

Serafin v New York State Dept. of Health
2021 NY Slip Op 34025(U)
December 9, 2021
Supreme Court, Albany County
Docket Number: Index No. 908296-21
Judge: Roger D. McDonough
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**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 herself 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 own behalf in his official capacity and on behalf of similarly situated members of the New York State Legislature,

Petitioners/Plaintiffs,

**DECISION, ORDER and
JUDGMENT**

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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Roger D. McDonough, J.:

This proceeding is hybrid in nature, seeking relief under Article 78 and/or declaratory relief. In their petition and complaint ("petition"), petitioners seek, *inter alia*, an Order and Judgment: (1) declaring that 10 NYCRR § 2.61 ("§ 2.61") is void and a legal nullity not authorized by statute; (2) declaring that § 2.61 is unconstitutional because it violates the separation of powers inherent in the State Constitution; (3) declaring that § 2.61 violates petitioners' substantive due process rights; and (4) declaring that § 2.61 violates petitioners' procedural due process rights. Respondents have moved for partial dismissal and served their answer. In their answer they seek complete dismissal of the petition and the relief requested therein. Petitioners have cross-moved for leave to file an amended petition and complaint ("amended petition"). Petitioners' cross-motion papers included the proposed amended petition. Respondents oppose the cross-motion and again stress that they are entitled to outright dismissal of the proceeding.

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. Thereafter, the Court denied the request for preliminary injunctive relief and lifted Judge Ryba's TRO. There is no record of petitioners appealing this Court's decision.

Background/Party Submissions

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.¹ § 2.61 applies to "covered entities" including the hospitals and nursing homes where the petitioners work. The rule required certain personnel to be fully vaccinated against COVID-19. § 2.61 further required 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. 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

¹ By the Court's calculations, the 90 day period expired on or about November 24, 2021. The Court has not been provided with any information as to any steps respondents have taken regarding the apparent expiration.

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 the Vaccine Adverse Event Reporting System (VAERS)² 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

² VAERS is a national early warning system for the detection of possible safety problems in U.S. - licensed vaccines. The system is co-managed by the Centers for Disease Control and Prevention and the U.S. Food and Drug Administration ([www://vaers.hhs.gov/about.html](http://www.vaers.hhs.gov/about.html)).

medical reasons. She expresses her concern with the U.S. Food and Drug Administration's ("FDA") "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 initial affidavit from NYSDOH's Medical Director of the Bureau of Immunization. Dr. Rausch-Phung indicates that her affidavit was 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. She maintains that the Delta variant led respondents to act 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 as 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.

Dr. Rausch-Phung 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 she claims refute the proposition that natural immunity is equal to or greater than the immunity afforded by the vaccines.

After the Court issued its decision and order on the preliminary injunctive relief, the parties agreed to a briefing schedule. Respondents have provided the Court with four new affidavits.

Emily Lutterloh, MD, MPH is NYSDOH's Director of the Division of Epidemiology. Dr. Lutterloh's responsibilities include coordinating NYSDOH's "efforts to investigate, reduce and prevent outbreaks and transmission of infectious diseases." She maintains that § 2.61 was adopted based on determinations by respondents that it was necessary to immediately address a rapidly worsening public health crisis. Dr. Lutterloh further asserts that § 2.61 was created after considering data and research regarding COVID-19, the impact of the Delta variant and the effectiveness of existing mitigation strategies. In support she cites a number of the statistics, data findings and research relied upon by Dr. Rausch-Phung in her earlier affidavit. In sum, Dr.

Lutterloh contends that the various considerations provided a rational basis for the promulgation of § 2.61 on an emergency basis.

Additionally, respondents provided a second affidavit from Dr. Rausch-Phung. The second affidavit is predominantly repetitive of her first affidavit. However, updated and new information was provided, including the following: (1) for the four-week period ending on September 25, 2021, 99.4% of New York's COVID-19 cases were Delta; (2) as of October 18, 2021, New York's positivity rate was at 2.43% as compared to 1.22% on October 18, 2020; (3) as of October 17, 2021, respondents are aware of confirmed breakthrough cases in New York State in .9% of the fully-vaccinated population; (4) as of October 17, 2021, respondents are aware of confirmed breakthrough cases in New York State resulting in hospitalizations in .06% of the fully-vaccinated population; (5) as of September 27, 2021, fully-vaccinated New Yorkers had 77.9% lower chance of becoming a COVID-19 case and between a 89.7-95.2% lower chance of becoming hospitalized, as compared to unvaccinated New Yorkers. Finally, Dr. Rausch-Phung discussed medical exemptions to the vaccine mandate and stressed that the narrow breath of currently known limited contraindications and precautions in this area. She also noted that, statewide, only .5% of staff for hospitals, .4% of staff for nursing homes, and only .6% of staff for adult care facilities were considered medically ineligible.

