UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

KATHLEEN HOCHUL, HOWARD A. ZUCKER, M.D.,

Defendants-Appellees.

No. 21-2179

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR EMERGENCY INJUNCTION PENDING APPEAL

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PRELIMINARY STATEMENT

The COVID-19 pandemic has imposed a deadly toll on New York, which continues to this day with the spread of the highly contagious SARS-CoV-2 Delta variant. COVID-19's impact has been particularly devastating in the healthcare sector, where already-vulnerable patients are inherently at greater risk of severe harm from any infection, and where the spread of the virus among healthcare workers can lead to a vicious cycle of staff shortages and deterioration of patient care.

In light of the distinct concerns raised by the spread of COVID-19 in the healthcare sector, the New York Department of Health (DOH) promulgated an emergency rule requiring certain healthcare workers to receive a COVID-19 vaccination: namely, any worker whose activities could potentially expose other personnel or patients to COVID-19 if he or she were infected. Like preexisting vaccination requirements for measles and rubella that have long applied to healthcare workers, DOH's emergency COVID-19 rule contains no religious exemption. The plaintiffs here—three individual healthcare workers and a membership organization—seek to stay the enforcement of the rule based on the absence of a religious exemption. The U.S. District Court for the Eastern District of New

York (Kuntz, J.) denied their request for a preliminary injunction, and they now seek a stay pending appeal.

This Court should deny plaintiffs' motion. The equities weigh heavily in favor of allowing DOH's emergency rule to go into effect. Delaying the mandatory vaccination of New York's healthcare workers poses the risk of infection, complications, and death to the vulnerable population that they serve. And the public at large risks receiving substandard medical care at facilities that have inadequate staffing following an outbreak among healthcare workers. By contrast, the principal harm identified by plaintiffs is their conclusory assertion that they may lose their employment if they adhere to their religious objection to the vaccine, but it is well settled that such potential economic harm is inadequate to justify the extraordinary remedy of a preliminary injunction.

Plaintiffs also fail to show a likelihood of success on the merits or sufficiently serious questions going to the merits. Courts have upheld vaccination requirements for well over a century—and this Court has squarely recognized that religious exemptions are not required by the

First Amendment. Under these precedents, rules such as the one challenged here are rational exercises of the States' police powers and do not violate First Amendment or substantive due process rights.

ISSUES PRESENTED

1. Whether the balance of the equities favors denying a stay of DOH's emergency rule, when a stay would lead to increased risk of transmission of a potentially fatal disease among healthcare workers and the vulnerable populations they serve, whereas absent a stay plaintiffs face the speculative loss of employment—a harm that can be compensated (if necessary) by monetary damages.

2. Whether plaintiffs have established a likelihood of success on the merits, where courts have uniformly rejected First Amendment and substantive due process challenges to compulsory vaccination laws for well over a century, including those without any religious exemption.

STATEMENT OF THE CASE

A. New York's Long and Successful History of Vaccination Requirements

New York has been a leader in mandating vaccination of school-age children since first requiring vaccination against smallpox in the 1860s. *See* James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 851 (2002). New York also has regularly imposed vaccination requirements on healthcare workers. For example, hospital employees who pose a risk of transmission to patients must be immunized against measles and rubella, and religious exemptions are not permitted. *See, e.g.*, 10 N.Y.C.R.R. § 405.3(b)(10)(i)-(ii). New York's mandatory vaccination program reflects the consensus view that "immunizations are among the most effective preventative measures to preserve and protect the public health" and that compliance with "childhood and adult vaccination schedules" is essential to preventing the spread of communicable diseases. Ch. 603, § 1, 2005 N.Y. Laws 3379, 3379.

B. The COVID-19 Pandemic and New York's Response

1. The COVID-19 pandemic, the invention of safe and effective vaccines, and efforts to promote their use

COVID-19 is a highly infectious and potentially deadly respiratory illness that spreads easily from person to person, and was first detected in December 2019.[1] To date, COVID-19 has infected more than 41 million people and claimed over 675,000 lives in the United States,[2] including at least 550,000 infections and 1,750 deaths among healthcare workers.[3]

In light of the emergency caused by the COVID-19 pandemic, the federal government has issued emergency use authorizations for the Moderna and Janssen COVID-19 vaccines, and the Pfizer-BioNTech vaccine has received full regulatory approval. Studies show that the vaccines are highly effective, and increasing vaccination coverage is

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[1] World Health Org., *Listings of WHO's Response to COVID-19* (last updated Jan. 29, 2021) (internet). (For internet sources, URLs are provided in the Table of Authorities.)

