

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-2179

Caption [use short title]

Motion for: Emergency Injunction Pending Appeal

Set forth below precise, complete statement of relief sought:
Plaintiffs request the Court enjoin the decision and order by Judge William F. Kuntz, II denying Plaintiff's emergency motion for a temporary restraining order and a preliminary injunction and their motion for an injunction pending appeal. They also move the Court to stay the Defendants' enforcement of New York State Health Regulation Section 2.61.

We The Patriots USA, Inc. v. Hochul

MOVING PARTY: We The Patriots USA, Inc., et al.

OPPOSING PARTY: Governor Kathy Hochul, Dr. Howard Zucker

- Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Cameron L. Atkinson
Pattis & Smith, LLC
383 Orange Street, New Haven, CT 06511
203-393-3017, catkinson@pattisandsmith.com

OPPOSING ATTORNEY: NY State Attorney General's Office
NY State Office of the Attorney General
28 Liberty Street, 17th Floor, New York, NY 10005

Court- Judge/ Agency appealed from: USDC EDNY, Judge William F. Kuntz, II

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
Yes No (explain): Movant has attempted to notify opposing counsel by leaving voicemails and sending emails to those he has had communication with.

Opposing counsel's position on motion:
Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/ Cameron L. Atkinson /s/ Date: 9/13/2021

Service by: CM/ECF Other [Attach proof of service]

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Yes No
Has this relief been previously sought in this court? Yes No
Requested return date and explanation of emergency: Plaintiffs request an emergency injunction from this Court pending appeal by no later than 5 PM, Thursday, September 16, 2021 so they do not lose their jobs and careers because of their religious beliefs. The Plaintiffs will be terminated, beginning on September 21, 2021, and will need time to inform their employers of any injunction issued by this Court.

## Cameron Atkinson

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**From:** Cameron Atkinson  
**Sent:** Monday, September 13, 2021 10:35 PM  
**To:** dohweb@health.ny.gov; letitia.james@ag.ny.gov; gov.hochul@chamber.state.ny.us; robert.morelli@ag.ny.gov; richard.yorke@ag.ny.gov; valerie.singleton@ag.ny.gov; todd.spiegelman@ag.ny.gov; barbara.underwood@ag.ny.gov; nyoag.nycpdf@ag.ny.gov; seth.farber@ag.ny.gov  
**Cc:** Norm Pattis; Austin Voss  
**Subject:** 2d Cir. 21-2179: We The Patriots USA, Inc. et al., v. Kathleen Hochul, et. al. Emergency Motion For Injunction Pending Appeal  
**Attachments:** Declaration of Atkinson.pdf; Motion To Stay Pending Appeal.pdf  
**Importance:** High

Greetings,

My name is Attorney Cameron Atkinson, and, along with Attorney Norm Pattis and Austin Voss, I represented We The Patriots USA and three NY healthcare workers – Diane Bono, Michelle, Melendez, and Michelle Synakowski – in a lawsuit filed against Governor Kathleen Hochul and Dr. Howard Zucker, Commissioner of the New York Department of Health. The case is now in the Second Circuit, and it bears docket number 21-2179.

Pursuant to Second Circuit requirements, I am trying to go above and beyond to ensure that you are served with the proper paperwork. Attached is our emergency motion for an injunction pending appeal that will be filed in a few minutes with the Second Circuit. It has requested proof of service so I am sending it before filing.

Regards,

**Cameron L. Atkinson**  
Associate – Pattis & Smith, LLC  
(203) 393-3017 ext. 203  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

---

<https://cameronlatkinson.com/>

***Publications:***

A General Sovereign/Public Employer Distinction: Should Garcetti v. Ceballos Govern Public Employment Cases Concerning Off-Duty Sexual Conduct Instead of Lawrence v. Texas?

<https://ssrn.com/abstract=3383680>

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**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

WE THE PATRIOTS USA, INC.,	:	
DIANE BONO,	:	
MICHELLE MELENDEZ,	:	Case No. 21-2179
MICHELLE SYNAKOWSKI,	:	
	:	
Plaintiffs-Appellants	:	
v.	:	
	:	
KATHLEEN HOCHUL - GOVERNOR	:	
OF NEW YORK; HOWARD	:	
ZUCKER, M.D, - COMMISSIONER,	:	
NEW YORK STATE DEPARTMENT	:	
OF HEALTH	:	
	:	
Defendants-Appellees.	:	SEPTEMBER 13, 2021

**PLAINTIFF-APPELLANTS’ DISCLOSURE STATEMENT PURSUANT TO  
FED. R. APP. P. 26.1**

Pursuant to Fed. R. App. P. 26.1, the undersigned, as attorneys for Plaintiffs-Appellants, certify that, to the best of our knowledge, We The Patriots USA, Inc., has no parent corporations, and there is no publicly held corporation owning 10% or more of their stock.

Dated: New Haven, CT  
September 13, 2021

**PATTIS & SMITH, LLC**

By: /s/ Cameron L. Atkinson /s/  
Cameron L. Atkinson, Esq.  
383 Orange Street, 1<sup>st</sup> Floor  
T: (203) 393-3017  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

*Attorneys For Plaintiffs-Appellants*

# 21-2179

**IN UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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

*Plaintiffs-Appellants,*

v.

KATHLEEN HOCHUL, HOWARD ZUCKER,

*Defendants-Appellees,*

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

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**EMERGENCY MOTION OF PLAINTIFFS-APPELLANTS FOR  
INJUNCTION PENDING APPEAL  
RELIEF REQUESTED BY 5 P.M. THURSDAY, SEPTEMBER 16, 2021**

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Norman A. Pattis  
Cameron L. Atkinson  
Earl A. Voss  
383 Orange Street, 1<sup>st</sup> Floor  
New Haven, Connecticut 06511  
Phone: (203) 393-3017  
Fax: 203-393-9745  
Emails: [npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)  
[avoss@pattisandsmith.com](mailto:avoss@pattisandsmith.com)

*Attorneys for Plaintiffs-Appellants*

September 13, 2020

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## INTRODUCTION

COVID-19 vaccinations have undoubtedly changed how state policymakers choose to battle the COVID-19 pandemic. Calls for nationwide vaccination mandates have dominated national discussion, and President Joseph Biden imposed one on the nation's workforce on September 9, 2021.<sup>1</sup> Conspicuously absent in these discussions and policies is any consideration for people of faith despite clear constitutional and statutory protections for their freedom to exercise their religion.

New York got out in front of this curve, and it imposed a statewide COVID-19 vaccination mandate on its healthcare workers in August 2021. Despite having a system of individualized exemptions, its Department of Health made clear that it would not permit employers to accept religious exemptions and would bar healthcare workers who do not receive COVID-19 vaccinations from working in healthcare settings.

The Appellants' faith will not permit them to comply with New York's mandate, and they will lose their careers in a matter of days without the Court's intervention. **Thus, the Appellants request an emergency injunction from this Court by no later than 5 PM on Thursday, September 16, 2021 so that they can keep their jobs and careers while their quest for judicial relief remains pending.**

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<sup>1</sup> <https://apnews.com/article/joe-biden-business-health-coronavirus-pandemic-executive-branch-18fb12993f05be13bf760946a6fb89be>

## **BACKGROUND**

On August 16, 2021, then New York Governor Andrew Cuomo promised New York health care workers that the state's coming COVID-19 vaccine mandate for healthcare workers would allow for "limited exceptions for those with religious or medical reasons." App.17-18.<sup>2</sup> On August 26, 2021, the Appellees promulgated New York State Health Regulation, Title 10, § 2.61 without any public notice and comment period. The regulation departed drastically from Governor Cuomo's promises by eliminating religious exemptions for healthcare workers when it comes to the Appellees' COVID-19 vaccination mandate. App.13-15.

§ 2.61 covers "any facility or institution included in the definition of 'hospital' ... including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers...." App.13. It applies to

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

App.14. The regulation requires "[c]overed entities ... [to] continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes,

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<sup>2</sup> Appendix cites are to the compiled exhibits to the "Declaration of Cameron L. Atkinson," which are numbered as a regular appendix.

and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed....” App.14.

The only exemption that § 2.61 provides is a “medical exemption.” App.14.

### **I. Vaccines – Ingredients.**

The three major COVID-19 vaccines – Johnson & Johnson (Janssen), Pfizer, and Moderna – use cells artificially developed using fetal cells taken from aborted fetuses in the 1970s and the 1980s in their testing and/or manufacture. *See COVID-19 Vaccines & Fetal Cells*, Michigan Department of Health & Human Services.<sup>3</sup>

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

### **II. Northwell Health & Appellants Diane Bono & Michelle Melendez.**

Appellant Diane Bono is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. App.56, ¶ 3. She is a practicing Christian and believes in “the sanctity of life, born and unborn.” App.56, ¶ 5. She believes that abortion is morally evil and that its fruits are as well. App.56, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines

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<sup>3</sup> [https://www.michigan.gov/documents/coronavirus/COVID-19\\_Vaccines\\_and\\_Fetal\\_Cells\\_031921\\_720415\\_7.pdf](https://www.michigan.gov/documents/coronavirus/COVID-19_Vaccines_and_Fetal_Cells_031921_720415_7.pdf)

because they use aborted fetal cell lines. App.56, ¶ 6. On August 23, 2021, she submitted a request for a religious exemption from New York's COVID-19 vaccination mandate to Northwell Health. App.58. Northwell Health denied her religious exemption on August 31, 2021 and explained why:

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

App.58.

It then delivered her an ultimatum: "If you choose to not receive your first shot between now and September 27, 2021, you will be non-compliant with the NYS mandate and your continued employment will be at risk." App.58.

Bono has elected not to comply with the Appellees' mandate because it would violate her religious beliefs. App.57. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. App.57, ¶ 9.

Appellee Michelle Melendez is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. App.61, ¶¶ 2-3. She is a practicing Catholic and believes in "the sanctity of life, born and unborn." App.61, ¶¶ 4-5. She

believes that abortion is morally evil and that its fruits are as well. App.61, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. App.61, ¶ 6. On August 22, 2021, she submitted a request for a religious exemption from New York's COVID-19 vaccination mandate to Northwell Health. App.64. Northwell Health denied her religious exemption on August 31, 2021 and explained why:

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

App.64.

Northwell Health, however, did not issue the same direct ultimatum to Melendez as it did to Diane Bono. Melendez, however, believes that, like Bono, she will be terminated on or after September 27, 2021 if she refuses to get a COVID-19 vaccine. App.62, ¶ 8.

Melendez has elected not to comply with the Appellees' mandate because it would violate her religious beliefs. App.62, ¶ 9. Her choice will subject her to the termination of her current employment and will bar her from obtaining other

employment as a nurse unless she yields and receives a COVID-19 vaccination. App.62, ¶ 9.

### **III. Appellant Michelle Synakowski.**

Michelle Synakowski is a registered nurse employed at St. Joseph's Hospital in New York. App.67, ¶¶ 2-3. She is a practicing Catholic and believes in "the sanctity of life, born and unborn." App.67, ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. App.67, ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. App.67, ¶ 6. She will not comply with New York's vaccination mandate, and her employer has informed her that it will terminate her employment on September 21, 2021 if she does not receive the vaccine because it is required to do so by New York State Health Regulation, Title 10, § 2.61. App.67, ¶¶ 7-8. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. App.68, ¶ 9.

### **IV. Procedural History**

The Appellants filed the underlying action in the U.S. District Court for the Eastern District of New York on September 2, 2021. App.4. On September 12, they filed an emergency motion for a temporary restraining order and for a preliminary injunction. App.22. The District Court denied both requests that same day. App.116.

The Appellants filed a notice of appeal on September 12, 2021. App.119. On September 13, 2021, the Appellants moved the District Court for an injunction staying enforcement of § 2.61 pending appeal of its denial of their requests for a temporary restraining order and a preliminary injunction. App.70. The District Court denied the motion that same day. App.116-17.

### **LEGAL STANDARD**

Appellants seeking an “injunction while an appeal is pending” before this Court, Fed. R. App. P. 8, must satisfy the traditional standard for injunctive relief: (1) likelihood of success on the merits; (2) irreparable injury absent an injunction; (3) balance of the hardships tips in the Appellants’ favor; (4) the public interest would not be disserved by the issuance of an injunction. *Benihana, Inc. v. Benihana of Toyko, LLC*, 784 F.3d 887, 895 (2d Cir. 2015).

### **ARGUMENT**

#### **I. THE APPELLANTS SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.**

##### **A. Supreme Court Precedent Does Not Establish A Public Health Exception To The First Amendment.**

The U.S. Supreme Court has reshaped its decisions in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and *Zucht v. King*, 260 U.S. 174 (1922) over the last year. It has clearly established that, even during a public health emergency, the First Amendment’s prohibition on the attachment of special disabilities to religion

still applies in full force. *See Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889(Mem) (Dec. 3, 2020) (granting certiorari and adopting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) as its decision). In other words, a state's assertion of a public health emergency interest does not swallow the First Amendment even when it comes in the form of a vaccine mandate.

The U.S. Supreme Court has also indicated that *Jacobson* and *Zucht* involved assertions of different rights than the ones that the Appellants assert here. As Justice Gorsuch pointed out in his *Cuomo* concurrence and as *Jacobson* itself makes clear, Henning Jacobson only asserted a generalized Fourteenth Amendment liberty interest claim in *Jacobson*, not a First Amendment claim, a suspect classification claim, or a claim of a fundamental right. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). Justice Gorsuch then makes the following observation:

Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.

*Id.* at 70.

Likewise, in *Zucht v. King*, 260 U.S. 24 (1922), Rosalyn Zucht only asserted a generalized Fourteenth Amendment liberty claim against a school vaccination mandate and a vague equal protection claim. The *Zucht* Court relied on *Jacobson* to reject her claim.

*Jacobson* and *Zucht* reflect the constitutional doctrine of their time. The Supreme Court did not begin to incorporate the Bill of Rights against the states until 1925 in *Gitlow v. New York*, 268 U.S. 652 (1925), and it did not recognize unenumerated rights as being protected by the Fourteenth Amendment until *Lochner v. New York*, 198 U.S. 45 (1905). It also did not even discuss modern constitutional scrutiny doctrines until 1938 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), and it did not apply a form of scrutiny other than rational basis review until *Korematsu v. United States*, 323 U.S. 214 (1944).

Thus, when the Supreme Court decided *Jacobson* and *Zucht*, it had not given the First and Fourteenth Amendments the more robust protections that constitutional doctrine recognizes today. The controlling jurisprudence at the time meant that the Supreme Court did not examine unenumerated rights or enumerated rights guaranteed by the Fourteenth Amendment because it did not interpret the Fourteenth Amendment as protecting either form of individual rights. Even more notably, the litigants in *Jacobson* and *Zucht* did not even attempt to assert claims under the Bill of Rights or some sort of unenumerated rights theory within the Fourteenth

Amendment, relying wholly on the argument that the Fourteenth Amendment protected a form of generalized liberty.

The Supreme Court did not revisit the scope of *Jacobson* and *Zucht* until last year. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (Apr. 9, 2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889(Mem) (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). When it did revisit them, it limited their controlling authority to claims of generalized Fourteenth Amendment liberty. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

It, however, had already limited *Jacobson* and *Zucht* implicitly almost 20 years ago. The CDC described HIV/AIDS as a global pandemic in 2006,<sup>4</sup> and it was treated as a global pandemic since the 1980s.<sup>5</sup> According the CDC's statistics in 2018, gay and bisexual men accounted for 69% of new HIV diagnoses.<sup>6</sup> Despite HIV/AIDS being declared a global pandemic and the increased risk of the spread of HIV/AIDS among gays and bisexuals, the Supreme Court clearly established that states' police power does not permit them to criminalize homosexual intimacy, which is protected as a fundamental unenumerated right under the Fourteenth

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<sup>4</sup> <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5531a1.htm>

<sup>5</sup> Michael H. Merson, *The HIV-AIDS Pandemic at 25 – The Global Response*, N. Engl. J. Med. (2006). <https://www.nejm.org/doi/full/10.1056/nejmp068074>

<sup>6</sup> <https://www.cdc.gov/hiv/statistics/overview/ataglace.html>

Amendment.<sup>7</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003). If *Jacobson* and *Zucht* controlled as a rule of law, they would undoubtedly permit states to prohibit conduct that would spread HIV/AIDS with the threat of criminal consequences. However, as the Supreme Court recognized in *Lawrence*, modern constitutional jurisprudence does not permit the state to classify fundamental rights – enumerated or unenumerated – as forbidden fruit at which a mere nibble will result in criminal consequences. The Supreme Court did not cite or discuss *Jacobson* or *Zucht* once in its *Lawrence* opinion, and it did not address public health concerns either. *Lawrence v. Texas*, 539 U.S. 558 (2003).