Respondents submitted an affidavit from Valerie A. Deetz, the Deputy Director of the Center for Health Care Provider Services and Oversight, Office of Primary Care and Health Systems Management at NYSDOH. The Deputy Director provided the following statistics for nursing homes statewide as of October 19, 2021 – 88.7% of healthcare workers had completed the vaccine series, an additional 8.7% had received their first dose, .4% were reported as medically ineligible, and 1.9% were reported in “other” exemption status. Finally, respondents supplied an affidavit from Dorothy Persico, the Deputy Director of the Divisions of Hospitals and Diagnostic and Treatment Centers, Office of Primary Care and Health Systems Management at NYSDOH. Deputy Director Persico provided the following statistics for hospitals statewide as of October 19, 2021 – 91% of healthcare workers had completed the vaccine series, an additional 5% had received their first dose, .5% were reported as medically ineligible, and 1.3% were listed as having another exemption. Statistics broken down specifically for Erie County and Monroe

County were similar although the numbers reported for other exemptions were higher, at 3% and 4% respectively.

In reply, petitioners submitted an affidavit from Dr. Paul Elias Alexander, PHD. Doctor Alexander's PhD is in Evidence-Based Medicine, Research Methods, and Clinical Epidemiology. He has a Master's in Epidemiology as well as a Master's in Evidence-Based Medicine. Dr. Alexander's extensive professional history included time as a COVID-Pandemic evidence-synthesis consultant advisor to the World Health Organization. He also works for the U.S. Government as an advisor to the Assistant Secretary of Health and Human Services . Specifically, his title is Senior Advisor for COVID Pandemic response. Dr. Alexander stresses that his affidavit is specifically made in response and opposition to Dr. Rausch-Phung's assertions that: (1) vaccine immunity is superior to natural immunity; and (2) that natural immunity is not a proper basis for a medical exemption to the vaccine mandate. He opines that there is no sound scientific basis for requiring vaccinations of individuals who have previously recovered from COVID-19 and have acquired natural immunity through such recovery. In support he cites his own published article wherein he compiled, analyzed and reviewed 91 studies, articles and other forms of evidence. Dr. Alexander's article concluded that natural immunity is equal to or more robust and superior to existing vaccines. He also argues that the vaccine is less effective against Delta than natural immunity. Additionally, Dr. Alexander argues that individuals with natural immunity should not be forced to deal with the potential harms and adverse effects of vaccination since vaccination will not provide them with any meaningful health benefit.

Further, Dr. Alexander describes the severely compressed schedule vaccine makers utilized in developing the vaccine and evaluating adverse effects. He also appears to accuse the CDC of grossly misleading the nation by undercounting the number of individuals who have died of COVID-19 despite being vaccinated. Finally, he notes that individuals who'd been previously infected with measles, mumps and rubella do not require the measles, mumps and rubella vaccination. Dr. Alexander maintains that the same standard should be applied to the COVID-19 vaccine for individuals who'd been previously infected with COVID-19.

Discussion

The petition sets 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 that 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 that 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.

The proposed amended petition adds a fifth cause of action. Therein, petitioners seek to prevent respondents from failing to comply with SAPA § 202(6)(e). Specifically, they ask the Court to declare that, unless and until SAPA has been complied with, § 2.61 cannot be readopted and no substantially similar emergency regulation may be adopted. Additionally, they seek a permanent injunction enforcing such relief.

Respondents' Partial Motion to Dismiss

Respondents seek dismissal, pursuant to CPLR § 3211, of all portions of the petition seeking relief pursuant to CPLR § 3001 and/or non-Article 78 relief. Petitioners did not meaningfully address the partial motion. The Court has reviewed the petition and finds that it is clearly and wholly a proceeding sounding in mandamus to review. Accordingly, as CPLR Article 78 relief is an available remedy, a declaratory judgment action is duplicative and an improper method to challenge respondents' promulgation and enactment of § 2.61 (*see, Greystone Mgt. Corp. v Conciliation & Appeals Bd. of City of N.Y.*, 62 NY2d 763, 765 [1984]). As such, respondents' partial motion to dismiss must be granted in its entirety.