[2] Centers for Disease Control & Prevention, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory* (last visited Sept. 23, 2021) (internet).

[3] *See* Centers for Disease Control & Prevention, *COVID Data Tracker: Cases & Deaths Among Healthcare Personnel* (last visited Sept. 23, 2021) (internet).

"critical to reducing the risk for COVID-19–related hospitalization, particularly in older adults."[4]

The COVID-19 vaccines do not contain aborted fetal cells.[5] HEK-293—cells grown in a laboratory from cells collected from a fetus in 1973—were used to test the Pfizer and Moderna vaccines.[6] Such testing is common for a variety of everyday medications, including widely used over-the-counter drugs like Tylenol, Benadryl, and Pepto-Bismol.[7]

In addition to the medical consensus supporting the COVID-19 vaccine, a diverse range of religious leaders has also strongly encouraged adherents to receive a COVID-19 vaccination. In particular, Pope Francis, the leader of the Roman Catholic Church (a church with which two of the three plaintiffs are affiliated) has recognized that taking an approved

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[4] *See, e.g.*, Heidi L. Moline et al., *Effectiveness of COVID-19 Vaccines in Preventing Hospitalization Among Adults Aged ≥ 65 Years – COVID-NET, 13 States, February-April 2021*, 70 Morbidity & Mortality Wkly. Rep. 1088, 1092 (Aug. 13, 2021).

[5] Los Angeles Cnty. Dep't of Pub. Health, *COVID-19 Vaccine and Fetal Cell Lines* 1 (Apr. 20, 2021) (internet).

[6] *See id.* at 1-2.

[7] *See* Matthew P. Schneider, *If Any Drug Tested on HEK-293 Is Immoral, Goodbye Modern Medicine*, Through Catholic Lenses (Jan. 28, 2021) (internet) (collecting research papers).

COVID-19 vaccine is "an act of love" and "a simple yet profound way to care for one another, especially the most vulnerable."[8] The U.S. Conference of Catholic Bishops has explained that the Pfizer and Moderna vaccines did not use fetal cell lines for their "design, development, or production," and the connection between those vaccines and abortion "is very remote."[9] More broadly, a coalition of 145 diverse faith leaders stated that the "only way to end the pandemic" is to ensure that COVID-19 vaccines "are made available to all people as a global common good."[10]

2. New York's adoption of a COVID-19 vaccination requirement for certain healthcare workers

On August 26, 2021, DOH promulgated an emergency rule requiring covered healthcare entities to "continuously require" employees to be fully vaccinated against COVID-19 if they "engage in activities such that if

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[8] Devin Watkins, *Pope Francis Urges People to Get Vaccinated Against Covid-19*, Vatican News (Aug. 18, 2021) (internet) (quotation marks omitted).

[9] Chairmen of the Comm. on Doctrine and the Comm. on Pro-Life Activities, *Moral Considerations Regarding the New COVID-19 Vaccines* 4-5, U.S. Conf. of Catholic Bishops (Dec. 11, 2020) (internet).

[10] Press Release, ReliefWeb, *World Religious Leaders Call for Massive Increases in Production of Covid Vaccines and End to Vaccine Nationalism* (Apr. 27, 2021) (internet).

they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease." 10 N.Y.C.R.R. § 2.61(a)(2), (c). The rule contains a limited exception for employees for whom a "COVID-19 vaccine [would be] detrimental to" their health "based upon a pre-existing health condition."[11] *Id.* § 2.61(d)(1). There is no religious exemption. The availability of a medical but not religious exemption is also true for the longstanding requirement that healthcare workers be vaccinated against measles and rubella. *See, e.g.*, *id.* § 405.3(b)(10)(iii).

DOH explained that the emergency rule responded to the increasing circulation of the Delta variant, which has led to a tenfold increase in COVID-19 infections since early July 2021. DOH found that COVID-19 vaccines are safe and effective, and that the presence of unvaccinated personnel in healthcare settings poses "an unacceptably high risk" that

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[11] DOH's emergency rule superseded an order issued on August 18, 2021, under New York Public Health Law § 16, *see* Dep't of Health, Order for Summary Action (Aug. 18, 2021) (internet). The August 18 order differed in two primary respects: it (1) covered a narrower range of healthcare entities, *see id.* at 3; and (2) included an exemption for individuals who "hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer," *id.* at 5-6.

employees may acquire COVID-19 and transmit the virus to colleagues, thereby "exacerbating staffing shortages," or "vulnerable patients or residents," "causing [an] unacceptably high risk of complications."[12] DOH emphasized that unvaccinated individuals have *eleven times* the risk of being hospitalized with COVID-19.