*Lawrence* shows that *Jacobson* is out of place in modern constitutional jurisprudence and confirms its historical context as a pre-incorporation/unenumerated rights rule of law that has little to no application in modern constitutional jurisprudence. The Court should not give *Jacobson* and other decisions that rely on it dispositive weight over the Appellants’ Free Exercise claims or their privacy and medical freedom claims, and it should instead apply modern constitutional jurisprudence to scrutinize the Appellees’ restrictions as the Supreme Court itself has done recently. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294 (Apr.

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<sup>7</sup> Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

9, 2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889(Mem) (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

**B. New York State Health Regulation, Title 10, § 2.61 Targets Religion For A Special Disability In Violation Of The First Amendment Because It Allows Healthcare Workers To Claim A Medical Exemption, But Not A Religious One.**

Although the First Amendment does not entitle religious observers to special dispensations from general criminal laws because of their religion, “[t]he Free Exercise Clause protect[s] religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017) (internal citation and quotation marks omitted); *see also Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Thus, laws may not discriminate against “some or all religious beliefs.” *Trinity Lutheran*, 137 S.Ct. at 2021 (quoting *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993)). Laws that discriminate in such a manner are subject to the strictest scrutiny. *Id.* at 2019. Thus, the analysis of First Amendment Free Exercise claims begins with an analysis of whether a law is neutral and of general applicability. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (Jun. 17, 2021).

“A law is not generally applicable if it invite[s] the government to consider the particular reasons for a person’s conduct by providing a mechanism for

individualized exemptions.” *Fulton*, 141 S. Ct. at 1877 (internal quotation marks and citations omitted). “A law also lacks general applicability if it permits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* While it is true that all laws are somewhat selective, the Supreme Court has held that specific “categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

At least one circuit court has previously held that the grant of a medical exemption, but not a religious exemption, violates the neutrality and general applicability requirements of the Free Exercise Clause. In *Fraternal order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999), now-Justice Samuel Alito held that a police department’s medical exemptions from a shaving policy, but denial of religious exemptions, constituted a set of individualized exemptions within the meaning of *Lukumi*. Of particular concern to Justice Alito and his fellow Third Circuit judges was when “the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection, but not for individuals with a religious objection.” *Id.* at 365. Thus, they held that such a categorical distinction triggered strict scrutiny because the medical exemption undermined the government’s interests in the same way that the religious exemption did. *Id.*

Additionally, in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (Apr. 2021), the Supreme Court held that whether two activities or exemptions are comparable for purposes of a Free Exercise Clause analysis is determined by the risks that they pose, not the reasons for giving them.

In their public statements justifying § 2.61, the Appellees have argued that a mandatory COVID-19 vaccination for healthcare workers is necessary to protect public health. This argument, however, falter under § 2.61's system of individualized exemptions that entertains requests for secular (medical) exemptions while categorically excluding requests for religious exemptions.

The empty platitudes that the Appellees have offered the public ignore reality. Regardless of whether a healthcare worker claims a medical or a religious exemption, they enter hospitals and other covered entities unvaccinated and, in the Appellees' eyes, more likely to spread COVID-19 than their peers. COVID-19, and the spread of COVID-19, will not inquire as to a healthcare worker's reasons for being exempt from the Appellees' COVID-19 vaccination requirement. As set forth in *Tandon*, the law does not inquire why either when considering which level of constitutional scrutiny to apply. The plain truth of the matter is that the Appellees consider all unvaccinated healthcare workers to be a public health risk because of their increased likelihood to spread contagious disease.

Because § 2.61 provides a system of individualized exemptions, *Fulton* clearly mandates the conclusion that it is not a regulation of neutral and general applicability. Thus, Supreme Court precedent requires the Court to apply strict scrutiny to § 2.61.

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

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

Second, § 2.61 does not even abide in the same universe as narrow tailoring does. The Appellees willingly provide accommodations to healthcare workers claiming medical exemptions, but mandate the termination of healthcare workers

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

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

The Supreme Court's decision in *Fulton* clearly indicates that § 2.61 is constitutionally impermissible. Thus, the Appellants have shown that they are likely to prevail on the merits, and the Court should issue an injunction pending appeal staying enforcement of § 2.61.

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

The Supreme Court unequivocally established a fundamental right to privacy in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments in *Roe v. Wade* and prior decisions. *See Roe v. Wade*, 410 U.S. 113, 152-53 (1973). While its precedents only covered matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, the *Roe* Court refrained from confining it to just those areas. *Id.* at 152-53. The *Roe* Court then elaborated on the medical nature of the decision that a woman must make on whether to elect an abortion:

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

*Id.* at 153.

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

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

If the right to elect a medical procedure to terminate the life of another being is a fundamental constitutional right, the right to decline a vaccination is also a fundamental constitutional right with similar roots in the Supreme Court’s precedents. *See Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (holding that there is a fundamental constitutional right to refuse medical treatment). Like the right to abortion, the right to decline a vaccination is not an unlimited right, but one that is entitled to be protected by strict scrutiny.

As discussed previously, § 2.61 cannot survive strict scrutiny because there are ways where the Appellees can tailor their “solutions” for preventing the spread of COVID-19 while respecting the Appellants’ rights – i.e., restricting them to working with low-risk patients while testing frequently and wearing the same personal protective equipment that they did throughout the entirety of the COVID-19 pandemic. Thus, the Appellants are likely to prevail on the merits of this claim.

**II. THE APPELLANTS WILL SUFFER IRREPARABLE HARM IF THE COURT DOES NOT GRANT THEIR REQUEST FOR AN INJUNCTION PENDING APPEAL.**

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

time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Appellants here are entitled to the presumption of irreparable harm in the absence of injunctive relief because they have alleged that they will be wholly deprived of their constitutional rights to the free exercise of religion, privacy, and medical freedom.

The Appellants also show actual and imminent harm that is irreparable and caused by § 2.61 because they will be terminated and barred from working as healthcare professionals in New York unless they receive COVID-19 vaccinations in violation of their religious beliefs. This harm is imminent as at least one Appellant – Michelle Synakowski – will be terminated on September 21, 2021 and the other two Appellants – Diane Bono and Michelle Melendez – will be terminated on September 27, 2021. No amount of money will repair the damage caused by such terminations and the subsequent bar for the Appellants to reenter the healthcare field in New York.

### **III. NO PARTY WILL SUFFER SUBSTANTIAL INJURY IF THE COURT ISSUES AN INJUNCTION PENDING APPEAL.**

For more than a year and a half, healthcare workers in New York have successfully and safely delivered health care to patients during the COVID-19 pandemic. They have not suddenly lost their ability to be professional and deliver safe care to patients. Nor have hospitals lost the ability to make operational decisions

regarding on how to maximize the protection of patients while respecting the Appellants' religious beliefs. In other words, a COVID-19 vaccination is no magic antidote.

While the Appellees have mandated that all healthcare workers receive a COVID-19 vaccination, they will not suffer a substantial injury if a portion of New York's healthcare workers go unvaccinated, but follow the Appellees' other health guidelines as they have done throughout the COVID-19 pandemic. The Appellees also have other options to protect their interests while the Appellants pursue their appeal like requiring unvaccinated healthcare workers to only work with certain low-risk populations. Instead of creating a system of reasonable accommodation, they have created a system of unreasonable termination.

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

#### **IV. THE RELEVANT PUBLIC INTERESTS DECIDEDLY WEIGH IN FAVOR OF THE APPELLANTS.**

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

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

Here, the Appellants have proposed less restrictive measures. The Appellees have not appeared to rebut them, and a stay is necessary both to afford the Appellees that opportunity as well as to allow the Appellants an opportunity to oppose the Appellees’ assertions.

### **CONCLUSION**

For the foregoing reasons, the Appellants respectfully request the Court to issue an injunction enjoining the enforcement of § 2.61 until the Appellants’ appeal of the District Court’s order denying their motion for a temporary restraining order and a preliminary injunction is decided **by no later than 5 PM on Thursday, September 16, 2021 so that they can keep their jobs and careers while their quest for judicial relief remains pending.**

Dated: September 13, 2021

Respectfully Submitted,

/s/ Norman A. Pattis /s/

/s/ Cameron L. Atkinson /s/

/s/ Earl A. Voss /s/

Norman A. Pattis, Esq.

Cameron L. Atkinson, Esq.

Earl A. Voss, Esq.

PATTIS & SMITH, LLC

383 Orange Street, 1<sup>st</sup> Fl.

New Haven, CT 06511

T: (203) 393-3017

F: (203) 393-9745

[npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)

[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

[avoss@pattisandsmith.com](mailto:avoss@pattisandsmith.com)

*Attorneys for Plaintiffs-Appellants*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This emergency motion complies with the type-volume limitation of Federal Rules of Appellate Procedure 27(d)(2) and 32(a)(7)(b) and Circuit Rule 32(c) because this brief contains 5,147 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This emergency motion complies with the type face requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Times New Roman font.

Dated: September 13, 2021

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

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 13<sup>th</sup> day of September 2020, I filed the foregoing Emergency Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that I have been in communication with New York Assistant Attorney General Todd A. Spiegelman by electronic mail and that I have delivered a copy of this Emergency Motion to Assistant Attorney General Spiegelman by electronic mail.

Dated: September 13, 2021

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

# 21-2179

**IN UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

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

*Plaintiffs-Appellants,*

v.

KATHLEEN HOCHUL, HOWARD ZUCKER,

*Defendants-Appellees,*

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

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**DECLARATION OF CAMERON L. ATKINSON**

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Norman A. Pattis  
Cameron L. Atkinson  
Earl A. Voss  
383 Orange Street, 1<sup>st</sup> Floor  
New Haven, Connecticut 06511  
Phone: (203) 393-3017  
Fax: 203-393-9745  
Emails: [npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)  
[avoss@pattisandsmith.com](mailto:avoss@pattisandsmith.com)

*Attorneys for Plaintiffs-Appellants*

September 13, 2020

Pursuant to 28 U.S.C. § 1746, I, Cameron L. Atkinson, hereby certify as follows:

1. I make this declaration for use as evidence in support of the Emergency Motion For Injunction Pending Appeal, filed by We The Patriots USA, Inc., Diane Bono, Michelle Melendez, and Michelle Synakowski.

2. I am counsel for Plaintiffs-Appellants in the above-captioned case.

3. Attached hereto as Exhibit A is a true and correct copy of the Complaint filed on September 2, 2021 in the United States District Court for the Eastern District of New York.

4. Attached hereto as Exhibit B is a true and correct copy of Plaintiffs' Emergency Motion For A Temporary Restraining Order and Preliminary Injunction, along with all accompanying memorandums and exhibits, filed on September 12, 2021 in the United States District Court for the Eastern District of New York.

5. Attached hereto as Exhibit C is a true and correct copy of Plaintiffs' Emergency Motion For An Injunction Pending Appeal, along with all accompanying memorandums and exhibits, filed on September 13, 2021 in the United States District Court For The Eastern District of New York.

6. Attached hereto as Exhibit D is a true and correct copy of the United States District Court For The Eastern District of New York's docket sheet as 9:30 PM Eastern Standard Time for the case of *We The Patriots USA, Inc., et. al. v.*

*Hochul, et. al.*, No. 1:21-cv-04954-WFK. It contains the District Court's orders denying the Plaintiffs' emergency motions.

7. Attached hereto as Exhibit E is a true and correct copy of the Plaintiffs' Notice of Appeal in the United States District Court For The Eastern District of New York in the case of *We The Patriots USA, Inc., et. al. v. Hochul, et. al.*, No. 1:21-cv-04954-WFK.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2021

/s/ Cameron L. Atkinson /s/  
Cameron L. Atkinson, Esq.  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

PATTIS & SMITH, LLC  
383 Orange Street, 1<sup>st</sup> Fl.  
New Haven, CT 06511  
T: (203) 393-3017  
F: (203) 393-9745

*Attorneys for Plaintiffs-Appellants*

**EXHIBIT A TO  
DECLARATION OF  
CAMERON L. ATKINSON**

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

We The Patriots USA, Inc.; Diane Bono; Michelle Melendez; Michelle Synakowski

Hartford, CT

(EXCEPT IN U.S. PLAINTIFF CASES)

(b) County of Residence of First Listed Plaintiff

(c) Attorneys (Firm Name, Address, and Telephone Number)

Pattis & Smith, LLC, 383 Orange Street, New Haven, CT 06511

DEFENDANTS

Kathleen Hochul; Howard Zucker

County of Residence of First Listed Defendant Albany, NY

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff, 2 U.S. Government Defendant, 3 Federal Question (U.S. Government Not a Party), 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, HABES CORPUS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding, 2 Removed from State Court, 3 Remanded from Appellate Court, 4 Reinstated or Reopened, 5 Transferred from Another District, 6 Multidistrict Litigation - Transfer, 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 U.S.C. Section 1983

Brief description of cause:

Free Exercise claim for injunctive relief against New York State officials

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

9/2/2021 /s/ Norman A. Pattis /s/

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP App.2 JUDGE MAG. JUDGE

Local Arbitration Rule 83.7 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

Case is Eligible for Arbitration

I, Norman A. Pattis, counsel for the Plaintiffs, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- the complaint seeks injunctive relief,
- the matter is otherwise ineligible for the following reason

**DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1**

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

**We The Patriots USA, Inc. - It is not publicly held and it does not have any parent corporation.**

**RELATED CASE STATEMENT (Section VIII on the Front of this Form)**

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

**NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)**

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County?  Yes  No
- 2.) If you answered "no" above:
  - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County?  Yes  No
  - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District?  Yes  No
  - c) If this is a Fair Debt Collection Practice Act case, specify the County in which the offending communication was received:

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County?  Yes  No

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

**BAR ADMISSION**

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

Yes  No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

Yes (If yes, please explain)  No

I certify the accuracy of all information provided above.

Signature: /s/ Norman A. Pattis /s/

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.,	:	
DIANE BONO,	:	
MICHELLE MELENDEZ,	:	Dkt. No.:1:21-cv-4954
MICHELLE SYNAKOWSKI,	:	
Plaintiffs,	:	
v.	:	
	:	
KATHLEEN HOCHUL - GOVERNOR	:	
OF NEW YORK; HOWARD	:	
ZUCKER, M.D. - COMMISSIONER,	:	
NEW YORK STATE DEPARTMENT	:	
OF HEALTH	:	
Defendants.	:	SEPTEMBER 2, 2021

**COMPLAINT**

*"I never thought your announcements could give you – a mere human being – power to trample the gods' unyielding, unwritten laws. These laws weren't made now/or yesterday. They live for all time." – Sophocles, Antigone.*

1. The State of New York has turned a terrifying corner in the name of public health: It is mandating that all health-care professionals in the state of New York be vaccinated to combat the spread of COVID-19 as a condition of their employment, regardless of the sincerely held religious convictions of those employees. By administrative fiat, the State proposes to do what no court has done thus far and what federal law prohibits: eliminate the religious exemption to the requirement that folks submit to government-mandated vaccination. The plaintiffs seek declaratory and injunctive relief.

***Jurisdiction***

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 2201, and venue is proper under 28 U.S.C. § 1391. The claims arise under 42 U.S.C. § 1983.

### ***Parties***

3. Plaintiff, We The Patriots USA, Inc., is a nonprofit charity organized and operated exclusively for tax-exempt purposes in accordance with Section 501(c)(3) of the Internal Revenue Code. It is incorporated in the State of Connecticut. More specifically, We The Patriots USA, Inc., is dedicated to promoting constitutional rights and other freedoms through education, outreach, and public interest litigation, thereby advancing religious freedom, medical freedom, parental rights, and educational freedom for all. As a Section 501(c)(3) public charity, it has members who participate in its tax-exempt activities as volunteers and committed community stakeholders, bringing and supporting litigation in state and federal courts on a variety of constitutional and civil-liberties matters directly affecting their rights and interests. The organization has members in New York State who are affected by the matters complained of herein, including the individual plaintiffs.