Standing of Petitioner DiPietro

The Court finds that the petition/amended petition adequately establish that Assembly Member DiPietro has standing to bring this proceeding. Specifically, petitioner DiPietro sufficiently alleged that respondents' promulgation of § 2.61 constituted a usurpation of the Legislature's power (*see, Matter of Silver v Pataki*, 96 NY2d 532, 539-540 [2001]).

First Cause of Action - SAPA Violations

Respondents contend that § 2.61 complies with SAPA's emergency rule making requirements. They point to the Emergency Justification statement and the facts underlying the information therein. Further, they rely upon the enumerated statutory authority cited in § 2.61. Specifically, respondents and § 2.61 cite Public Health Law §§ 225(5), 2800, 2803(2), 3612 and 4010(4) as well as Social Services Law §§ 461 and 461-e. Additionally, respondents point to the following SAPA emergency rule making components that were satisfied by § 2.61: (1) a statement that the notice does not constitute a notice of revised rulemaking for permanent adoption; (2) the findings required by SAPA § 202(6)(a); (3) the effective date upon the filing with the Department of State; (4) the provisions for expiration of § 2.61; (5) the full text of § 2.61; (6) the regulatory impact statement; (7) the requisite flexibility analyses; and (8) the contact information for the appropriate agency representative. Accordingly, respondents argue that they've satisfied SAPA's requirements for emergency rulemaking and that this Court should hold that § 2.61 and its promulgations were not irrational or arbitrary or capricious. As such, they maintain that the first cause of action should be dismissed.

Petitioners argue that § 2.61 lacks any statutory authority and thus fails to comply with SAPA § 202(6)(d)(i). Accordingly, they argue that it is wholly irrelevant whether the necessary SAPA procedures were followed in the emergency rulemaking process. Specifically, petitioners assert that none of the cited statutes mention vaccination requirement for healthcare workers and that none could be interpreted as encompassing such a vaccination requirement. Petitioners also argue that § 2.61 has added an additional job qualification for medical professionals without any statutory authority. They further note that the requirements for entry into these medical professions are already governed by existing laws and regulations as well as agencies other than respondents. Petitioners also stress respondents' prior recognition of its lack of authority to

impose job requirements like the vaccination mandate. As a comparison they cite 10 NYCRR § 2.59 which required health care personnel who were not vaccinated for influenza to wear a surgical or procedural mask at certain times. Petitioners contrast this with § 2.61 which does not provide impacted employees with any option other than being vaccinated. They also stress that if New York wants a vaccination mandate like § 2.61, the Legislature should enact a statute specifically empowering respondents to impose a vaccination requirement. Finally, petitioners discuss the impact that allowing respondents to enact policies like vaccination mandates would have on representative democracy and allowing citizens to determine their representative's positions on policies like this.

The Court finds that the promulgation of § 2.61, the language of § 2.61 and the supporting documentation adequately supports respondents' claim of necessity for 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 affidavits set forth 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 satisfied the requirements of SAPA § 202(6) as to the necessity for the immediate adoption of an emergency rule.

Additionally, 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]).

Based on all of the foregoing, the Court finds that the first cause of action must be dismissed as petitioners have failed to meet the heightened Article 78 burden of showing the regulation to be irrational and unreasonable, arbitrary or capricious (*see, Matter of Consolation Nursing Home v. Commissioner of New York State Department of Health*, 85, NY 2d 326, 331-332 (1995)).