C. This Lawsuit

On September 2, 2021, plaintiffs filed this lawsuit, challenging the omission of a religious exemption from DOH's emergency rule. The complaint names Howard A. Zucker, DOH's Commissioner, and Kathleen Hochul, New York's Governor, as defendants in their official capacities. (Compl. at 3 (¶¶ 7-8) (Sept. 2, 2021), ECF No. 2.) The plaintiffs are We The Patriots USA, Inc., a membership organization dedicated to "promoting constitutional rights" (*id.* at 2 (¶ 3)), and three individual healthcare workers: Diane Bono, Michelle Melendez, and Michelle Synakowski (*see id.* at 2 (¶¶ 4-6)).

[12] Prevention of COVID-19 Transmission by Covered Entities, 43 N.Y. Reg. 6, 8 (Sept. 15, 2021) (Regulatory Impact Statement).

Plaintiffs allege that they have religious objections to receiving a vaccine that uses "a fetal cell line for development, manufacturing, or testing" (*id.* at 3 (¶ 10)), and that the omission of a religious exemption will require two of the plaintiffs (Melendez and Synakowski) to choose whether to take the vaccination "or lose their employment" (*id.* at 5 (¶ 22)). They claim that the DOH emergency rule violates their rights to free exercise of religion, privacy, and medical freedom. (*Id.* at 5-7 (¶¶ 23-34).)

Plaintiffs moved for a temporary restraining order and a preliminary injunction ten days later. The only evidence they submitted consisted of conclusory affidavits from the individual plaintiffs and letters from two of their employers. According to these submissions, Bono is "a committed and practicing member of the Christian faith," Melendez and Synakowski are "committed and practicing member[s] of the Roman Catholic Church," and they object to the use of fetal cell lines in COVID-19 vaccines. (Aff. of Diane Bono ¶¶ 4, 6 (Sept. 2, 2021), ECF No. 6-4 ("Bono Aff."); Aff. of Michelle Melendez ¶¶ 4, 6 (Sept. 3, 2021), ECF No. 6-6 ("Melendez Aff."); Aff. of Michelle Synakowski ¶¶ 4, 6 (Sept. 10, 2021), ECF No. 6-8 ("Synakowski Aff.").)

Plaintiffs believe that their employers will terminate them if they do not receive a COVID-19 vaccine. (Bono Aff. ¶ 8; Melendez Aff. ¶ 8; Synakowski Aff. ¶ 8.) A letter from Bono's employer states that her "continued employment will be at risk" if she does not receive a COVID-19 vaccine. (Letter from Northwell Health Human Resources to Diane Bono at 1 (Aug. 31, 2021), ECF No. 6-5 ("Bono Ltr.").) But a letter from Melendez's employer simply states restrictions on Melendez's activities at work if she does not receive a COVID-19 vaccine. (Letter from Northwell Health Human Resources to Michelle Melendez (Aug. 30, 2021), ECF No. 6-7 ("Melendez Ltr.").) And Synakowski does not submit any documentation from her employer corroborating her claim.

Based on these papers, the district court denied plaintiffs' motion. (Order (Sept. 12, 2021).) The next day, plaintiffs sought a stay pending appeal, which the court also denied. (Order (Sept. 13, 2021).) Plaintiffs then filed this motion seeking a stay pending appeal from this Court.

Shortly thereafter, district courts entertaining two other lawsuits challenging DOH's vaccination requirement ruled on applications for emergency relief. In one proceeding, the court entered a temporary

restraining order (TRO) barring defendants from "enforcing any requirement that employers" deny or revoke religious exemptions from COVID-19 vaccination, without hearing from defendants. Order at 3, *Dr. A. v. Hochul*, No. 21-cv-1009 (N.D.N.Y. Sept. 14, 2021), ECF No. 7. That TRO was originally scheduled to expire on September 28, but the court recently extended it to October 12. Order at 4, *Dr. A.*, No. 21-cv-1009 (N.D.N.Y. Sept. 20, 2021), ECF No. 15. In a separate proceeding, the court denied a request for a TRO as moot in light of the TRO already in effect in *Dr A.* Mem. & Order at 1-3, *Does v. Hochul*, No. 21-cv-5067 (E.D.N.Y. Sept. 14, 2021), ECF No. 35.