4. Plaintiff Diane Bono is an adult resident of the State of New York, residing in Seaford. She is a registered nurse employed at the Syosset Hospital. She is a practicing non-denominational Christian and a member of We The Patriots USA, Inc.

5. Plaintiff Michelle Melendez is an adult resident of the State of New York, residing in Wheatley Heights. She is a registered nurse employed at the Syosset Hospital. She is a baptized and practicing Roman Catholic and a member of We The Patriots USA, Inc.

6. Plaintiff Michelle Synakowski is an adult resident of the State of New York, residing in Syracuse. She is a health care professional employed by the St. Joseph's Hospital in Syracuse, New York. She is a baptized and practicing Roman Catholic and a member of We The Patriots USA, Inc.

7. Defendant Kathleen Hochul is the governor of the State of New York, and, as such, is the primary policymaker and principal executive officer of the State of New York. She is sued in her official capacity.

8. Defendant Howard Zucker is the Commissioner of the State of New York Department of Health (NYDOH). He is sued in his official capacity.

### ***Factual Allegations***

9. The three major vaccines distributed to prevent illness due to COVID-19 relied on use of a fetal cell line harvested from aborted fetuses acquired in the 1970s and 1980s. Johnson & Johnson used a fetal cell line to produce and manufacture the vaccine. Pfizer and Moderna used the cells in testing the efficacy of their vaccines prior to production and manufacturing.<sup>1</sup>

10. Plaintiffs Bono, Melendez, and Synakowski have sincere and personal religious beliefs supported by the teaching of their churches that elective abortion is wrong. They object to placing in their bodies a vaccine that relies in whole or in part on the use of a fetal cell line for development, manufacturing, or testing.

11. Plaintiffs Bono, Melendez, and Synakowski are not alone in their religious beliefs. Thousands of Plaintiff We The Patriots USA, Inc.'s members, including the substantial number of members that they have in New York, share Bono, Melendez, and Synakowski's religious convictions.

12. The Defendants, acting pursuant to authority vested in the Public Health and Health Planning Council and the Commissioner of Public Health, Defendant Zucker, has promulgated regulations requiring employees of "covered entities" to be "fully

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<sup>1</sup> *COVID-19 Vaccines and Fetal Cells*, Michigan Department of Health and Human Services (April 21, 2021).

vaccinated” unless medically exempt. See New York State Health Regulation, Title 10, § 2.61 (attached as **Exhibit A**). The new regulations do not provide for a religious exemption to vaccination. *Id.*

13. The new regulations constitute state action, that is to say a new policy requiring compliance by residents of New York State who must either be vaccinated or potentially lose their employment and be barred from future employment in their career fields within the state of New York.

14. The new regulations cover “any facility or institution included in the definition of ‘hospital’ ... including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers....” **Exhibit A, p. 1.**

15. The new regulations cover “all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients or residents to the disease.” **Exhibit A, p. 2.**

16. The new regulations require “[c]overed entities ... [to] continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed ....” **Exhibit A, p. 2.**

17. The only exemption specified in the new regulation is a “medical exemption.” **Exhibit A, p. 2**

18. Prior to the promulgation of the new regulations, employees of covered entities were permitted to seek a religious exemption from vaccination requirements.

19. Indeed, as recently as August 16, 2021, then Governor Andrew Cuomo announced that new regulations would require “staff at hospitals and long-term care facilities, including nursing homes” to be vaccinated against COVID-19 by Monday, September 27, 2021, except for “limited exceptions for those with religious or medical reasons.” **Exhibit B, pp. 1-2.**

20. Thereafter, Governor Cuomo resigned from office, effective August 24, 2021, the date upon which Defendant Hochul was sworn into office.

21. On August 26, 2021, the new regulations eliminating the religious exemption were promulgated and took immediate effect. They were promulgated without any public notice and comment period, announced by fiat and in a startling departure from the earlier statements of Governor Cuomo.

22. The elimination of the religious exemption will require plaintiffs Melendez and Synakoski to choose either to submit to a vaccination abhorrent to their deeply held beliefs or lose their employment.

### **Count One – Violation of First Amendment Right To Free Exercise Of Religion**

23. Paragraphs one through 22 are incorporated herein.

24. The First Amendment provides, in relevant part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” This Free Exercise Clause “protects religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based their religious status.... Applying that basic principle, this Court has repeatedly confirmed

that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest of the highest order.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct 2012, 2019 (2017) (internal citation and quotation marks omitted).

25. The Free Exercise Clause also guarantees an affirmative right to practice sincerely held religious beliefs.

26. The Defendants have conducted the ultimate bait-and-switch on healthcare workers of faith in New York. They initially made public statements and declarations telling healthcare workers including the Plaintiffs that they would be able to request religious exemptions from the state’s COVID-19 vaccination mandate. When it came time to actually put their statements and declarations into law, the Defendants forgot their previous promises entirely and completely omitted the promised religious exemption from their COVID-19 vaccination mandate.

27. Their mandate, however, provides an avenue for healthcare workers to request medical exemptions.

28. The mandate takes effect immediately and requires all personnel to be vaccinated against COVID-19 by September 27, 2021 or lose their jobs.

29. The Defendants’ COVID-19 vaccination mandate violates the Free Exercise Clause by permitting a secular (medical) exemption on an individualized basis while categorically mandating the rejection of religious exemptions.

30. The Defendants’ COVID-19 vaccination mandate violates the Free Exercise Clause by forcing the Plaintiffs and all healthcare workers in New York to choose between their religious beliefs and their jobs and careers.

**Count Two – Violation of First, Fourth, Fifth, And Fourteenth Amendment Rights To Privacy And Medical Freedom**

31. Paragraphs 1 through 29 of this Complaint are incorporated herein.

32. In *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the United States Supreme Court established a woman’s right to terminate her pregnancy under the First, Fourth, Fifth, and Fourteenth Amendments. The principles derived from these cases establish a broad right to freedom to make personal choices – central to personal dignity and autonomy – about one’s own medical decisions.

33. The Defendants’ COVID-19 vaccination mandate places an undue burden on the Plaintiffs’ right to make personal choices – central to their personal dignity and autonomy – about their own medical decisions.

34. Thus, the Defendants’ COVID-19 vaccination violates the First, Fourth, Fifth, and Fourteenth Amendments on its face.

**Declaratory and Injunctive Relief**

WHEREFORE, the Plaintiffs seek declaratory and injunctive relief as follows:

- A. A declaratory judgment finding that New York State Public Health Regulation, Title 10, § 2.61 violates the First Amendment’s Free Exercise Clause and is unconstitutional.
- B. A declaratory judgment finding that New York State Public Health Regulation, Title 10, § 2.61 violates the Plaintiffs’ right to privacy and medical freedom under the First, Fourth, Fifth, and Fourteenth Amendments and is unconstitutional.

- C. A permanent injunction enjoining the Defendants and their agents from enforcing any provision of New York State Public Health Regulation, Title 10, § 2.61.
- D. Costs and attorney's fees.
- E. Such other relief as this Court deems fair and equitable.

THE PLAINTIFFS

/s/ Norman A. Pattis /s/

NORMAN A. PATTIS, ESQ.  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)

/s/ Cameron L. Atkinson /s/

CAMERON L. ATKINSON, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

/s/ Earl A. Voss /s/

EARL A. VOSS, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[avoss@pattisandsmith.com](mailto:avoss@pattisandsmith.com)

# Exhibit A

August 31, 2021 | 12:13 pm

## COVID-19 Vaccines

On August 23, the FDA announced the full approval of the Pfizer-BioNTech vaccine for the prevention of COVID-19 disease in individuals age 16 and older. [Read more.](#)

DETAILS >

(<https://covid19vaccine.health.ny.gov/>)

## New York Codes, Rules and Regulations (/)

[Home \(/\)](#) / [VOLUME A \(Title 10\) \(/content/volume-title-10\)](#)

/ [Part 2 - Communicable Diseases \(/volume-title-10/content/part-2-communicable-diseases\)](#)

/ [OTHER MEASURES FOR PUBLIC PROTECTION \(/volume-title-10/content/other-measures-public-protection\)](#)

/ [Title: Section 2.61 - Prevention of COVID-19 transmission by covered entities](#)

# Title: Section 2.61 - Prevention of COVID-19 transmission by covered entities

## Effective Date

08/26/2021

Section 2.61 Prevention of COVID-19 transmission by covered entities.

(a) Definitions.

(1) "Covered entities" for the purposes of this section, shall include:

(i) any facility or institution included in the definition of "hospital" in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers;

(ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies;

(iii) hospices as defined in section 4002 of the Public Health Law; and

(iv) adult care facility under the Department's regulatory authority, as set forth in Article 7 of the Social Services Law.

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

(3) "Fully vaccinated," for the purposes of this section, shall be determined by the Department in accordance with applicable federal guidelines and recommendations. Unless otherwise specified by the Department, documentation of vaccination must include the manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site, in one of the following formats:

(i) record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;

(ii) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or

(iii) any other documentation determined acceptable by the Department.

(c) Covered entities shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed below. Documentation of such vaccination shall be made in personnel records or other appropriate records in accordance with applicable privacy laws, except as set forth in subdivision (d) of this section.

(d) Exemptions. Personnel shall be exempt from the COVID-19 vaccination requirements set forth in subdivision (c) of this section as follows:

(1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (i) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

(e) Upon the request of the Department, covered entities must report and submit documentation, in a manner and format determined by the Department, for the following:

(1) the number and percentage of personnel that have been vaccinated against COVID-19;

(2) the number and percentage of personnel for which medical exemptions have been granted;

(3) the total number of covered personnel.

(f) Covered entities shall develop and implement a policy and procedure to ensure compliance with the provisions of this section and submit such documents to the Department upon request.

(g) The Department may require all personnel, whether vaccinated or unvaccinated, to wear an appropriate face covering for the setting in which such personnel are working in a covered entity. Covered entities shall supply face coverings required by this section at no cost to personnel.

## Statutory Authority

Public Health Law, Sections 225, 2800, 2803, 3612, and 4010 & Social Services Law, Sections 461 and 461-e

## Volume

VOLUME A (Title 10)

☰ Outline

^ up (/volume-title-10/content/other-measures-public-protection)

## New York Codes, Rules and Regulations

**Search Title 10 (/search-title-10)**

**Proposed Rule Making (/regulations/proposed-rule-making)**

**Three, Five, Ten and Fifteen Year Regulation Review (/regulations/five-ten-fifteen-review)**

**Search Title 18 (/search-title-18)**

**Emergency Regulations (/regulations/emergency)**

**Recently Adopted Regulations (/regulations/recently-adopted)**

# Exhibit B

August 31, 2021 | 12:13 pm

## COVID-19 Vaccines

On August 23, the FDA announced the full approval of the Pfizer-BioNTech vaccine for the prevention of COVID-19 disease in individuals age 16 and older. [Read more.](#)

DETAILS >



**GOVERNOR**  
KATHY HOCHUL

AUGUST 16, 2021 | Albany, NY

# Governor Cuomo Announces COVID-19 Vaccination Mandate for Healthcare Workers

**COVID-19 VACCINE** (/KI HEALTH VID/KI PUBLIC SAFETY (/KEYWORDS/PUBLIC-  
19- SAFETY)  
VACCINE)

Department of Health Issues Section 16 Orders to Hospitals and Long-Term Care Facilities Requiring Policy to Ensure All Employees Are Vaccinated

First Dose Required by September 27

Department of Health Authorizes Third Dose for Immunocompromised New Yorkers

Governor Andrew M. Cuomo announced today that all healthcare workers in New York State, including staff at hospitals and long-term care facilities (LTCF), including nursing homes, adult care, and other congregate care settings, will be required to be vaccinated against COVID-19 by Monday, September 27. The State Department of Health will issue Section 16 Orders requiring all hospital, LTCF, and nursing homes to develop and implement a policy mandating employee vaccinations, with limited exceptions for those with religious or medical reasons. To date, 75% of the state's ~450,000 hospital workers, 74% of the state's ~30,000 adult care facility workers, and 68% of the state's ~145,500 nursing home workers have completed their vaccine series. Lt. Governor Kathy Hochul's administration was briefed prior to the announcement.

"When COVID ambushed New York last year, New Yorkers acted, while the Federal Government denied the problem," **Governor Cuomo said.** "Now, the Delta variant is spreading across the nation and across New York -- [new daily positives are up over 1000% over the last six weeks](https://www.governor.ny.gov/sites/default/files/2021-08/Presentation1.pdf) (<https://www.governor.ny.gov/sites/default/files/2021-08/Presentation1.pdf>), and over 80 percent of recent positives in New York State are linked to the Delta variant. We must now act again to stop the spread. Our healthcare heroes led the battle against the virus, and now we need them to lead the battle between the variant and the vaccine. We have always followed the science, and we're doing so again today, with these recommendations by Dr. Zucker and federal and state health experts. But we need to do more. I have strongly urged private businesses to implement vaccinated-only admission policies, and school districts to mandate vaccinations for teachers. Neither will occur without the state legally mandating the actions -- private businesses will not enforce a vaccine mandate unless it's the law, and local school districts will be hesitant to make these challenging decisions without legal direction."

Governor Cuomo also announced that the Department of Health has authorized a third COVID-19 vaccine dose for New Yorkers with compromised immune systems, following the Centers for Disease Control and Prevention's recommendation last week. Eligible New Yorkers can receive their third dose 28 days after the completion of their two-dose vaccine series, effective immediately.

The CDC is currently recommending that moderately to severely immunocompromised people receive an additional dose, including people who have:

- Been receiving active cancer treatment for tumors or cancers of the blood;
- Received an organ transplant and are taking medications to suppress the immune system;
- Received a stem cell transplant within the last 2 years or are taking medicine to suppress the immune system;
- Moderate or severe primary immunodeficiency (such as DiGeorge syndrome, Wiskott-Aldrich syndrome);
- Advanced or untreated HIV infection;
- Active treatment with high-dose corticosteroids, cancer chemotherapy that causes severe immunosuppression, or other medications that may suppress your immune response.

New Yorkers should contact their healthcare provider about whether getting an additional dose is appropriate for them at this time.

**New York State Health Commissioner Dr. Howard Zucker said,** "While we have made tremendous progress in getting New Yorkers vaccinated, this pandemic is far from over and more must be done. The data and science tell us that getting more people vaccinated as quickly as possible is the best way to keep people safe, prevent further mutations, and enable us to

resume our daily routines. This mandate will both help close the vaccination gap and reduce the spread of the Delta variant. I want to thank all New York State's healthcare workers for stepping up once again and showing our state that getting vaccinated is safe, easy, and most importantly, effective."

These steps follow Governor Cuomo's August 2 announcement that MTA and Port Authority employees working in New York facilities will be required to be vaccinated for COVID-19 by Labor Day, and his July 28 announcement that state employees and patient-facing employees in state-run hospitals will be required to get vaccinated for COVID-19 by Labor Day. State employees who choose to remain unvaccinated will be required to undergo weekly COVID testing.

## Contact the Governor's Press Office

### Contact us by phone:

Albany: [\(518\) 474-8418](tel:5184748418)

New York City: [\(212\) 681-4640](tel:2126814640)

### Contact us by email:

[Press.Office@exec.ny.gov](mailto:Press.Office@exec.ny.gov)

## Translations

### Arabic Translation

الترجمة إلى العربية

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Arabic.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Arabic.pdf))

### Bengali Translation

বাংলা অনুবাদ

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Bengali.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Bengali.pdf))

**Chinese Translation**

中文翻譯

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Chinese.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Chinese.pdf)**Haitian-Creole Translation**

Tradiksyon kreyòl ayisyen

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_HaitianCreole.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_HaitianCreole.pdf)**Italian Translation**

Traduzione italiana

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Italian.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Italian.pdf)**Korean Translation**

한국어 번역

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Korean.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Korean.pdf)**Polish Translation**

Polskie tłumaczenie

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Polish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Polish.pdf)**Russian Translation**

Перевод на русский язык

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Russian.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Russian.pdf)**Spanish Translation**

Traducción al español

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Spanish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Spanish.pdf)**Yiddish Translation**

אידישע איבערטייטשונג

[https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Yiddish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Yiddish.pdf)

**EXHIBIT B TO  
DECLARATION OF  
CAMERON L. ATKINSON**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

WE THE PATRIOTS USA, INC.,	:	
DIANE BONO,	:	
MICHELLE MELENDEZ,	:	Dkt. No.:1:21-cv-4954
MICHELLE SYNAKOWSKI,	:	
Plaintiffs,	:	
v.	:	
	:	
KATHLEEN HOCHUL - GOVERNOR	:	
OF NEW YORK; HOWARD	:	
ZUCKER, M.D. - COMMISSIONER,	:	
NEW YORK STATE DEPARTMENT	:	
OF HEALTH	:	
Defendants.	:	SEPTEMBER 12, 2021

**NOTICE OF EMERGENCY MOTION AND EMERGENCY MOTION FOR TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 7.1, the Plaintiffs respectfully give notice of their emergency motion for a temporary restraining order and a preliminary injunction and move the Court for the following relief:

1. A temporary restraining order staying enforcement of the Defendants’ New York State Health Regulation, Title 10, § 2.61 until the parties have an opportunity to be heard on the Plaintiffs’ motion for a preliminary injunction;
2. A preliminary injunction staying enforcement of the Defendants’ New York State Health Regulation, Title 10, § 2.61 until the parties have an opportunity to fully brief and argue its constitutionality;
3. Any such other and further relief that the Court considers proper.

