with this loss of employment is the impact the terminations will have on their professional careers. The petitioners also note that an ultimate win on the merits would be economically valueless in the absence of a preliminary injunction. Specifically, petitioners argue that they would not be able to recover any back pay or reinstatements in this scenario. The petitioners also argue that the aforementioned constitutional violation claims are sufficient to constitute sufficient irreparable harm for an injunction. Alternatively, petitioners argue that petitioner DiPietro can demonstrate irreparable harm by virtue of respondents' bypassing of the constitutionally prescribed law-making process.

Respondents contend that the loss of employment claim is highly speculative for several reasons. Among these is the possibility that the covered entities could accommodate the impacted petitioners by offering employment in areas and activities where they would not potentially expose other covered staff, patients or residents.

Petitioners re-stress their original arguments in reply. Regardless, having reached the above conclusion on likelihood of success, the Court need not reach the issue of irreparable harm (*see*, Doe v Axelrod, 73 NY2d 748, 750 [1988]).

Balancing of the Equities

Petitioners argue that respondents cannot explain how allowing petitioners to retain their jobs would harm New York's COVID-19 response. To the contrary, they maintain that the significant termination of healthcare professionals will grievously harm New York's COVID-19 response during the upcoming critical seasonal time periods. They also note that upcoming federal vaccination and testing requirements render § 2.61 a superfluous and unnecessary rule. As such, petitioners ask why it is necessary that they be completely excluded from their profession when the federal vaccine regulations could allow them to work for small, private

healthcare facilities that do not accept medicaid and medicare. Finally, petitioners appear to be arguing that New York should not be denying respondents the ability to work in their chosen profession simply to protect patients, nursing home residents and other similarly situated New Yorkers who have voluntarily chosen not to be vaccinated.

Respondents argue that the public health crisis exacerbated by the Delta variant means that the public interest in battling the pandemic cannot be understated. They further note that petitioners' speculative and conclusory claims of future harm simply do not outweigh the pressing public interest.

In reply, petitioners note that § 2.61 has created a state of emergency regarding medical staffing issues. They also stress that the enforcement of an unconstitutional law is contrary to the public interest.

Having reached the above conclusions on likelihood of success, the Court need not reach the issue of balancing of equities (*see*, Doe v Axelrod, *supra*).

Based on all of the foregoing, the Court finds that preliminary injunctive relief is not appropriate here.

Petitioners' remaining arguments and requests for relief as to the preliminary injunction, have been considered and found to be lacking in merit and/or unnecessary to reach in light of the Court's findings. Respondents' remaining arguments and requests for relief, including their challenge to one petitioner's standing, have been considered and found to be unnecessary to reach in light of the Court' findings.

Based upon the foregoing it is hereby

ORDERED that petitioners' request for a preliminary injunction is hereby denied in its entirety; and it is further

ORDERED that this Court's September 24, 2021 temporary restraining order is hereby

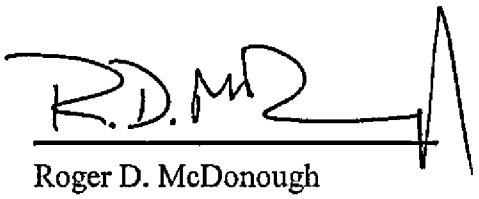
lifted in its entirety.

SO ORDERED.

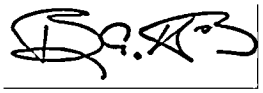
This shall constitute the Decision and Order of the Court. This Decision and Order will be forwarded to the Albany County Clerk by the Court. A copy of the Decision and Order is being forwarded to counsel for all parties. The signing of this Decision and Order and delivery of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel for the respondents is not relieved from the applicable provisions of that rule with respect to filing, entry, and notice of entry of the Decision and Order. As this is an E-FILED case, there are no original papers considered for the Court to transmit to the County Clerk.

ENTER

Dated: Albany, New York
October 8, 2021



Roger D. McDonough
Acting Supreme Court Justice



10/12/2021

Papers Considered[1]:

1. Petition and Complaint, dated September 21, 2021, with annexed exhibits;
2. Affidavit of petitioner Gregory Serafin, sworn to September 20, 2021;
3. Affidavit of petitioner Azima Rasiwala, D.O., sworn to September 21, 2021;
4. Affidavit of petitioner Deborah Conrad, sworn to September 21, 2021;
5. Affidavit of petitioner Kathleen McGowan, sworn to September 20, 2021;
6. Affidavit of petitioner Renee Rogers, sworn to September 21, 2021;

[1] The parties also submitted memoranda of law in support of their respective positions. Petitioners served a reply memorandum of law as well. Both of petitioners' memoranda contained exhibits as well.

7. TRO Notice Affidavit of Todd J. Aldinger, Esq., sworn to September 22, 2021, with annexed exhibit;
8. Petitioners' Verification Pages, sworn to September 27, 2021[2];
9. Affidavit of Dr. Elizabeth Rausch-Phung, M.D., M.P.H., sworn to September 30, 2021, with annexed exhibits.

[2] At oral argument, respondents waived their nullity argument as to the verification of the petition/complaint.