ARGUMENT

PLAINTIFFS HAVE FAILED TO ESTABLISH THE REQUISITE ELEMENTS FOR PRELIMINARY INJUNCTIVE RELIEF

A party seeking preliminary injunctive relief

> must demonstrate (1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor.

MyWebGrocer, LLC v. HomeTown Info, Inc., 375 F.3d 190, 192 (2d Cir. 2004) (quotation marks omitted). Plaintiffs have failed to satisfy these prerequisites here.

A. The Balance of the Equities Tips Decidedly in Favor of Defendants.

Plaintiffs have failed to establish that they will suffer irreparable harm absent injunctive relief, which is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (alteration in original) (quotation marks omitted).

The principal harm asserted by plaintiffs is a potential loss of their employment due to the DOH emergency rule (*see* Emergency Mot. of Pls.-Appellants for Inj. Pending Appeal (Mot.) at 20). But for several reasons, plaintiffs have failed to establish that any such harm is either imminent or irreparable.

First, plaintiffs' threadbare evidence fails to establish that they will actually be terminated by their employers. Synakowski offers no evidence to support her conclusory assertion that she will be terminated. (*See* Synakowski Aff. ¶ 8.) Melendez's fear of termination is undermined by

the letter from her employer, which simply lists restrictions on her activities if she does not receive a COVID-19 vaccine. (*See* Melendez Ltr.) And while the letter from Bono's employer does state that her "continued employment will be at risk" if she does not receive a COVID-19 vaccine, that language establishes at most a speculative harm. (*See* Bono Ltr.) Further, plaintiffs fail to describe either the functions they perform at work or whether they have sought (or been denied) a transfer to a position outside the coverage of DOH's emergency rule, *see* 10 N.Y.C.R.R. § 2.61(a)(2). Courts routinely deny injunctive relief when presented with conclusory and self-serving claims of irreparable harm like those asserted here. *See, e.g.*, *Baker's Aid v. Hussmann Foodservice Co.*, 830 F.3d 13, 16 (2d Cir. 1987).

Second, DOH is currently barred from "enforcing any requirement that employers deny religious exemptions from COVID-19 vaccination." Order at 3, *Dr. A.*, ECF No. 7. Plaintiffs suggest that their employer may terminate them anyway (*see* Letter from Cameron L. Atkinson (Sept. 15, 2021), CA2 ECF No. 20), but that dispute is one between plaintiffs and their private employers, entities that have not been named in this suit.

Third, even if plaintiffs did face the imminent threat of being terminated, it is well established that the loss of employment, and the resulting financial loss, do not constitute "irreparable harm" because plaintiffs can be fully compensated with money damages. *See Sampson v. Murray*, 415 U.S. 61, 90-92 (1974); *Hyde v. KLS Pro. Advisors Grp., LLC*, 500 F. App'x 24, 25 (2d Cir. 2012); *Savage v. Gorski*, 850 F.2d 64, 67 (2d Cir. 1988). This principle is independently fatal to plaintiffs' motion.

Plaintiffs also assert irreparable injury from an imminent deprivation of their First Amendment right to free exercise. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). But plaintiffs do not allege—much less prove—that DOH's emergency rule will compel them to act in violation of their religious beliefs. They can choose to refuse a COVID-19 vaccine, but if they do so, they may need to find a new position that falls outside the scope of DOH's emergency rule (whether with their current employer or a new employer).

In sharp contrast to plaintiffs' failure to show irreparable harm, the public would suffer serious harms if DOH's emergency rule were stayed. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). As discussed above (see *supra* at 8-9), achieving high vaccination rates in

particularly vulnerable settings is of the utmost importance. Those vulnerable populations include immunocompromised patients especially susceptible to viral infections. The COVID-19 vaccines are extremely safe and effective at protecting healthcare workers themselves and the populations they serve from suffering severe complications from COVID-19. And the vaccination requirement will also protect others who need emergency medical treatment from the consequences of staffing shortages and overstrained emergency rooms that could follow a COVID-19 outbreak among healthcare workers.