THE PLAINTIFFS  
/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)

/s/ Cameron L. Atkinson /s/  
CAMERON L. ATKINSON, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

/s/ Earl A. Voss /s/  
EARL A. VOSS, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[avoss@pattisandsmith.com](mailto:avoss@pattisandsmith.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that on the date above a copy of the foregoing was served by certified mail, email, and/or by fax upon Governor Hochul and Dr. Zucker or their proper representatives designated by law.

/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.,	:	
DIANE BONO,	:	
MICHELLE MELENDEZ,	:	Dkt. No.:1:21-cv-4954
MICHELLE SYNAKOWSKI,	:	
Plaintiffs,	:	
v.	:	
	:	
KATHLEEN HOCHUL - GOVERNOR	:	
OF NEW YORK; HOWARD	:	
ZUCKER, M.D. - COMMISSIONER,	:	
NEW YORK STATE DEPARTMENT	:	
OF HEALTH	:	
Defendants.	:	SEPTEMBER 12, 2021

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

The Plaintiffs respectfully request the Court to issue an emergency temporary restraining order pursuant to Federal Rule of Civil Procedure 65(b) until the Court can fully hear their request for a preliminary injunction and make a final determination as to the constitutionality of New York State Health Regulation, Title 10, § 2.61.

**Factual Background**

On August 16, 2021, then New York Governor Andrew Cuomo promised New York health care workers that the state’s coming COVID-19 vaccine mandate for healthcare workers would allow for “limited exceptions for those with religious or medical reasons.” **Exhibit B, pp. 1-2.** On August 26, 2021, the Defendants promulgated New York State Health Regulation, Title 10, § 2.61 with no public notice and comment period. The regulation departed drastically from then Governor Cuomo’s promises by eliminating religious exemptions for healthcare workers when it comes to the Defendants’ COVID-19 vaccination mandate. **Exhibit A, p. 2**

New York State Health Regulation, Title 10, § 2.61 covers “any facility or institution included in the definition of ‘hospital’ ... including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers....” *Id.* at p. 1. It applies to

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

*Id.* at p. 2. The regulation requires “[c]overed entities ... [to] continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed....” *Id.* at p. 2.

The only exemption that New York State Health Regulation, Title 10, § 2.61 provides is a “medical exemption.” *Id.* at p. 2.

### ***Vaccines – Ingredients:***

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

Johnson & Johnson used an aborted fetal cell line to produce and manufacture its vaccine. *Id.* Pfizer and Moderna did not use an aborted fetal cell line to produce and

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<sup>1</sup> [https://www.michigan.gov/documents/coronavirus/COVID-19\\_Vaccines\\_and\\_Fetal\\_Cells\\_031921\\_720415\\_7.pdf](https://www.michigan.gov/documents/coronavirus/COVID-19_Vaccines_and_Fetal_Cells_031921_720415_7.pdf)

manufacture their vaccines, but they did use an aborted fetal cell line to confirm its efficacy prior to producing and manufacturing it. *Id.*

***Northwell Health & Plaintiffs Diane Bono & Michelle Melendez:***

Plaintiff Diane Bono is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. **Exhibit C – Affidavit of Diane Bono, ¶ 3.** She is a practicing Christian and believes in “the sanctity of life, born and unborn.” *Id.* at ¶ 5. She believes that abortion is morally evil and that its fruits are as well. *Id.* at ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. *Id.* at ¶ 6. On August 23, 2021, she submitted a request for a religious exemption from New York’s COVID-19 vaccination mandate to Northwell Health. **Exhibit D – Religious Exemption Denial For Diane Bono.** Northwell Health denied her religious exemption on August 31, 2021 and explained why:

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

*Id.*

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

Bono has elected not to comply with the Defendants’ mandate because it would violate her religious beliefs. **Exhibit C, ¶ 7.** Her choice will subject her to the termination

of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. *Id.* at ¶ 9.

Plaintiff Michelle Melendez is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. **Exhibit E – Affidavit of Michelle Melendez, ¶¶ 2-3.** She is a practicing Catholic and believes in “the sanctity of life, born and unborn.” *Id.* at ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. *Id.* at ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. *Id.* at ¶ 6. On August 22, 2021, she submitted a request for a religious exemption from New York’s COVID-19 vaccination mandate to Northwell Health. **Exhibit F – Religious Exemption Denial For Michelle Melendez.** Northwell Health denied her religious exemption on August 31, 2021 and explained why:

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

*Id.*

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

**Exhibit E, ¶ 8.**

Melendez has elected not to comply with the Defendants' mandate because it would violate her religious beliefs. *Id.* at ¶ 7. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. *Id.* at ¶ 9.

***Michelle Synakowski:***

Michelle Synakowski is a registered nurse employed at St. Joseph's Hospital in New York. **Exhibit G – Affidavit of Michelle Synakowski.** She is a practicing Catholic and believes in “the sanctity of life, born and unborn.” *Id.* at ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. *Id.* at ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. *Id.* at ¶ 6. She will not comply with New York's vaccination mandate, and her employer has informed her that it will terminate her employment on September 21, 2021 if she does not receive the vaccine because it is required to do so by New York State Health Regulation, Title 10, § 2.61. *Id.* at ¶¶ 7-8. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. *Id.* at ¶ 9.

**Argument**

A temporary restraining order is an extraordinary remedy. *Moore v. Consol. Edison Co. of N.Y., Inc. v. Reidy*, 409 F.3d 506, 510 (2d Cir. 2005). “The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction.” *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 107 (2d Cir. 2009). The same factors used to determine

the merits of a preliminary injunction are used to determine a request for a temporary restraining order. *Longshoremen's Ass'n, AFL-CIO v. New York Shipping Ass'n, Inc.*, 965 F.2d 1224 (2d Cir. 1992). Thus, to obtain their requested temporary restraining order, the Plaintiffs must show "irreparable harm, and either (1) a likelihood of success on the merits of the case or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in favor of the moving party." *Waldman Pub. Corp. v. Landall, Inc.*, 43 F.3d 775, 779-80 (2d Cir. 1994).

**I. THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE COURT DOES NOT GRANT THEIR REQUEST FOR A TEMPORARY RESTRAINING ORDER.**

To show irreparable harm, the Plaintiffs must show that, absent a temporary restraining order, they will "suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Id.* at 118-19. Courts will presume that a movant has established irreparable harm in the absence of injunctive relief when the movant's claim involves the alleged deprivation of a constitutional right. *Am. Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015).

The Plaintiffs here are entitled to the presumption of irreparable harm in the absence of injunctive relief because they have alleged that they will be wholly deprived of their constitutional rights to the free exercise of religion, privacy, and medical freedom.

The Plaintiffs also show actual and imminent harm that is irreparable and caused by New York State Health Regulation, Title 10, § 2.61 because they will be terminated and barred from working as healthcare professionals in New York unless they receive

COVID-19 vaccinations in violation of their religious beliefs. This harm is imminent as at least one plaintiff – Michelle Synakowski – will be terminated on September 21, 2021 and the other two plaintiffs – Diane Bono and Michelle Melendez – will be terminated on September 27, 2021. No amount of money will repair the damage caused by such terminations and the subsequent bar for the Plaintiffs to reenter the healthcare field in New York.

**II. THE PLAINTIFFS SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.**

**A. Supreme Court Precedent Does Not Establish A Public Health Exception To The First Amendment.**

The Defendants will likely claim that the Supreme Court's decisions in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), *Zucht v. King*, 260 U.S. 174 (1922), and *Prince v. Massachusetts*, 321 U.S. 158 (1944) as well as the Second Circuit's decision in *Philips v. City of New York*, 775 F.3d 538 (2d Cir. 2015) dispositively establish that mandatory vaccination laws are per se constitutional even when they seek to subjugate First Amendment rights. This claim seeks to establish a public health exception to the First Amendment, and it fails for three reasons.

First, the Supreme Court has clearly established that, even during a public health emergency, the First Amendment's prohibition on the attachment of special disabilities to religion still applies in full force. See *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889(Mem) (Dec. 3, 2020) (granting certiorari and adopting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) as its decision). If such a rule applies during a public health emergency, common sense dictates that it applies during ordinary circumstances as well. In other words, the Defendants' assertion of a public health

interest does not swallow the First Amendment even when it comes in the form of a vaccine mandate.

Second, *Jacobson* and *Zucht* involved assertions of different rights than the ones that the Plaintiffs assert here. As Justice Gorsuch pointed out in his *Cuomo* concurrence and as *Jacobson* itself makes clear, Henning Jacobson only asserted a generalized Fourteenth Amendment liberty interest claim in *Jacobson*, not a First Amendment claim, a suspect classification claim, or a claim of a fundamental right. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). Justice Gorsuch then makes the following observation:

Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.

*Id.* at 70.

Likewise, in *Zucht v. King*, 260 U.S. 24 (1922), Rosalyn Zucht only asserted a generalized Fourteenth Amendment liberty claim against a school vaccination mandate and a vague equal protection claim. The *Zucht* Court relied on *Jacobson* to reject her claim.

In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court expressly limited its decision to the facts of the case:

Our ruling does not extend beyond the facts the case presents. We neither lay the foundation 'for any (that is, every) state intervention in the indoctrination and participation of children in religion' which may be done 'in the name of their health and welfare' nor give warrant for 'every limitation on their religious training and activities.' The religious training and indoctrination of children may be accomplished in many ways, some of

which, as we have noted, have received constitutional protection through decisions of this Court. These and all others except the public proclaiming of religion on the streets, if this may be taken as either training or indoctrination of the proclaimer, remain unaffected by the decision.

*Id.* at 171.

Thus, even though the *Prince* Court rejected the First Amendment claim and permitted Massachusetts to regulate child street preaching, it expressly instructed lower courts that its opinion did not purport to establish legal principles on any other issue. By the Supreme Court's own language, *Prince* has no controlling weight in this case.

Third, even if Justice Gorsuch's view of *Jacobson* is incorrect and *Jacobson* does stand for the proposition that vaccination mandates are per se a valid exercise of the state's police power, the Second Circuit's reliance on it and *Zucht* in *Philips* errs, and the Court should refuse the temptation to make such an error.

There is no question that the Fourteenth Amendment represented a drastic shift in American constitutional law. Before its ratification, the Supreme Court had clearly established that the Founders did not intend for the Bill of Rights to apply to state governments. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Thus, the states enjoyed a greater measure of sovereignty than they did after the ratification of the Fourteenth Amendment. In the thirty years before the ratification of the Fourteenth Amendment, there were strong political movements – primarily the abolition movement – that sought to subject state sovereignty to the individual rights protections guaranteed by the Bill of Rights. See Michael Kent Curtis, *The Bill of Rights As A Limitation On State Authority: A Reply To Professor Berger*, 16 Wake Forest L. Rev. 45 (1980). The framers of Fourteenth Amendment were abolitionists, and they intended to achieve the subjugation of state sovereignty to individual rights protections through the Fourteenth Amendment. *Id.*

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

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

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

The Supreme Court declined to adopt the clear interpretation of the Fourteenth Amendment's Privileges or Immunities Clause as a vehicle for incorporation of the Bill of Rights and substantive due process in *The Slaughter-House Cases*, 83 U.S. 36 (1873). Over the late 1800s, the Supreme Court repeatedly rejected arguments aimed at achieving the Fourteenth Amendment's original purpose of incorporating the Bill of Rights against the states. See, e.g., *United States v. Cruikshank*, 92 U.S. 542 (1876). The Supreme Court did not recognize incorporation as a constitutional doctrine until 1925 in *Gitlow v. New York*, 268 U.S. 652 (1925), and it did not recognize unenumerated rights

as being protected by the Fourteenth Amendment until *Lochner v. New York*, 198 U.S. 45 (1905). Furthermore, the Supreme Court did not even discuss modern constitutional scrutiny doctrines until 1938 in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), and it did not apply a form of scrutiny other than rational basis review until *Korematsu v. United States*, 323 U.S. 214 (1944).

Thus, when the Supreme Court decided *Jacobson*, it had not given full force and meaning to the precise nature of the Fourteenth Amendment. The controlling jurisprudence at the time meant that the Supreme Court did not examine unenumerated rights or enumerated rights guaranteed by the Fourteenth Amendment because it did not interpret the Fourteenth Amendment as protecting either form of individual rights. Even more notably, Henning Jacobson did not even attempt to assert claims under the Bill of Rights or some sort of unenumerated rights theory within the Fourteenth Amendment, relying wholly on the argument that the Fourteenth Amendment protected a form of generalized liberty.

The Supreme Court has never had the occasion to revisit the scope of *Jacobson* after it recognized the full scope of the Fourteenth Amendment and effected the fundamental change required by the Fourteenth Amendment in the dynamic between the state's police power and individual rights. The result is that *Jacobson* is out of place in modern constitutional jurisprudence and should not be given the force of controlling law.

An illustration of *Jacobson's* place in modern constitutional jurisprudence readily presents itself. The CDC described HIV/AIDS as a global pandemic in 2006,<sup>2</sup> and it was

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<sup>2</sup> <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5531a1.htm>

treated as a global pandemic since the 1980s.<sup>3</sup> According to the CDC's statistics in 2018, gay and bisexual men accounted for 69% of new HIV diagnoses.<sup>4</sup> Despite HIV/AIDS being declared a global pandemic and the increased risk of the spread of HIV/AIDS among gays and bisexuals, the Supreme Court clearly established that states' police power does not permit them to criminalize homosexual intimacy, which is protected as a fundamental unenumerated right under the Fourteenth Amendment.<sup>5</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003). If *Jacobson* controlled as a rule of law, it would undoubtedly permit states to prohibit conduct that would spread HIV/AIDS with the threat of criminal consequences. However, as the Supreme Court recognized in *Lawrence*, modern constitutional jurisprudence does not permit the state to classify fundamental rights – enumerated or unenumerated – as forbidden fruit at which a mere nibble will result in criminal consequences. The Supreme Court did not cite or discuss *Jacobson* once in its *Lawrence* opinion, and it did not address public health concerns either. *Lawrence v. Texas*, 539 U.S. 558 (2003).

*Lawrence* shows that *Jacobson* is out of place in modern constitutional jurisprudence and confirms its historical context as a pre-incorporation/unenumerated rights rule of law that has little to no application in modern constitutional jurisprudence. The Court should not give *Jacobson* and other decisions that rely on it dispositive weight over the Plaintiffs' Free Exercise claims, and it should instead apply modern constitutional jurisprudence to scrutinize the Defendants' restrictions as the Supreme Court itself has

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<sup>3</sup> Michael H. Merson, *The HIV-AIDS Pandemic at 25 – The Global Response*, N. Engl. J. Med. (2006). <https://www.nejm.org/doi/full/10.1056/nejmp068074>

<sup>4</sup> <https://www.cdc.gov/hiv/statistics/overview/ataglance.html>

<sup>5</sup> Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893 (2004).

done recently. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (Apr. 9, 2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889(Mem) (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

**B. New York State Health Regulation, Title 10, § 2.61 Targets Religion For A Special Disability In Violation Of The First Amendment Because It Allows Healthcare Workers To Claim A Medical Exemption, But Not A Religious One.**

Although the First Amendment does not entitle religious observers to special dispensations from general criminal laws because of their religion, “[t]he Free Exercise Clause protect[s] religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017) (internal citation and quotation marks omitted); see also *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Thus, laws may not discriminate against “some or all religious beliefs.” *Trinity Lutheran*, 137 S.Ct. at 2021 (quoting *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993)). Laws that discriminate in such a manner are subject to the strictest scrutiny. *Id.* at 2019. Thus, the analysis of First Amendment Free Exercise claims begins with an analysis of whether a law is neutral and of general applicability. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (Jun. 17, 2021).