Second Cause of Action -Separation of Powers

As to the separation of powers cause of action, respondents reiterate their argument that all four *Boreali* factors weigh in their favor. As to the first factor, respondents maintain that § 2.61 is an across the board requirement with no attempts to weigh competing or special interests unrelated to the public health goal. They further maintain that inclusion of a religious exemption would actually represent the carving out of an exception to the vaccine mandate that is unrelated to the policy goal of public health. As to the second factor, respondents maintain that they are regulating in a subject area where they have previously regulated. Further, respondents argue that they are appropriately executing policy decisions in an area where the Legislature has granted them broad authority via a comprehensive statutory scheme. As to the third factor, respondents again point to the absence of any legislative attempts to mandate a vaccine for healthcare workers. They further argue that petitioners are disregarding controlling case law by characterizing the Legislature's inaction as somehow determinative. Finally, respondents contend that the respondent agencies clearly used their special expertise/competence in the

healthcare field to develop § 2.61. Accordingly, and based on petitioners' purported acknowledgment, respondents argue that the fourth *Boreali* factor is not in dispute. As such, respondents maintain that § 2.61 did not violate the separation of powers doctrine and that the second cause of action should be dismissed.

In reply, petitioners question whether *Boreali* is even applicable to the Court's review of the legality of § 2.61. Rather, petitioners maintain that the Court should focus on whether respondents have inappropriately made a critical policy decision and engaged in law-making functions. Petitioners question how § 2.61 could be rationally viewed as anything other than a critical policy decision in light of its impact on the economy, the livelihood of a substantial proportion of New York's healthcare workers and the civil discord generated by vaccine mandates. They ask the Court to go beyond the *Boreali* factors and focus upon whether respondents evaded SAPA's requirements and promulgated a regulation constituting respondents' assessment of what public policy as to vaccination mandates should be. Petitioners again stress the viable alternatives that respondents failed to provide to impacted healthcare workers like: (1) exemptions for natural immunity; (2) testing for COVID-19; and (3) masking with N95 masks.

The Court concludes that all four factors proffered and discussed in *Boreali* support the legality of respondents' promulgation of § 2.61 and finds that the doctrine of separation of powers has not been violated here. 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 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. The Court also finds that consideration of petitioners' separation of powers claim clearly 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).

Based on all of the foregoing, the Court finds that the second cause of action must be dismissed as petitioners have failed to meet their Article 78 burden.

Additionally, as to both the first and second causes of action, respondents have made a sufficient showing as to the rational basis for promulgating § 2.61. While petitioners credibly buttressed their assertions by means of the expert's affidavit submitted in reply, they have not shown by clear and convincing evidence that § 2.61 is 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 demonstrated their reasoned reliance upon a multitude of documented medical studies and findings in support of the promulgation of § 2.61 (*see*, Id. at 332). Conversely, the competing analysis and credible medical studies offered by petitioners' expert were simply insufficient to demonstrate outright irrationality, arbitrariness or capriciousness in § 2.61 or its promulgation, and petitioners therefore fail to satisfy the high threshold necessary to invalidate the emergency rule under § 2.61 (*see*, Id.).

Third Cause of Action-Substantive Due Process

Assuming, *arguendo*, that petitioners have adequately established protected rights in their employment and pursuit of their medical professions, the Court finds that petitioners have not

met their heavy burden of showing that respondents' promulgation of § 2.61 rises to the level of a substantive due process violation (*see, Cunney v Bd. of Trustees of Vill. of Grand View, N.Y.*, 660 F.3d 612, 626 [2nd Cir. 2011]). While petitioners have provided admissible submissions challenging the correctness and advisability of the vaccine mandate, particularly as to those impacted healthcare workers who've already contracted COVID-19, they have not established that the vaccine mandate and/or the promulgation procedures are "arbitrary, conscience shocking, or oppressive in a constitutional sense" (*see, Id.*). Substantive due process relief is simply not warranted absent such a showing. The protections of substantive due process are not available against government action that is merely incorrect or ill advised (*see, Id.*).

Based on the analysis set forth above and previously by this Court, the Court concludes that respondents have complied with SAPA and made a detailed showing of their rational basis for promulgating § 2.61. Accordingly, the Court finds that the third cause of action must be dismissed as petitioners have not met their Article 78 burden of establishing a substantive due process violation.

As to petitioners' request for alternative relief on this cause of action, the petitioners have not sufficiently demonstrated the legal appropriateness or effective practical implementation of an Order allowing covered entities to accept a form of natural immunity as a valid medical exemption under § 2.61.