These concerns are even more urgent now, especially with the emergence and prevalence of the Delta variant. Experts predict that there will be a fall surge in COVID-19 infections,[13] and healthcare resources will soon face additional strains due to seasonal influenza. Vaccination of healthcare workers will help to prevent additional burdens from being inflicted on the healthcare sector at the precise moment when it is already at threat of becoming overtaxed.

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[13] Jeanne Whalen, *Models Predict U.S. Coronavirus Infections Could Surge This Fall If Vaccination Rates Lag, Former FDA Chief Says*, Wash. Post (June 20, 2021) (internet).

Accordingly, the balance of the equities tips decidedly in favor of defendants. This Court may deny plaintiffs' motion on that ground alone.

B. Plaintiffs Have Not Established a Likelihood of Success on the Merits or Sufficiently Serious Questions Going to the Merits.

1. Courts—including this Court—have long upheld mandatory vaccination requirements, including those without religious exemptions.

Courts have long held that mandatory vaccination laws constitute a valid exercise of the States' police powers, and such laws have withstood challenges on various constitutional grounds for more than a century. In 1905, for example, the Supreme Court held that mandatory vaccination laws do not offend "any right given or secured by the Constitution," and the States' police powers allow imposition of "restraints to which every person is necessarily subject for the common good." *Jacobson v. Massachusetts*, 197 U.S. 11, 25-27 (1905); *see Zucht v. King*, 260 U.S. 174, 176 (1922).

Courts have specifically recognized that generally applicable vaccination requirements do not infringe on religious liberties. As the Supreme Court held over seventy years ago, "[t]he right to practice [one's] religion freely does not include liberty to expose the community . . . to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 &

n.12 (1944). More recently, the Court identified "compulsory vaccination laws" as among the neutral, generally applicable laws that did not require religious exemptions under the First Amendment. *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 889 (1990).

As recently as 2015, this Court similarly explained that mandatory vaccination (in that case, for schoolchildren) "does not violate the Free Exercise Clause." *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). This Court reasoned that "New York could constitutionally require that all children be vaccinated in order to attend public school" without any religious exemption at all.[14] *Id.* In short, "it has been settled law for many years that claims of religious freedom must give way in the face of the compelling interest of society in fighting the spread of contagious diseases through mandatory inoculation programs." *Sherr v. Northport–E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987); *see id.* at 83 (citing cases).

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[14] Plaintiffs argue (at 10-12) that *Lawrence v. Texas*, 539 U.S. 558 (2003), somehow undermined *Jacobson*, but fail to address the holding in *Phillips* that *Jacobson* remains good law.

In light of this settled law upholding vaccination requirements, plaintiffs fail to show a likelihood of success on the merits or sufficiently serious questions going to the merits. For the reasons given below, as a neutral law of general applicability, DOH's emergency rule is subject to rational-basis review—a bar that it readily clears. Although the rule would pass heightened scrutiny as well, plaintiffs' attempt to invoke such scrutiny fails. Finally, *Phillips* forecloses plaintiffs' substantive due process claim.

2. The emergency rule is subject to rational-basis review, which it readily satisfies.

It is well-established that the right to free exercise of religion does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability." *Smith*, 494 U.S. at 879 (quotation marks omitted). Rational basis review is all that is required to uphold neutral laws of general applicability—i.e., laws that do not target, disapprove of, or single out religious groups or practices or seek to coerce religious beliefs, even if the law "proscribes (or prescribes) conduct that [one's] religion prescribes (or proscribes)." *Id.* at 889 (quotation marks omitted).

DOH's emergency rule is a neutral law of general applicability. It applies to every employee in covered healthcare settings who "could potentially expose other covered personnel, patients or residents to" COVID-19 if infected, unless the employee falls under a limited medical exemption. 10 N.Y.C.R.R. § 2.61(a)(2), (d). And the rule is neutral as to religion on its face.

As a neutral law of general applicability, the DOH emergency rule easily satisfies rational-basis review because it demonstrates a "reasonable fit" between the State's purpose and "the means chosen to advance that purpose." *Leebaert v. Harrington*, 332 F.3d 134, 139 (2d Cir. 2003) (quotation marks omitted). New York seeks to protect public health and safety by reducing the incidence of COVID-19 by vaccinating New York's healthcare workers and thereby protect them, their colleagues, the vulnerable populations that they serve, and the general public. Vaccination ensures that healthcare workers themselves are protected, prevents staffing shortages that could follow an outbreak among staff, and protects the vulnerable populations that they serve from infection. *See* 43 N.Y. Reg. at 8. Indeed, plaintiffs do not even purport to contest the rationality of DOH's emergency rule.