“A law is not generally applicable if it invite[s] the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized exemptions.” *Fulton*, 141 S. Ct. at 1877 (internal quotation marks and citations omitted). “A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.”

*Id.* While it is true that all laws are somewhat selective, the Supreme Court has held that specific “categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

At least one circuit court has previously held that the grant of a medical exemption, but not a religious exemption, violates the neutrality and general applicability requirements of the Free Exercise Clause. In *Fraternal order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999), now-Justice Samuel Alito held that a police department’s medical exemptions from a shaving policy, but denial of religious exemptions, constituted a set of individualized exemptions within the meaning of *Lukumi*. Of particular concern to Justice Alito and his fellow Third Circuit judges was when “the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection, but not for individuals with a religious objection.” *Id.* at 365. Thus, they held that such a categorical distinction triggered strict scrutiny because the medical exemption undermined the government’s interests in the same way that the religious exemption did. *Id.*

Additionally, in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (Apr. 2021), the Supreme Court held that whether two activities or exemptions are comparable for purposes of a Free Exercise Clause analysis is determined by the risks that they pose, not the reasons for giving them.

The Defendants have offered familiar cliches when it comes to justifying New York State Health Regulation, Title 10, § 2.61, arguing that a mandatory COVID-19 vaccination

for healthcare workers is necessary to protect public health. These cliches, however, falter under New York State Health Regulation, Title 10, § 2.61's system of individualized exemptions that entertains requests for secular (medical) exemptions while categorically excluding requests for religious exemptions.

The empty platitudes that the Defendants have offered the public ignore reality. Regardless of whether a healthcare worker claims a medical or a religious exemption, they enter hospitals and other covered entities unvaccinated and, in the Defendants' eyes, more likely to spread COVID-19 than their peers. COVID-19, and the spread of COVID-19, will not inquire as to a healthcare worker's reasons for being exempt from the Defendants' COVID-19 vaccination requirement. As set forth in *Tandon*, the law does not inquire why either when considering which level of constitutional scrutiny to apply. The plain truth of the matter is that the Defendants consider all unvaccinated healthcare workers to be a public health risk because of their increased likelihood to spread contagious disease.

Because New York State Health Regulation, Title 10, § 2.61 provides a system of individualized exemptions, *Fulton* clearly mandates the conclusion that it is not a regulation of neutral and general applicability. Thus, Supreme Court precedent requires the Court to apply strict scrutiny to New York State Health Regulation, Title 10, § 2.61.

It cannot survive strict scrutiny. Under a strict scrutiny analysis, a government defendant must show that the challenged law is narrowly tailored to further a compelling government interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015). New York State Health Regulation, Title 10, § 2.61 fails on both elements.

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

Second, New York State Health Regulation, Title 10, § 2.61 does not even abide in the same universe as narrow tailoring does. The Defendants willingly provide accommodations to healthcare workers claiming medical exemptions, but mandate the termination of healthcare workers claiming religious exemptions and then bar them from working in healthcare until they bow to the COVID-19 vaccination mandate. Even assuming *arguendo* that the Defendants could constitutionally impose stricter requirements on healthcare workers who receive religious exemptions, the Defendants had many ways to limit their risk to public health. The Defendants could have required all exempt healthcare workers to work only with low-risk populations in the healthcare system. It could have required them to submit to regular COVID-19 testing, masking, and other restrictions.

They chose to do none of these things and completely ignored the fact that healthcare workers such as the Plaintiffs delivered quality and safe healthcare throughout the COVID-19 pandemic without being vaccinated. Last year, the Defendants categorically lauded the Plaintiffs as heroes. This year, they are trying to fire them with

no consideration of how they can accommodate them. The First Amendment requires narrow tailoring, and the Defendants have not made any good faith efforts to narrowly tailor New York State Health Regulation, Title 10, § 2.61.

The Supreme Court's decision in *Fulton* clearly indicates that the Defendants' behavior is constitutionally impermissible. Thus, the Plaintiffs have shown that they are likely to prevail on the merits and that a temporary restraining order and a preliminary injunction are appropriate and required here to protect their First Amendment rights.

**C. New York State Health Regulation, Title 10, § 2.61 Violates The Plaintiffs' Fourteenth Amendment Rights To Privacy And Medical Freedom.**

The Supreme Court unequivocally established a fundamental right to privacy in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments in *Roe v. Wade* and prior decisions. See *Roe v. Wade*, 410 U.S. 113, 152-53 (1973). While its precedents only covered matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education, the *Roe* Court refrained from confining it to just those areas. *Id.* at 152-53. The *Roe* Court then elaborated on the medical nature of the decision that a woman must make on whether to elect an abortion:

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

unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

*Id.* at 153.

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

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

If the right to elect a medical procedure to terminate the life of another being is a fundamental constitutional right, the right to decline a vaccination is also a fundamental constitutional right with similar roots in the Supreme Court’s precedents. See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (holding that there is a fundamental constitutional right to refuse medical treatment). Like the right to abortion, the right to decline a vaccination is not an unlimited right, but one that is entitled to be protected by strict scrutiny.

As discussed previously, the state of federal constitutional law has changed dramatically since *Jacobson*, and, as Justice Gorsuch pointed out, courts must follow

*Jacobson*'s approach to selecting levels of scrutiny and issuing rulings. Because *Philips* and the other Second Circuit cases that the Defendants rely on blindly embrace *Jacobson* as dispositive for its holding instead of what it did, they cannot control this claim.

New York State Health Regulation, Title 10, § 2.61 cannot survive strict scrutiny because there are ways where the Defendants can tailor their “solutions” for preventing the spread of COVID-19 while respecting the Plaintiffs’ rights – i.e., restricting them to working with low-risk patients while testing frequently and wearing the same personal protective equipment that they did throughout the entirety of the COVID-19 pandemic. Thus, the Plaintiffs are likely to prevail on the merits of this claim.

### **III. THE BALANCE OF HARDSHIPS DECIDEDLY WEIGHS IN FAVOR OF THE PLAINTIFFS.**

If the Court does not grant the Plaintiffs’ application for a temporary restraining order and a preliminary injunction, they will suffer irreparable harm in the form of the loss of their employment and income and being barred from working in the healthcare industry in New York State for the foreseeable future. See New York State Health Regulation, Title 10, § 2.61. More seriously, they will be subject to daily religious discrimination as they will be unable to find work as nurses or in other healthcare positions because of the Defendants’ intolerance for their religious beliefs. No amount of monetary compensation can compensate the Defendants for such a devastating turn of events.

To the contrary, the Defendants and their proclaimed interests will suffer no harm from a temporary restraining order and a preliminary injunction. They have lauded the professionalism of healthcare workers such as the Plaintiffs throughout the course of the COVID-19 pandemic. They praised their ability to control the spread of COVID-19 through the use of proper personal protective equipment (PPE) and various other precautions.

The mere emergence of COVID-19 vaccinations did not eliminate the same precautions or professionalism that the Defendants once praised. The Plaintiffs are more than willing to and capable of exercising that professionalism and those precautions, and they have proven that for over a year.

While the Defendants may assert that the public interest lies in the control of the spread of COVID-19, the public interest that our nation has articulated for centuries is in constitutional liberties. Even in times of national emergencies, the public interest lies in the rights guaranteed to every American by the United States Constitution. While there is an undeniable public interest in combatting and containing COVID-19, it does not take precedent over the public interest established in the supreme law of the land: the United States Constitution.

Thus, issuing the temporary restraining order would serve the public interest by protecting the constitutional liberties that our ancestors established and which have remained constant through every time of national crisis this nation has faced.

### **Conclusion**

For the foregoing reasons, the Plaintiffs respectfully request the Court to immediately issue a temporary restraining order enjoining the enforcement of New York State Health Regulation, Title 10, § 2.61 until such time as the Court can hear the parties' arguments for a preliminary injunction.

THE PLAINTIFFS  
/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)

/s/ Cameron L. Atkinson /s/  
CAMERON L. ATKINSON, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

/s/ Earl A. Voss /s/  
EARL A. VOSS, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[avoss@pattisandsmith.com](mailto:avoss@pattisandsmith.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on the date above a copy of the foregoing was served by certified mail, email, and/or by fax upon Governor Hochul and Dr. Zucker or their proper representatives designated by law.

/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.

# Exhibit A

August 31, 2021 | 12:13 pm

## COVID-19 Vaccines

On August 23, the FDA announced the full approval of the Pfizer-BioNTech vaccine for the prevention of COVID-19 disease in individuals age 16 and older. [Read more.](#)

**DETAILS** >

(<https://covid19vaccine.health.ny.gov/>)

## New York Codes, Rules and Regulations (/)

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# Title: Section 2.61 - Prevention of COVID-19 transmission by covered entities

## Effective Date

08/26/2021

Section 2.61 Prevention of COVID-19 transmission by covered entities.

(a) Definitions.

(1) "Covered entities" for the purposes of this section, shall include:

(i) any facility or institution included in the definition of "hospital" in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers;

(ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies;

(iii) hospices as defined in section 4002 of the Public Health Law; and

(iv) adult care facility under the Department's regulatory authority, as set forth in Article 7 of the Social Services Law.

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

(3) "Fully vaccinated," for the purposes of this section, shall be determined by the Department in accordance with applicable federal guidelines and recommendations. Unless otherwise specified by the Department, documentation of vaccination must include the manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site, in one of the following formats:

- (i) record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;
- (ii) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or
- (iii) any other documentation determined acceptable by the Department.

(c) Covered entities shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed below. Documentation of such vaccination shall be made in personnel records or other appropriate records in accordance with applicable privacy laws, except as set forth in subdivision (d) of this section.

(d) Exemptions. Personnel shall be exempt from the COVID-19 vaccination requirements set forth in subdivision (c) of this section as follows:

(1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (i) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

(e) Upon the request of the Department, covered entities must report and submit documentation, in a manner and format determined by the Department, for the following:

- (1) the number and percentage of personnel that have been vaccinated against COVID-19;
- (2) the number and percentage of personnel for which medical exemptions have been granted;
- (3) the total number of covered personnel.

(f) Covered entities shall develop and implement a policy and procedure to ensure compliance with the provisions of this section and submit such documents to the Department upon request.

(g) The Department may require all personnel, whether vaccinated or unvaccinated, to wear an appropriate face covering for the setting in which such personnel are working in a covered entity. Covered entities shall supply face coverings required by this section at no cost to personnel.

## Statutory Authority

Public Health Law, Sections 225, 2800, 2803, 3612, and 4010 & Social Services Law, Sections 461 and 461-e

## Volume

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## New York Codes, Rules and Regulations

**Search Title 10 (/search-title-10)**

**Proposed Rule Making (/regulations/proposed-rule-making)**

**Three, Five, Ten and Fifteen Year Regulation Review (/regulations/five-ten-fifteen-review)**

**Search Title 18 (/search-title-18)**

**Emergency Regulations (/regulations/emergency)**

**Recently Adopted Regulations (/regulations/recently-adopted)**

# Exhibit B

August 31, 2021 | 12:13 pm

## COVID-19 Vaccines

On August 23, the FDA announced the full approval of the Pfizer-BioNTech vaccine for the prevention of COVID-19 disease in individuals age 16 and older. Read more.

DETAILS >

 **GOVERNOR**  
KATHY HOCHUL

AUGUST 16, 2021 | Albany, NY

# Governor Cuomo Announces COVID-19 Vaccination Mandate for Healthcare Workers

**COVID-19 VACCINE (/KI HEALTH VID/KI PUBLIC SAFETY (/KEYWORDS/PUBLIC-  
19- SAFETY)  
VACCINE)**

Department of Health Issues Section 16 Orders to Hospitals and Long-Term Care Facilities Requiring Policy to Ensure All Employees Are Vaccinated

First Dose Required by September 27

Department of Health Authorizes Third Dose for Immunocompromised New Yorkers

Governor Andrew M. Cuomo announced today that all healthcare workers in New York State, including staff at hospitals and long-term care facilities (LTCF), including nursing homes, adult care, and other congregate care settings, will be required to be vaccinated against COVID-19 by Monday, September 27. The State Department of Health will issue Section 16 Orders requiring all hospital, LTCF, and nursing homes to develop and implement a policy mandating employee vaccinations, with limited exceptions for those with religious or medical reasons. To date, 75% of the state's ~450,000 hospital workers, 74% of the state's ~30,000 adult care facility workers, and 68% of the state's ~145,500 nursing home workers have completed their vaccine series. Lt. Governor Kathy Hochul's administration was briefed prior to the announcement.

"When COVID ambushed New York last year, New Yorkers acted, while the Federal Government denied the problem," **Governor Cuomo said.** "Now, the Delta variant is spreading across the nation and across New York -- [new daily positives are up over 1000% over the last six weeks](https://www.governor.ny.gov/sites/default/files/2021-08/Presentation1.pdf) (<https://www.governor.ny.gov/sites/default/files/2021-08/Presentation1.pdf>), and over 80 percent of recent positives in New York State are linked to the Delta variant. We must now act again to stop the spread. Our healthcare heroes led the battle against the virus, and now we need them to lead the battle between the variant and the vaccine. We have always followed the science, and we're doing so again today, with these recommendations by Dr. Zucker and federal and state health experts. But we need to do more. I have strongly urged private businesses to implement vaccinated-only admission policies, and school districts to mandate vaccinations for teachers. Neither will occur without the state legally mandating the actions -- private businesses will not enforce a vaccine mandate unless it's the law, and local school districts will be hesitant to make these challenging decisions without legal direction."

Governor Cuomo also announced that the Department of Health has authorized a third COVID-19 vaccine dose for New Yorkers with compromised immune systems, following the Centers for Disease Control and Prevention's recommendation last week. Eligible New Yorkers can receive their third dose 28 days after the completion of their two-dose vaccine series, effective immediately.

The CDC is currently recommending that moderately to severely immunocompromised people receive an additional dose, including people who have:

- Been receiving active cancer treatment for tumors or cancers of the blood;
- Received an organ transplant and are taking medications to suppress the immune system;
- Received a stem cell transplant within the last 2 years or are taking medicine to suppress the immune system;
- Moderate or severe primary immunodeficiency (such as DiGeorge syndrome, Wiskott-Aldrich syndrome);
- Advanced or untreated HIV infection;
- Active treatment with high-dose corticosteroids, cancer chemotherapy that causes severe immunosuppression, or other medications that may suppress your immune response.

New Yorkers should contact their healthcare provider about whether getting an additional dose is appropriate for them at this time.

**New York State Health Commissioner Dr. Howard Zucker said,** "While we have made tremendous progress in getting New Yorkers vaccinated, this pandemic is far from over and more must be done. The data and science tell us that getting more people vaccinated as quickly as possible is the best way to keep people safe, prevent further mutations, and enable us to

resume our daily routines. This mandate will both help close the vaccination gap and reduce the spread of the Delta variant. I want to thank all New York State's healthcare workers for stepping up once again and showing our state that getting vaccinated is safe, easy, and most importantly, effective."

These steps follow Governor Cuomo's August 2 announcement that MTA and Port Authority employees working in New York facilities will be required to be vaccinated for COVID-19 by Labor Day, and his July 28 announcement that state employees and patient-facing employees in state-run hospitals will be required to get vaccinated for COVID-19 by Labor Day. State employees who choose to remain unvaccinated will be required to undergo weekly COVID testing.