Fourth Cause of Action-Procedural Due Process

Assuming, *arguendo*, that petitioners have adequately established protected rights in their employment and pursuit of their medical professions, the Court finds that petitioners have not met their burden of establishing a procedural due process violation. The Court has concluded that respondents have complied with the emergency rulemaking procedures set forth in SAPA. Accordingly, respondents were authorized to dispense with the public notice and comment period requirements. In any event, this very Article 78 proceeding speaks to the existence of the availability of a post-deprivation remedy (*see, Marino v Ameruso*, 837 F.2d 45, 47 [2nd Cir. 1988]). Based on the foregoing and the available post-deprivation remedy, the Court finds no procedural due process violation here, and the fourth cause of action is therefore dismissed.

Petitioners' Cross-Motion/Fifth Cause of Action

The Court has reviewed the proposed amended petition and finds that petitioners' cross-motion must be denied. The proposed new cause of action seeks declaratory relief and a permanent injunction. For the reasons stated above, the Court finds that declaratory relief is unnecessarily duplicative and improper in light of the available remedy of a future action in the form of mandamus to review should petitioners' fears of noncompliance be realized. Further, the preliminary injunctive relief is improper as the injunction seeks to compel respondents to comply with an existing New York State statute with which they must already comply. Under these circumstances, and based on the Court's prior and current findings regarding respondents' compliance with SAPA, the extraordinary relief of a permanent injunction is inappropriate (*see, Matter of Willkie v Delaware County Bd. of Elections*, 55 AD3d 1088, 1092 [3rd Dept. 2008]). As such, petitioners' cross-motion for leave to amend their petition must be denied in its entirety.

Finally, to the extent the claim has been properly raised and not abandoned, the Court concludes that the lack of a religious exemption does not render § 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]).

The parties' remaining arguments and requests for relief³ have been considered and found to be lacking in merit and/or unnecessary to reach in light of the Court's findings.

Based upon the foregoing it is hereby

ORDERED AND ADJUDGED that the respondents' partial motion to dismiss the requested declaratory relief is hereby granted in its entirety; and it is further

³ Petitioners appear to have abandoned their religious exemption argument. To the extent that the argument has not been waived, the Court finds it to be without merit for the reasons stated in the Court's prior Decision and Order.

ORDERED AND ADJUDGED that the petition is hereby dismissed and the relief requested therein is in all respects denied; and it is further

ORDERED AND ADJUDGED that petitioners' cross-motion for leave to amend their petition is hereby denied; and it is further

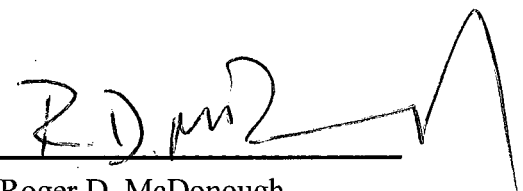
ORDERED AND ADJUDGED that the Court declines to issue any declaratory relief as said causes of action have been dismissed as duplicative and unnecessary.

SO ORDERED AND ADJUDGED.

This shall constitute the Decision, Order and Judgement of the Court. This Decision, Order and Judgment will be forwarded to the Albany County Clerk by the Court. A copy of the Decision, Order and Judgment is being forwarded to counsel for all parties. The signing of this Decision, Order and Judgment 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
December 9, 2021



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered⁴:

1. Petition, 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;
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;⁵
9. Affidavit of Dr. Elizabeth Rausch-Phung, M.D., M.P.H., sworn to September 30, 2021, with annexed exhibits;
10. Respondents' Motion for Partial Dismissal, dated October 21, 2021;
11. Respondents' Answer, dated October 21, 2021;
12. Affidavit of Dr. Emily Lutterloh, M.D., M.P.H., sworn to October 21, 2021, with annexed record/exhibits;
13. Affidavit of Dr. Elizabeth Rausch-Phung, M.D., M.P.H., sworn to October 21, 2021, with annexed record/exhibits;
14. Affidavit of Valerie A. Deetz, sworn to October 20, 2021;
15. Affidavit of Dorothy Persico, sworn to October 21, 2021;
16. Petitioners' Notice of Cross-Motion for Leave to Amend their Complaint, dated October 25, 2021;
17. Affirmation of Todd J. Aldinger, Esq., dated October 25, 2021, with annexed proposed first amended complaint;
18. Affidavit of Dr. Paul Elias Alexander, PHD, sworn to October 25, 2021, with annexed exhibits.

⁴ The parties also submitted memoranda of law in support of their respective positions.

⁵ At oral argument for the preliminary injunction, respondents waived their nullity argument as to the verification of the petition.