Instead, plaintiffs attempt to invoke heightened scrutiny, based on their assertion (at 12-16) that by omitting an exemption for those with religious objections to vaccination, DOH targeted religion, rendering the regulation not neutral. But *Smith* forecloses any argument that the omission of a religious exemption necessarily constitutes the improper targeting of religion. *See Smith*, 494 U.S. at 879.

Plaintiffs are likewise incorrect to argue that DOH's emergency rule is not generally applicable because it allows for medical exemptions. Plaintiffs rely on decisions holding that, when a regulation permits a nonreligious exemption that undermines the purpose of an underlying restriction, it would be improper to deny a religious exemption on the ground that it also undermines the underlying purpose of the restriction. But those decisions are inapposite here because the medical exemption furthers the rule's underlying purpose of promoting public health, while a religious exemption would not.

For example, the policy at issue in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark* prohibited police officers from wearing beards in order to maintain uniform appearance. 170 F.3d 359 (3d Cir. 1999). The Third Circuit reasoned that, because a medical exemption from

the policy undermined the defendants' proffered interest in uniformity, there was no basis to deny a religious exemption. *See id.* at 365-66. The policy instead reflected an impermissible "value judgment" that secular motivations for wearing a beard were more important than religious motivations. *Id.* at 366.

Similar reasoning appears in recent Supreme Court orders striking down policies that imposed capacity limitations to reduce the spread of COVID-19. Those policies were found to impose more stringent restrictions on religious services than on similar, secular activities in a manner that allowed secular business, but not religious institutions, to undermine the stated purpose of the policies. For example, the Court noted that a store in Brooklyn could have "hundreds of people" shopping there while a nearby religious institution could not have "more than 10 or 25 people inside for a worship service." *Roman Catholic Diocese*, 141 S. Ct. at 67 (quotation marks omitted); *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

Here, by contrast, DOH's medical exemption furthers the same stated purpose as the underlying vaccine requirement (promoting public

health), unlike the claimed religious exemption. The DOH medical exemption, like the vaccine requirement, promotes the health of (among others) healthcare workers by exempting those for whom a "COVID-19 vaccine is detrimental to" their health. 10 N.Y.C.R.R. § 2.61(d)(1). A contrary rule—requiring individuals to take a vaccine that is harmful to their health—would exacerbate one of the very risks that DOH is attempting to address. Accordingly, because the "single exception for medical exemptions" furthers the same policy as DOH's emergency rule, it is not comparable to a proposed religious exemption that would undermine that policy. *See W.D. v. Rockland County*, No. 19-cv-2066, 2021 WL 707065, at *26-30 (S.D.N.Y. Feb. 22, 2021).

Finally, plaintiffs' reliance on *Fulton v. City of Philadelphia* is misplaced as well. *See* 141 S. Ct. 1868 (2021). That narrow decision rested on a contract clause that gave a city official authority to "grant exemptions to [a] non-discrimination clause in her sole discretion." *Resurrection Sch. v. Hertel*, No. 20-2256, 2021 WL 3721475, at *14 (6th Cir. Aug. 23, 2021) (quotation marks omitted). That "unfettered discretion meant that the non-discrimination clause was not neutral and of general applicability." *Id.* Here, by contrast, DOH provides specific criteria for qualifying for a

medical exemption: namely, a showing that the "COVID-19 vaccine is detrimental to" an individual's health "based upon a pre-existing health condition." 10 N.Y.C.R.R. § 2.61(d)(1). And employers determine an individual's qualification for that exemption. There is thus no "unfettered discretion" exercised by a government official here that would preclude application of *Smith* and this Court's precedents upholding mandatory vaccination requirements.

3. DOH's emergency rule would satisfy heightened scrutiny in any event.

In any event, even if some form of heightened scrutiny did apply here, DOH's emergency rule would satisfy it. As the Supreme Court has made clear, promoting public health by preventing the spread of COVID-19 is "unquestionably a compelling interest." *Roman Catholic Diocese*, 141 S. Ct. at 67.