## Contact the Governor's Press Office

 Contact us by phone:

Albany: [\(518\) 474-8418](tel:5184748418)

New York City: [\(212\) 681-4640](tel:2126814640)

 Contact us by email:

[Press.Office@exec.ny.gov](mailto:Press.Office@exec.ny.gov)

## Translations

### Arabic Translation

الترجمة إلى العربية

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Arabic.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Arabic.pdf))

### Bengali Translation

বাংলা অনুবাদ

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Bengali.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Bengali.pdf))

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### Chinese Translation

中文翻譯

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Chinese.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Chinese.pdf))

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### Haitian-Creole Translation

Tradiksyon kreyòl ayisyen

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_HaitianCreole.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_HaitianCreole.pdf))

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### Italian Translation

Traduzione italiana

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Italian.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Italian.pdf))

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### Korean Translation

한국어 번역

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Korean.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Korean.pdf))

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### Polish Translation

Polskie tłumaczenie

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Polish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Polish.pdf))

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### Russian Translation

Перевод на русский язык

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Russian.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Russian.pdf))

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### Spanish Translation

Traducción al español

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Spanish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Spanish.pdf))

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### Yiddish Translation

אידישע איבערטייטשונג

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Yiddish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Yiddish.pdf))

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# Exhibit C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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

DOCKET NO.: 1:21-cv-04954

v.

KATHLEEN HOCHUL, GOVERNOR OF  
NEW YORK; HOWARD ZUCKER, M.D.,  
COMMISSIONER, NEW YORK DEP'T  
OF HEALTH,  
*Defendants.*

AFFIDAVIT OF DIANE BONO

DIANE BONO swears or affirms, under penalty of perjury, the following:

1. I am an adult resident of the State of New York, residing in Seaford;
2. I am a Registered Nurse, duly licensed to practice in the State of New York;
3. I am an employee of Syosset Hospital, Syosset, New York;
4. I am a committed and practicing member of the Christian faith;
5. I wholly subscribe to the teachings of the Christian faith as it pertains to the sanctity of life, born and unborn, and, in particular, with respect to the intrinsic evil of abortion and all of its fruits.
6. I object to putting in my body any of the available COVID-19 vaccines that relied, in whole or in part, on the use of fetal cell lines procured from electively aborted fetuses, for development, manufacturing or testing.

- 7. I will not comply with New York's regulation requiring all healthcare workers to be vaccinated for COVID-19 unless they have a medical exemption because it will violated my religious beliefs.
- 8. If I remain faithful to my conscience, I believe that my employer will terminate my employment on or after September 27, 2021.
- 9. Not only will I be terminated from my current employment, but the new regulation bars me from obtaining other employment in my career field unless I receive the COVID-19 vaccination first.

Signed on September 2, 2021 at Nassau County  
 (DATE) (LOCATION)

NAME OF AFFIANT (PRINT): Diane Bono

SIGNATURE OF AFFIANT: Diane Bono

NOTARY PUBLIC (PRINT): Kathleen Fischer

SIGNATURE OF NOTARY PUBLIC: Kathleen Fischer

**KATHLEEN FISCHER**  
 Notary Public, State of New York  
 Registration #01F14983004  
 Qualified In Nassau County  
 Commission Expires June 17, 2023



## **Exhibit D**



**Personal and Confidential**

August 31, 2021

Sent VIA Electronic Mail

Diane Bono

[dbono@northwell.edu](mailto:dbono@northwell.edu)

Re: COVID-19 Vaccine Religious Accommodation Request

Dear Ms. Bono:

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

Although mask wearing and other existing protocols will continue to be required to help prevent the spread of the virus, these life-saving vaccines remain our best shot at crushing COVID-19. As healthcare professionals and members of the largest healthcare provider in New York State, we have a unique responsibility to get vaccinated to protect our patients, colleagues, families and communities. If you have additional questions, please explore [educational materials](#) on the employee intranet, including FAQs, information sheets, recorded discussions and videos, some of which are available in multiple languages. Those without intranet access can also visit our [digital vaccine hub](#) for the community. Please reach out if we can provide you with any other information. Northwell is committed to providing you with the information you need to make this decision and can connect you with an expert to discuss your options. We urge you to get your first dose of vaccine by September 27 to ensure you can help us continue to improve the health and quality of life of the communities we serve.

If you choose to not receive your first shot between now and September 27, 2021, you will be non-compliant with the NYS mandate and your continued employment will be at risk. In the meantime, we appreciate your cooperation with health and safety precautions to protect the health of you, your colleagues, our patients and visitors. These precautions include the requirement to undergo weekly nasal PCR testing in accordance with Northwell's mandatory PCR testing program. Additionally, you may

be unable to participate in certain meetings, gatherings, and/or Northwell-sponsored events and programs due solely to your unvaccinated or partially vaccinated status.

Please know that Northwell has a COVID-19 vaccine reserved for all team members. If you are interested in receiving a COVID-19 vaccine, you can book an appointment through the Employee Health Portal. If you opt to get vaccinated at a non-Northwell source, you can upload proof to the portal or email it to [EHSCompliance@northwell.edu](mailto:EHSCompliance@northwell.edu) to record your new vaccination status.

Thank you,

Northwell Health  
Human Resources

cc: SITE HRBP

# Exhibit E

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.;	:	DOCKET NO.: 1:21-cv-04954
DIANE BONO;	:	
MICHELLE MELENDEZ;	:	
MICHELLE SYNAKOWSKI;	:	
<i>Plaintiffs,</i>	:	
	:	
v.	:	
	:	
KATHLEEN HOCHUL, GOVERNOR OF	:	
NEW YORK; HOWARD ZUCKER, M.D.,	:	
COMMISSIONER, NEW YORK DEP'T	:	
OF HEALTH,	:	
<i>Defendants.</i>	:	SEPTEMBER 2, 2021

**AFFIDAVIT OF MICHELLE MELENDEZ**

MICHELLE MELENDEZ swears or affirms, under penalty of perjury, the following:

1. I am an adult resident of the State of New York, residing in Wheatley Heights;
2. I am a Registered Nurse, duly licensed to practice in the State of New York;
3. I am an employee of Syosset Hospital, Syosset, New York;
4. I am a committed and practicing member of the Roman Catholic Church;
5. I wholly subscribe to the teachings of the Roman Catholic Church as it pertains to the sanctity of life, born and unborn, and, in particular, with respect to the intrinsic evil of abortion and all of its fruits.
6. I object to putting in my body any of the available COVID-19 vaccines that relied, in whole or in part, on the use of fetal cell lines procured from electively aborted fetuses, for development, manufacturing or testing.

- 7. I will not comply with New York’s regulation requiring all healthcare workers to be vaccinated for COVID-19 unless they have a medical exemption because it will violated my religious beliefs.
- 8. If I remain faithful to my conscience, I believe that my employer will terminate my employment on or after September 27, 2021.
- 9. Not only will I be terminated from my current employment, but the new regulation bars me from obtaining other employment in my career field unless I receive the COVID-19 vaccination first.

Signed on 9/3/21 at Syosset, NY  
 (DATE) (LOCATION)

NAME OF AFFIANT (PRINT): Michelle Melendez

SIGNATURE OF AFFIANT: Michelle Melendez

NOTARY PUBLIC (PRINT): Kelly Earley

SIGNATURE OF NOTARY PUBLIC: Kelly Earley

KELLY N. EARLEY  
 NOTARY PUBLIC - STATE OF NEW YORK  
 NO. 01EA6384339  
 QUALIFIED IN NASSAU COUNTY  
 COMMISSION EXPIRES 12/10/2022

# Exhibit F



**Personal and Confidential**

August 30, 2021

Sent VIA Electronic Mail

Michelle Melendez

Email Address: MMelendez@northwell.edu

Re: COVID-19 Vaccine Religious Accommodation Request

Dear Ms. Melendez:

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

Although mask wearing and other existing protocols will continue to be required to help prevent the spread of the virus, these life-saving vaccines remain our best shot at crushing COVID-19. As healthcare professionals and members of the largest healthcare provider in New York State, we have a unique responsibility to get vaccinated to protect our patients, colleagues, families and communities. If you have additional questions, please explore educational materials on the employee intranet, including FAQs, information sheets, recorded discussions and videos, some of which are available in multiple languages. Those without intranet access can also visit our digital vaccine hub for the community. Please reach out if we can provide you with any other information. Northwell is committed to providing you with the information you need to make this decision and can connect you with an expert to discuss your options. We urge you to get your first dose of vaccine by September 27 to ensure you can help us continue to improve the health and quality of life of the communities we serve.

If you choose to not receive your first shot between now and September 27, 2021, we appreciate your cooperation with health and safety precautions to protect the health of you, your colleagues, our patients and visitors. These precautions include the requirement to undergo weekly nasal PCR testing in accordance with Northwell's mandatory PCR testing program. Additionally, you may be unable to participate in certain meetings, gatherings, and/or Northwell-sponsored events and programs due solely to your unvaccinated or partially vaccinated status.

Please know that Northwell has a COVID-19 vaccine reserved for all team members. If you are interested in receiving a COVID-19 vaccine, you can book an appointment through the Employee Health Portal. If you opt to get vaccinated at a non-Northwell source, you can upload proof to the portal or email it to [EHSCompliance@northwell.edu](mailto:EHSCompliance@northwell.edu) to record your new vaccination status.

Thank you,

Northwell Health  
Human Resources

cc: SITE HRBP

# Exhibit G

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.; : DOCKET NO.: 1:21-cv-04954  
DIANE BONO; :  
MICHELLE MELENDEZ; :  
MICHELLE SYNAKOWSKI; :  
    *Plaintiffs,* :  
 :  
v. :  
 :  
KATHLEEN HOCHUL, GOVERNOR OF :  
NEW YORK; HOWARD ZUCKER, M.D., :  
COMMISSIONER, NEW YORK DEP'T :  
OF HEALTH, :  
    *Defendants.* : SEPTEMBER 9, 2021

AFFIDAVIT OF MICHELLE SYNAKOWSKI

MICHELLE SYNAKOWSKI swears or affirms, under penalty of perjury, the following:

1. I am an adult resident of the State of New York, residing in Syracuse;
2. I am a Registered Nurse, duly licensed to practice in the State of New York;
3. I am an employee of St. Joseph's Hospital, Syracuse, New York;
4. I am a committed and practicing member of the Roman Catholic Church;
5. I wholly subscribe to the teachings of the Catholic moral tradition as it pertains to the sanctity of all life, born and unborn, and, in particular, with respect to the intrinsic evil of abortion and all of its fruits.
6. I object to putting into my body any of the available COVID-19 vaccines which relied, in whole or in part, upon the use of fetal cell lines procured from electively aborted fetuses, for development, manufacturing or testing.
7. I will not comply with New York's regulation requiring all healthcare workers to be vaccinated for COVID-19 unless they have a medical exemption because it will violate my religious beliefs.
8. My employer has informed me that, if I choose to remain faithful to my conscience, it will rescind my current religious exemption from the COVID-19 vaccine and terminate my employment on September 21, 2021 because it is required to do so by New York State Health Regulation, Title 10, §2.61.

9. Not only will I be terminated from my current employment, but the new regulation bars me from obtaining other employment in my career field unless I receive the COVID-19 vaccination first.

Signed on 9/10/21 at Dewitt New York  
(DATE) (LOCATION)

NAME OF AFFIANT (PRINT): Michelle Synakowski

SIGNATURE OF AFFIANT: *Michelle Synakowski*

NOTARY PUBLIC (PRINT): Andres Sarmiento

SIGNATURE OF NOTARY PUBLIC: *[Signature]*

Andres Avelino Sarmiento  
01SA6256097  
Notary Public, State of New York  
Qualified in Onondaga County  
My commission expires FEBRUARY 21st, 2024

**EXHIBIT C TO  
DECLARATION OF  
CAMERON L. ATKINSON**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.,	:	
DIANE BONO,	:	
MICHELLE MELENDEZ,	:	Dkt. No.:1:21-cv-4954
MICHELLE SYNAKOWSKI,	:	
Plaintiffs,	:	
v.	:	
	:	
KATHLEEN HOCHUL - GOVERNOR	:	
OF NEW YORK; HOWARD	:	
ZUCKER, M.D. - COMMISSIONER,	:	
NEW YORK STATE DEPARTMENT	:	
OF HEALTH	:	
Defendants.	:	SEPTEMBER 13, 2021

**NOTICE OF EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

Pursuant to Federal Rule of Civil Procedure 62(d), the Plaintiffs respectfully give notice of their emergency motion for an injunction pending appeal:

THE PLAINTIFFS  
/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)

/s/ Cameron L. Atkinson /s/  
CAMERON L. ATKINSON, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

/s/ Earl A. Voss /s/  
EARL A. VOSS, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
avoss@pattisandsmith.com

**CERTIFICATE OF SERVICE**

I hereby certify that on the date above a copy of the foregoing was served by certified mail, email, and/or by fax upon Governor Hochul and Dr. Zucker or their proper representatives designated by law.

/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.,	:	
DIANE BONO,	:	
MICHELLE MELENDEZ,	:	Dkt. No.:1:21-cv-4954
MICHELLE SYNAKOWSKI,	:	
Plaintiffs,	:	
v.	:	
	:	
KATHLEEN HOCHUL - GOVERNOR	:	
OF NEW YORK; HOWARD	:	
ZUCKER, M.D, - COMMISSIONER,	:	
NEW YORK STATE DEPARTMENT	:	
OF HEALTH	:	
Defendants.	:	SEPTEMBER 13, 2021

**MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR  
INJUNCTION PENDING APPEAL**

The Plaintiffs respectfully request the Court to immediately issue an injunction pending appeal to Federal Rule of Civil Procedure 62(d) staying enforcement of New York State Health Regulation, Title 10, § 2.61.

**Factual Background**

On August 16, 2021, then New York Governor Andrew Cuomo promised New York health care workers that the state’s coming COVID-19 vaccine mandate for healthcare workers would allow for “limited exceptions for those with religious or medical reasons.” **Exhibit B, pp. 1-2.** On August 26, 2021, the Defendants promulgated New York State Health Regulation, Title 10, § 2.61 with no public notice and comment period. The regulation departed drastically from then Governor Cuomo’s promises by eliminating religious exemptions for healthcare workers when it comes to the Defendants’ COVID-19 vaccination mandate. **Exhibit A, p. 2**

New York State Health Regulation, Title 10, § 2.61 covers “any facility or institution included in the definition of ‘hospital’ ... including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers....” *Id.* at p. 1. It applies to

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

*Id.* at p. 2. The regulation requires “[c]overed entities ... [to] continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed....” *Id.* at p. 2.

The only exemption that New York State Health Regulation, Title 10, § 2.61 provides is a “medical exemption.” *Id.* at p. 2.

***Vaccines – Ingredients:***

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

Johnson & Johnson used an aborted fetal cell line to produce and manufacture its vaccine. *Id.* Pfizer and Moderna did not use an aborted fetal cell line to produce and

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<sup>1</sup> [https://www.michigan.gov/documents/coronavirus/COVID-19\\_Vaccines\\_and\\_Fetal\\_Cells\\_031921\\_720415\\_7.pdf](https://www.michigan.gov/documents/coronavirus/COVID-19_Vaccines_and_Fetal_Cells_031921_720415_7.pdf)

manufacture their vaccines, but they did use an aborted fetal cell line to confirm its efficacy prior to producing and manufacturing it. *Id.*

***Northwell Health & Plaintiffs Diane Bono & Michelle Melendez:***

Plaintiff Diane Bono is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. **Exhibit C – Affidavit of Diane Bono, ¶ 3.** She is a practicing Christian and believes in “the sanctity of life, born and unborn.” *Id.* at ¶ 5. She believes that abortion is morally evil and that its fruits are as well. *Id.* at ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. *Id.* at ¶ 6. On August 23, 2021, she submitted a request for a religious exemption from New York’s COVID-19 vaccination mandate to Northwell Health. **Exhibit D – Religious Exemption Denial For Diane Bono.** Northwell Health denied her religious exemption on August 31, 2021 and explained why:

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

*Id.*

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

Bono has elected not to comply with the Defendants’ mandate because it would violate her religious beliefs. **Exhibit C, ¶ 7.** Her choice will subject her to the termination

of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. *Id.* at ¶ 9.

Plaintiff Michelle Melendez is a registered nurse at Syosset Hospital in New York and is employed by Northwell Health. **Exhibit E – Affidavit of Michelle Melendez, ¶¶ 2-3.** She is a practicing Catholic and believes in “the sanctity of life, born and unborn.” *Id.* at ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. *Id.* at ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. *Id.* at ¶ 6. On August 22, 2021, she submitted a request for a religious exemption from New York’s COVID-19 vaccination mandate to Northwell Health. **Exhibit F – Religious Exemption Denial For Michelle Melendez.** Northwell Health denied her religious exemption on August 31, 2021 and explained why:

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

*Id.*

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

**Exhibit E, ¶ 8.**

Melendez has elected not to comply with the Defendants' mandate because it would violate her religious beliefs. *Id.* at ¶ 7. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. *Id.* at ¶ 9.

***Michelle Synakowski:***

Michelle Synakowski is a registered nurse employed at St. Joseph's Hospital in New York. **Exhibit G – Affidavit of Michelle Synakowski.** She is a practicing Catholic and believes in “the sanctity of life, born and unborn.” *Id.* at ¶¶ 4-5. She believes that abortion is morally evil and that its fruits are as well. *Id.* at ¶ 5. As such, she has a sincere religious objection to taking any of the available COVID-19 vaccines because they use aborted fetal cell lines. *Id.* at ¶ 6. She will not comply with New York's vaccination mandate, and her employer has informed her that it will terminate her employment on September 21, 2021 if she does not receive the vaccine because it is required to do so by New York State Health Regulation, Title 10, § 2.61. *Id.* at ¶¶ 7-8. Her choice will subject her to the termination of her current employment and will bar her from obtaining other employment as a nurse unless she yields and receives a COVID-19 vaccination. *Id.* at ¶ 9.

***Procedural History:***

On September 2, 2021, the Plaintiffs filed this action seeking injunctive relief to stay enforcement of New York State Health Regulation, Title 10, § 2.61. Dkt. 2. On September 12, 2021, they filed a motion for an emergency temporary restraining order and for a preliminary injunction. Dkt. 6. The Court denied that motion on September 12, 2021 without opinion. The Plaintiffs then filed a notice of appeal that same day. Dkt. 8.

## Argument

Fed. R. Civ. P. 62(d) provides that, while an appeal is pending from an interlocutory order that refuses an injunction, the Court may grant an injunction on terms that secure the opposing party's rights. *See also Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556 (2d Cir. 1991). Much like a preliminary injunction, the Second Circuit has established four factors that the Court must consider: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated "a substantial possibility, although less than a likelihood, of success" on appeal, and (4) the public interests that may be affected." *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994).

The Plaintiffs more than satisfy this test.

### **I. THE PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE COURT DOES NOT GRANT THEIR REQUEST FOR A TEMPORARY RESTRAINING ORDER.**

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

for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Plaintiffs here are entitled to the presumption of irreparable harm in the absence of injunctive relief because they have alleged that they will be wholly deprived of their constitutional rights to the free exercise of religion, privacy, and medical freedom.

The Plaintiffs also show actual and imminent harm that is irreparable and caused by New York State Health Regulation, Title 10, § 2.61 because they will be terminated and barred from working as healthcare professionals in New York unless they receive COVID-19 vaccinations in violation of their religious beliefs. This harm is imminent as at least one plaintiff – Michelle Synakowski – will be terminated on September 21, 2021 and the other two plaintiffs – Diane Bono and Michelle Melendez – will be terminated on September 27, 2021. No amount of money will repair the damage caused by such terminations and the subsequent bar for the Plaintiffs to reenter the healthcare field in New York.

## **II. NO PARTY WILL SUFFER SUBSTANTIAL INJURY IF THE COURT ISSUES AN INJUNCTION PENDING APPEAL.**

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

While the Defendants have mandated that all healthcare workers receive a COVID-19 vaccination, they will not suffer a substantial injury if a portion of New York’s

healthcare workers go unvaccinated, but follow the Defendants' other health guidelines as they have done throughout the COVID-19 pandemic. The Defendants also have other options to protect their interests while the Plaintiffs pursue their appeal like requiring unvaccinated healthcare workers to only work with certain low-risk populations. Instead of creating a system of reasonable accommodation, they have created a system of unreasonable termination.

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

### **III. THE PLAINTIFFS SHOW A SUBSTANTIAL POSSIBILITY OF SUCCESS ON THE MERITS OF THEIR CLAIMS.**

#### **A. Supreme Court Precedent Does Not Establish A Public Health Emergency Exception To The First Amendment.**

The U.S. Supreme Court has reshaped its decisions in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), *Zucht v. King*, 260 U.S. 174 (1922), and *Prince v. Massachusetts*, 321 U.S. 158 (1944) over the last year. It has clearly established that, even during a public health emergency, the First Amendment's prohibition on the attachment of special disabilities to religion still applies in full force. See *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889(Mem) (Dec. 3, 2020) (granting certiorari and adopting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) as its decision). In other words, a state's assertion of a public health emergency interest does not swallow the First Amendment even when it comes in the form of a vaccine mandate.

The U.S. Supreme Court has also indicated that *Jacobson* and *Zucht* involved assertions of different rights than the ones that the Plaintiffs assert here. As Justice Gorsuch pointed out in his *Cuomo* concurrence and as *Jacobson* itself makes clear,

Henning Jacobson only asserted a generalized Fourteenth Amendment liberty interest claim in *Jacobson*, not a First Amendment claim, a suspect classification claim, or a claim of a fundamental right. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). Justice Gorsuch then makes the following observation:

Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, Jacobson applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest.

*Id.* at 70.

Likewise, in *Zucht v. King*, 260 U.S. 24 (1922), Rosalyn Zucht only asserted a generalized Fourteenth Amendment liberty claim against a school vaccination mandate and a vague equal protection claim. The *Zucht* Court relied on *Jacobson* to reject her claim.

When the Supreme Court decided *Jacobson*, it had not given full force and meaning to the precise nature of the Fourteenth Amendment. The incorporation of the Bill of Rights and strong protections for fundamental unenumerated rights did not exist at the time that the Supreme Court decided *Jacobson* and *Zucht*. Thus, the controlling jurisprudence at the time meant that the Supreme Court did not examine unenumerated rights or enumerated rights guaranteed by the Fourteenth Amendment because it did not interpret the Fourteenth Amendment as protecting either form of individual rights.

Incorporation and the Supreme Court's substantive due process doctrine has changed the impact that *Jacobson* and *Zucht* have on First Amendment cases. The Supreme Court has indicated as much even though it has not specifically done so in a

vaccine mandate case. See, e.g., *Tandon v. Newsom*, 141 S. Ct. 1294 (Apr. 9, 2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889(Mem) (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). There is a substantial possibility that either the Second Circuit or the Supreme Court will find that New York State Health Regulation, Title 10, § 2.61 creates similar circumstances requiring its intervention as discussed below.

**B. New York State Health Regulation, Title 10, § 2.61 Targets Religion For A Special Disability In Violation Of The First Amendment Because It Allows Healthcare Workers To Claim A Medical Exemption, But Not A Religious One.**

Although the First Amendment does not entitle religious observers to special dispensations from general criminal laws because of their religion, “[t]he Free Exercise Clause protect[s] religious observers against unequal treatment and subjects to the strictest scrutiny laws that target the religious for special disabilities based on their religious status.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2019 (2017) (internal citation and quotation marks omitted); see also *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). Thus, laws may not discriminate against “some or all religious beliefs.” *Trinity Lutheran*, 137 S.Ct. at 2021 (quoting *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993)). Laws that discriminate in such a manner are subject to the strictest scrutiny. *Id.* at 2019. Thus, the analysis of First Amendment Free Exercise claims begins with an analysis of whether a law is neutral and of general applicability. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (Jun. 17, 2021).

“A law is not generally applicable if it invite[s] the government to consider the particular reasons for a person’s conduct by providing a mechanism for individualized

exemptions.” *Fulton*, 141 S. Ct. at 1877 (internal quotation marks and citations omitted). “A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government’s asserted interests in a similar way.” *Id.* While it is true that all laws are somewhat selective, the Supreme Court has held that specific “categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993).

At least one circuit court has previously held that the grant of a medical exemption, but not a religious exemption, violates the neutrality and general applicability requirements of the Free Exercise Clause. In *Fraternal order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3rd Cir. 1999), now-Justice Samuel Alito held that a police department’s medical exemptions from a shaving policy, but denial of religious exemptions, constituted a set of individualized exemptions within the meaning of *Lukumi*. Of particular concern to Justice Alito and his fellow Third Circuit judges was when “the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection, but not for individuals with a religious objection.” *Id.* at 365. Thus, they held that such a categorical distinction triggered strict scrutiny because the medical exemption undermined the government’s interests in the same way that the religious exemption did. *Id.*

Additionally, in *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (Apr. 2021), the Supreme Court held that whether two activities or exemptions are comparable for

purposes of a Free Exercise Clause analysis is determined by the risks that they pose, not the reasons for giving them.

In their public statements justifying New York State Health Regulation, Title 10, § 2.61, the Defendants have argued that a mandatory COVID-19 vaccination for healthcare workers is necessary to protect public health. This argument, however, falter under New York State Health Regulation, Title 10, § 2.61's system of individualized exemptions that entertains requests for secular (medical) exemptions while categorically excluding requests for religious exemptions.

The empty platitudes that the Defendants have offered the public ignore reality. Regardless of whether a healthcare worker claims a medical or a religious exemption, they enter hospitals and other covered entities unvaccinated and, in the Defendants' eyes, more likely to spread COVID-19 than their peers. COVID-19, and the spread of COVID-19, will not inquire as to a healthcare worker's reasons for being exempt from the Defendants' COVID-19 vaccination requirement. As set forth in *Tandon*, the law does not inquire why either when considering which level of constitutional scrutiny to apply. The plain truth of the matter is that the Defendants consider all unvaccinated healthcare workers to be a public health risk because of their increased likelihood to spread contagious disease.

Because New York State Health Regulation, Title 10, § 2.61 provides a system of individualized exemptions, *Fulton* clearly mandates the conclusion that it is not a regulation of neutral and general applicability. Thus, Supreme Court precedent requires the Court to apply strict scrutiny to New York State Health Regulation, Title 10, § 2.61.

It cannot survive strict scrutiny. Under a strict scrutiny analysis, a government defendant must show that the challenged law is narrowly tailored to further a compelling government interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 172 (2015). New York State Health Regulation, Title 10, § 2.61 fails on both elements.

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

Second, New York State Health Regulation, Title 10, § 2.61 does not even abide in the same universe as narrow tailoring does. The Defendants willingly provide accommodations to healthcare workers claiming medical exemptions, but mandate the termination of healthcare workers claiming religious exemptions and then bar them from working in healthcare until they bow to the COVID-19 vaccination mandate. Even assuming *arguendo* that the Defendants could constitutionally impose stricter requirements on healthcare workers who receive religious exemptions, the Defendants had many ways to limit their risk to public health. The Defendants could have required all exempt healthcare workers to work only with low-risk populations in the healthcare system. It could have required them to submit to regular COVID-19 testing, masking, and other restrictions.

They chose to do none of these things and completely ignored the fact that healthcare workers such as the Plaintiffs delivered quality and safe healthcare throughout the COVID-19 pandemic without being vaccinated. Last year, the Defendants categorically lauded the Plaintiffs as heroes. This year, they are trying to fire them with no consideration of how they can accommodate them. The First Amendment requires narrow tailoring, and the Defendants have not made any good faith efforts to narrowly tailor New York State Health Regulation, Title 10, § 2.61.

The Supreme Court's decision in *Fulton* clearly indicates that the Defendants' behavior is constitutionally impermissible, and its decisions in *Tandon v. Newsom*, 141 S. Ct. 1294 (Apr. 9, 2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (Mem) (2020); and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) illustrate that *Fulton*, rather than *Jacobson* and *Zucht*, and its predecessors control. Under these cases and the rule that they establish, the Plaintiffs have a substantial possibility of prevailing on appeal, and the Court should issue an injunction prohibiting the Defendants from enforcing New York State Health Regulation, Title 10, § 2.61 while this appeal remains pending.

**C. New York State Health Regulation, Title 10, § 2.61 Violates The Plaintiffs' Fourteenth Amendment Rights To Privacy And Medical Freedom.**

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

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

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

*Id.* at 153.

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

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

If the right to elect a medical procedure to terminate the life of another being is a fundamental constitutional right, the right to decline a vaccination is also a fundamental constitutional right with similar roots in the Supreme Court's precedents. See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (holding that there is a fundamental constitutional right to refuse medical treatment). Like the right to abortion, the right to decline a vaccination is not an unlimited right, but one that is entitled to be protected by strict scrutiny.

As discussed previously, the state of federal constitutional law has changed dramatically since *Jacobson*, and, as Justice Gorsuch pointed out, courts must follow *Jacobson's* approach to selecting levels of scrutiny and issuing rulings. Because *Phillips* and the other Second Circuit cases that the Defendants rely on blindly embrace *Jacobson* as dispositive for its holding instead of what it did, they cannot control this claim.

New York State Health Regulation, Title 10, § 2.61 cannot survive strict scrutiny because there are ways where the Defendants can tailor their "solutions" for preventing the spread of COVID-19 while respecting the Plaintiffs' rights – i.e., restricting them to working with low-risk patients while testing frequently and wearing the same personal protective equipment that they did throughout the entirety of the COVID-19 pandemic. Thus, there is a substantial possibility that the Plaintiffs will prevail on this argument on appeal.

#### **IV. THE RELEVANT PUBLIC INTERESTS DECIDEDLY WEIGH IN FAVOR OF THE PLAINTIFFS.**

The rights to religious freedom, privacy, and medical freedom are enshrined in the U.S. Constitution. The right to be free from religious discrimination is enshrined in Title VII of the Civil Rights Act and New York state law. The repeated efforts that society has

made to articulate the public's supreme interest in protecting religious freedom cannot be clearer. The effort that it has made to secure privacy and medical freedom is also clear.

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

Here, the Plaintiffs have proposed less restrictive measures. The Defendants have not appeared to rebut them, and a stay is necessary both to afford the Defendants that opportunity as well as to allow the Plaintiffs an opportunity to oppose the Defendants' assertions.

### **Conclusion**

For the foregoing reasons, the Plaintiffs respectfully request the Court to immediately issue injunction enjoining the enforcement of New York State Health Regulation, Title 10, § 2.61 until the Plaintiffs' appeal of the Court's order denying their motion for a temporary restraining order and a preliminary injunction is decided.

THE PLAINTIFFS  
/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)

/s/ Cameron L. Atkinson /s/  
CAMERON L. ATKINSON, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

/s/ Earl A. Voss /s/  
EARL A. VOSS, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[avoss@pattisandsmith.com](mailto:avoss@pattisandsmith.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on the date above a copy of the foregoing was served by certified mail, email, and/or by fax upon Governor Hochul and Dr. Zucker or their proper representatives designated by law.

/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.

# Exhibit A

August 31, 2021 | 12:13 pm

## COVID-19 Vaccines

On August 23, the FDA announced the full approval of the Pfizer-BioNTech vaccine for the prevention of COVID-19 disease in individuals age 16 and older. [Read more.](#)

**DETAILS** >

(<https://covid19vaccine.health.ny.gov/>)

## New York Codes, Rules and Regulations (/)

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# Title: Section 2.61 - Prevention of COVID-19 transmission by covered entities

## Effective Date

08/26/2021

Section 2.61 Prevention of COVID-19 transmission by covered entities.

(a) Definitions.

(1) "Covered entities" for the purposes of this section, shall include:

(i) any facility or institution included in the definition of "hospital" in section 2801 of the Public Health Law, including but not limited to general hospitals, nursing homes, and diagnostic and treatment centers;

(ii) any agency established pursuant to Article 36 of the Public Health Law, including but not limited to certified home health agencies, long term home health care programs, acquired immune deficiency syndrome (AIDS) home care programs, licensed home care service agencies, and limited licensed home care service agencies;

(iii) hospices as defined in section 4002 of the Public Health Law; and

(iv) adult care facility under the Department's regulatory authority, as set forth in Article 7 of the Social Services Law.

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

(3) "Fully vaccinated," for the purposes of this section, shall be determined by the Department in accordance with applicable federal guidelines and recommendations. Unless otherwise specified by the Department, documentation of vaccination must include the manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site, in one of the following formats:

(i) record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;

(ii) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or

(iii) any other documentation determined acceptable by the Department.

(c) Covered entities shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed below. Documentation of such vaccination shall be made in personnel records or other appropriate records in accordance with applicable privacy laws, except as set forth in subdivision (d) of this section.