Moreover, the DOH emergency rule is narrowly tailored to that end. *See id. First*, there is a direct connection between vaccination requirements and promoting public health. See *supra* at 4. DOH specifically

noted that the COVID-19 vaccines are safe and effective, and unvaccinated individuals have *eleven times* the risk of being hospitalized with COVID-19. *See* 43 N.Y. Reg. at 8.

Second, the DOH emergency rule focuses on specific workers in a discrete sector where COVID-19 transmission poses heightened and unacceptable risks: employees in healthcare settings who directly interact with patients and personnel in a way that would expose them to infection. Transmission of COVID-19 by healthcare workers risks (1) their own personal safety; (2) the safety of their colleagues; (3) the safety of the vulnerable populations they serve; and (4) the safety of the public at large that could be threatened by staffing shortages at healthcare facilities. *See id.* The rule does not apply to individuals working outside of enumerated entities in the healthcare sector, and it does not apply to employees who pose no risk of exposing colleagues or patients to COVID-19. 10 N.Y.C.R.R. § 2.61(a)(2). These limitations mirror longstanding regulations governing mandatory measles and rubella vaccinations for healthcare workers, which also do not contain a religious exemption. *See id.* § 405.3(b)(10)(i)-(ii).

Third, DOH considered but rejected alternative approaches because they would not adequately achieve DOH's goal. DOH concluded that a testing requirement, for example, would be impracticable due to its expense and create an unreasonable burden by requiring frequent testing for subject employees. It is also limited in effect because personnel could contract and spread COVID-19 between tests. And a masking requirement, while "helpful to reduce transmission does not prevent transmission." 43 N.Y. Reg. at 8.

In addition, a policy deferring to healthcare employers to determine whether to require vaccinations would be inadequate to address the harms DOH has identified. One unvaccinated healthcare worker in one facility can cause immense harm. For example, a COVID-19 outbreak caused by an unvaccinated healthcare provider in Kentucky led to the infection of 46 residents and personnel.[15] And a recent study shows vaccination rates among nursing home staff lagging: only 60% were fully vaccinated as of

[15] Alyson M. Cavanaugh et al., *COVID-19 Outbreak Associated with a SARS-CoV-2 R.1 Lineage Variant in a Skilled Nursing Facility After Vaccination Program — Kentucky, March 2021*, 70 Morbidity & Mortality Wkly. Rep. 639, 639-40 (Apr. 30, 2021).

July 2021.[16] Finally, ensuring uniformity across New York's healthcare system protects patients transferred between facilities.

Accordingly, DOH's emergency rule is narrowly tailored to promote a compelling interest in protecting public health, and would therefore withstand heightened scrutiny if such scrutiny applied.

4. Compulsory vaccination does not violate substantive due process.

Finally, plaintiffs have also failed to show a likelihood of success on their substantive due process claim because *Phillips*, which held that there was no such right to resist New York's vaccination requirement for schoolchildren, forecloses plaintiffs' claim. *See* 775 F.3d at 542-43.

Substantive due process protects with heightened scrutiny only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation marks omitted). Because the Supreme Court has "always been reluctant to expand the concept of

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[16] Brian E. McGarry et al., *Association of Nursing Home Characteristics with Staff and Resident COVID-19 Vaccination Coverage* 2, JAMA Internal Med. (Sept. 16, 2021) (internet).

substantive due process," it has stressed the need to first carefully and narrowly define the interests at issue before looking to see if they are deeply rooted in law, practices, and traditions. *Id.* at 720 (quotation marks omitted).

Applying this framework, plaintiffs' substantive due process claim amounts to the claim that they have a right to work at healthcare facilities in positions where they could expose others to infection without receiving a vaccination. As in *Phillips*, this asserted right is not "objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21 (quotation marks omitted). To the contrary, the only deeply rooted history here supports New York's policy of requiring COVID-19 vaccinations for healthcare workers. See *supra* at 4.

Accordingly, plaintiffs' claim is evaluated under the deferential standards of rational-basis review. *See Beatie v. City of New York*, 123 F.3d 707, 711 (2d Cir. 1997). And, as explained above (see *supra* at 20), DOH's emergency rule is plainly rational.

CONCLUSION

For the foregoing reasons, this Court should deny plaintiffs' motion for an injunction pending appeal.

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September 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 5,199 words and complies with the typeface requirements and length limits of Rules 27(d) and 32(a)(5)-(6).

/s/ Kelly Cheung