(d) Exemptions. Personnel shall be exempt from the COVID-19 vaccination requirements set forth in subdivision (c) of this section as follows:

(1) Medical exemption. If any licensed physician or certified nurse practitioner certifies that immunization with COVID-19 vaccine is detrimental to the health of member of a covered entity's personnel, based upon a pre-existing health condition, the requirements of this section relating to COVID-19 immunization shall be inapplicable only until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment medical record, or other appropriate record, and must be in accordance with generally accepted medical standards, (see, for example, the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services), and any reasonable accommodation may be granted and must likewise be documented in such record. Covered entities shall document medical exemptions in personnel records or other appropriate records in accordance with applicable privacy laws by: (i) September 27, 2021 for general hospitals and nursing homes; and (ii) October 7, 2021 for all other covered entities. For all covered entities, documentation must occur continuously, as needed, following the initial dates for compliance specified herein, including documentation of any reasonable accommodation therefor.

(e) Upon the request of the Department, covered entities must report and submit documentation, in a manner and format determined by the Department, for the following:

(1) the number and percentage of personnel that have been vaccinated against COVID-19;

(2) the number and percentage of personnel for which medical exemptions have been granted;

(3) the total number of covered personnel.

(f) Covered entities shall develop and implement a policy and procedure to ensure compliance with the provisions of this section and submit such documents to the Department upon request.

(g) The Department may require all personnel, whether vaccinated or unvaccinated, to wear an appropriate face covering for the setting in which such personnel are working in a covered entity. Covered entities shall supply face coverings required by this section at no cost to personnel.

## Statutory Authority

Public Health Law, Sections 225, 2800, 2803, 3612, and 4010 & Social Services Law, Sections 461 and 461-e

## Volume

VOLUME A (Title 10)

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## New York Codes, Rules and Regulations

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**Recently Adopted Regulations (/regulations/recently-adopted)**

# Exhibit B

August 31, 2021 | 12:13 pm

## COVID-19 Vaccines

On August 23, the FDA announced the full approval of the Pfizer-BioNTech vaccine for the prevention of COVID-19 disease in individuals age 16 and older. [Read more.](#)

DETAILS >

 **GOVERNOR**  
KATHY HOCHUL

AUGUST 16, 2021 | Albany, NY

# Governor Cuomo Announces COVID-19 Vaccination Mandate for Healthcare Workers

**COVID-19 VACCINE (/KI HEALTH VID/KI PUBLIC SAFETY (/KEYWORDS/PUBLIC-  
19- SAFETY)  
VACCINE)**

Department of Health Issues Section 16 Orders to Hospitals and Long-Term Care Facilities Requiring Policy to Ensure All Employees Are Vaccinated

First Dose Required by September 27

Department of Health Authorizes Third Dose for Immunocompromised New Yorkers

Governor Andrew M. Cuomo announced today that all healthcare workers in New York State, including staff at hospitals and long-term care facilities (LTCF), including nursing homes, adult care, and other congregate care settings, will be required to be vaccinated against COVID-19 by Monday, September 27. The State Department of Health will issue Section 16 Orders requiring all hospital, LTCF, and nursing homes to develop and implement a policy mandating employee vaccinations, with limited exceptions for those with religious or medical reasons. To date, 75% of the state's ~450,000 hospital workers, 74% of the state's ~30,000 adult care facility workers, and 68% of the state's ~145,500 nursing home workers have completed their vaccine series. Lt. Governor Kathy Hochul's administration was briefed prior to the announcement.

"When COVID ambushed New York last year, New Yorkers acted, while the Federal Government denied the problem," **Governor Cuomo said.** "Now, the Delta variant is spreading across the nation and across New York -- [new daily positives are up over 1000% over the last six weeks](https://www.governor.ny.gov/sites/default/files/2021-08/Presentation1.pdf) (<https://www.governor.ny.gov/sites/default/files/2021-08/Presentation1.pdf>), and over 80 percent of recent positives in New York State are linked to the Delta variant. We must now act again to stop the spread. Our healthcare heroes led the battle against the virus, and now we need them to lead the battle between the variant and the vaccine. We have always followed the science, and we're doing so again today, with these recommendations by Dr. Zucker and federal and state health experts. But we need to do more. I have strongly urged private businesses to implement vaccinated-only admission policies, and school districts to mandate vaccinations for teachers. Neither will occur without the state legally mandating the actions -- private businesses will not enforce a vaccine mandate unless it's the law, and local school districts will be hesitant to make these challenging decisions without legal direction."

Governor Cuomo also announced that the Department of Health has authorized a third COVID-19 vaccine dose for New Yorkers with compromised immune systems, following the Centers for Disease Control and Prevention's recommendation last week. Eligible New Yorkers can receive their third dose 28 days after the completion of their two-dose vaccine series, effective immediately.

The CDC is currently recommending that moderately to severely immunocompromised people receive an additional dose, including people who have:

- Been receiving active cancer treatment for tumors or cancers of the blood;
- Received an organ transplant and are taking medications to suppress the immune system;
- Received a stem cell transplant within the last 2 years or are taking medicine to suppress the immune system;
- Moderate or severe primary immunodeficiency (such as DiGeorge syndrome, Wiskott-Aldrich syndrome);
- Advanced or untreated HIV infection;
- Active treatment with high-dose corticosteroids, cancer chemotherapy that causes severe immunosuppression, or other medications that may suppress your immune response.

New Yorkers should contact their healthcare provider about whether getting an additional dose is appropriate for them at this time.

**New York State Health Commissioner Dr. Howard Zucker said,** "While we have made tremendous progress in getting New Yorkers vaccinated, this pandemic is far from over and more must be done. The data and science tell us that getting more people vaccinated as quickly as possible is the best way to keep people safe, prevent further mutations, and enable us to

resume our daily routines. This mandate will both help close the vaccination gap and reduce the spread of the Delta variant. I want to thank all New York State's healthcare workers for stepping up once again and showing our state that getting vaccinated is safe, easy, and most importantly, effective."

These steps follow Governor Cuomo's August 2 announcement that MTA and Port Authority employees working in New York facilities will be required to be vaccinated for COVID-19 by Labor Day, and his July 28 announcement that state employees and patient-facing employees in state-run hospitals will be required to get vaccinated for COVID-19 by Labor Day. State employees who choose to remain unvaccinated will be required to undergo weekly COVID testing.

## Contact the Governor's Press Office

### Contact us by phone:

Albany: [\(518\) 474-8418](tel:5184748418)

New York City: [\(212\) 681-4640](tel:2126814640)

### Contact us by email:

[Press.Office@exec.ny.gov](mailto:Press.Office@exec.ny.gov)

## Translations

### Arabic Translation

الترجمة إلى العربية

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Arabic.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Arabic.pdf))

### Bengali Translation

বাংলা অনুবাদ

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Bengali.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Bengali.pdf))

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### Chinese Translation

中文翻譯

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Chinese.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Chinese.pdf))

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### Haitian-Creole Translation

Tradiksyon kreyòl ayisyen

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_HaitianCreole.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_HaitianCreole.pdf))

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### Italian Translation

Traduzione italiana

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Italian.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Italian.pdf))

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### Korean Translation

한국어 번역

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Korean.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Korean.pdf))

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### Polish Translation

Polskie tłumaczenie

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Polish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Polish.pdf))

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### Russian Translation

Перевод на русский язык

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Russian.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Russian.pdf))

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### Spanish Translation

Traducción al español

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Spanish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Spanish.pdf))

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### Yiddish Translation

אידישע איבערטייטשונג

([https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel\\_MANDATE\\_Yiddish.pdf](https://www.governor.ny.gov/sites/default/files/2021-08/08.16.21.rel_MANDATE_Yiddish.pdf))

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# Exhibit C

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.;	:	DOCKET NO.: 1:21-cv-04954
DIANE BONO;	:	
MICHELLE MELENDEZ;	:	
MICHELLE SYNAKOWSKI;	:	
<i>Plaintiffs,</i>	:	
	:	
v.	:	
	:	
KATHLEEN HOCHUL, GOVERNOR OF	:	
NEW YORK; HOWARD ZUCKER, M.D.,	:	
COMMISSIONER, NEW YORK DEP'T	:	
OF HEALTH,	:	
<i>Defendants.</i>	:	

**AFFIDAVIT OF DIANE BONO**

DIANE BONO swears or affirms, under penalty of perjury, the following:

1. I am an adult resident of the State of New York, residing in Seaford;
2. I am a Registered Nurse, duly licensed to practice in the State of New York;
3. I am an employee of Syosset Hospital, Syosset, New York;
4. I am a committed and practicing member of the Christian faith;
5. I wholly subscribe to the teachings of the Christian faith as it pertains to the sanctity of life, born and unborn, and, in particular, with respect to the intrinsic evil of abortion and all of its fruits.
6. I object to putting in my body any of the available COVID-19 vaccines that relied, in whole or in part, on the use of fetal cell lines procured from electively aborted fetuses, for development, manufacturing or testing.

- 7. I will not comply with New York's regulation requiring all healthcare workers to be vaccinated for COVID-19 unless they have a medical exemption because it will violated my religious beliefs.
- 8. If I remain faithful to my conscience, I believe that my employer will terminate my employment on or after September 27, 2021.
- 9. Not only will I be terminated from my current employment, but the new regulation bars me from obtaining other employment in my career field unless I receive the COVID-19 vaccination first.

Signed on September 2, 2021 at Nassau County  
 (DATE) (LOCATION)

NAME OF AFFIANT (PRINT): Diane Bono

SIGNATURE OF AFFIANT: Diane Bono

NOTARY PUBLIC (PRINT): Kathleen Fischer

SIGNATURE OF NOTARY PUBLIC: Kathleen Fischer

**KATHLEEN FISCHER**  
 Notary Public, State of New York  
 Registration #01F14983004  
 Qualified In Nassau County  
 Commission Expires June 17, 2023



# Exhibit D



**Personal and Confidential**

August 31, 2021

Sent VIA Electronic Mail

Diane Bono

[dbono@northwell.edu](mailto:dbono@northwell.edu)

Re: COVID-19 Vaccine Religious Accommodation Request

Dear Ms. Bono:

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

Although mask wearing and other existing protocols will continue to be required to help prevent the spread of the virus, these life-saving vaccines remain our best shot at crushing COVID-19. As healthcare professionals and members of the largest healthcare provider in New York State, we have a unique responsibility to get vaccinated to protect our patients, colleagues, families and communities. If you have additional questions, please explore [educational materials](#) on the employee intranet, including FAQs, information sheets, recorded discussions and videos, some of which are available in multiple languages. Those without intranet access can also visit our [digital vaccine hub](#) for the community. Please reach out if we can provide you with any other information. Northwell is committed to providing you with the information you need to make this decision and can connect you with an expert to discuss your options. We urge you to get your first dose of vaccine by September 27 to ensure you can help us continue to improve the health and quality of life of the communities we serve.

If you choose to not receive your first shot between now and September 27, 2021, you will be non-compliant with the NYS mandate and your continued employment will be at risk. In the meantime, we appreciate your cooperation with health and safety precautions to protect the health of you, your colleagues, our patients and visitors. These precautions include the requirement to undergo weekly nasal PCR testing in accordance with Northwell's mandatory PCR testing program. Additionally, you may

be unable to participate in certain meetings, gatherings, and/or Northwell-sponsored events and programs due solely to your unvaccinated or partially vaccinated status.

Please know that Northwell has a COVID-19 vaccine reserved for all team members. If you are interested in receiving a COVID-19 vaccine, you can book an appointment through the Employee Health Portal. If you opt to get vaccinated at a non-Northwell source, you can upload proof to the portal or email it to [EHSCompliance@northwell.edu](mailto:EHSCompliance@northwell.edu) to record your new vaccination status.

Thank you,

Northwell Health  
Human Resources

cc: SITE HRBP

# Exhibit E

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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

DOCKET NO.: 1:21-cv-04954

v.

KATHLEEN HOCHUL, GOVERNOR OF  
NEW YORK; HOWARD ZUCKER, M.D.,  
COMMISSIONER, NEW YORK DEP'T  
OF HEALTH,  
*Defendants.*

SEPTEMBER 2, 2021

**AFFIDAVIT OF MICHELLE MELENDEZ**

MICHELLE MELENDEZ swears or affirms, under penalty of perjury, the following:

1. I am an adult resident of the State of New York, residing in Wheatley Heights;
2. I am a Registered Nurse, duly licensed to practice in the State of New York;
3. I am an employee of Syosset Hospital, Syosset, New York;
4. I am a committed and practicing member of the Roman Catholic Church;
5. I wholly subscribe to the teachings of the Roman Catholic Church as it pertains to the sanctity of life, born and unborn, and, in particular, with respect to the intrinsic evil of abortion and all of its fruits.
6. I object to putting in my body any of the available COVID-19 vaccines that relied, in whole or in part, on the use of fetal cell lines procured from electively aborted fetuses, for development, manufacturing or testing.

- 7. I will not comply with New York’s regulation requiring all healthcare workers to be vaccinated for COVID-19 unless they have a medical exemption because it will violated my religious beliefs.
- 8. If I remain faithful to my conscience, I believe that my employer will terminate my employment on or after September 27, 2021.
- 9. Not only will I be terminated from my current employment, but the new regulation bars me from obtaining other employment in my career field unless I receive the COVID-19 vaccination first.

Signed on 9/3/21 at Syosset, NY  
 (DATE) (LOCATION)

NAME OF AFFIANT (PRINT): Michelle Melendez

SIGNATURE OF AFFIANT: Michelle Melendez

NOTARY PUBLIC (PRINT): Kelly Earley

SIGNATURE OF NOTARY PUBLIC: Kelly Earley

KELLY N. EARLEY  
 NOTARY PUBLIC - STATE OF NEW YORK  
 NO. 01EA6384339  
 QUALIFIED IN NASSAU COUNTY  
 COMMISSION EXPIRES 12/10/2022

# Exhibit F



**Personal and Confidential**

August 30, 2021

Sent VIA Electronic Mail

Michelle Melendez

Email Address: MMelendez@northwell.edu

Re: COVID-19 Vaccine Religious Accommodation Request

Dear Ms. Melendez:

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

Although mask wearing and other existing protocols will continue to be required to help prevent the spread of the virus, these life-saving vaccines remain our best shot at crushing COVID-19. As healthcare professionals and members of the largest healthcare provider in New York State, we have a unique responsibility to get vaccinated to protect our patients, colleagues, families and communities. If you have additional questions, please explore educational materials on the employee intranet, including FAQs, information sheets, recorded discussions and videos, some of which are available in multiple languages. Those without intranet access can also visit our digital vaccine hub for the community. Please reach out if we can provide you with any other information. Northwell is committed to providing you with the information you need to make this decision and can connect you with an expert to discuss your options. We urge you to get your first dose of vaccine by September 27 to ensure you can help us continue to improve the health and quality of life of the communities we serve.

If you choose to not receive your first shot between now and September 27, 2021, we appreciate your cooperation with health and safety precautions to protect the health of you, your colleagues, our patients and visitors. These precautions include the requirement to undergo weekly nasal PCR testing in accordance with Northwell's mandatory PCR testing program. Additionally, you may be unable to participate in certain meetings, gatherings, and/or Northwell-sponsored events and programs due solely to your unvaccinated or partially vaccinated status.

Please know that Northwell has a COVID-19 vaccine reserved for all team members. If you are interested in receiving a COVID-19 vaccine, you can book an appointment through the Employee Health Portal. If you opt to get vaccinated at a non-Northwell source, you can upload proof to the portal or email it to [EHSCompliance@northwell.edu](mailto:EHSCompliance@northwell.edu) to record your new vaccination status.

Thank you,

Northwell Health  
Human Resources

cc: SITE HRBP

# Exhibit G

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.; : DOCKET NO.: 1:21-cv-04954  
DIANE BONO; :  
MICHELLE MELENDEZ; :  
MICHELLE SYNAKOWSKI; :  
    *Plaintiffs,* :  
 :  
v. :  
 :  
KATHLEEN HOCHUL, GOVERNOR OF :  
NEW YORK; HOWARD ZUCKER, M.D., :  
COMMISSIONER, NEW YORK DEP'T :  
OF HEALTH, :  
    *Defendants.* : SEPTEMBER 9, 2021

AFFIDAVIT OF MICHELLE SYNAKOWSKI

MICHELLE SYNAKOWSKI swears or affirms, under penalty of perjury, the following:

1. I am an adult resident of the State of New York, residing in Syracuse;
2. I am a Registered Nurse, duly licensed to practice in the State of New York;
3. I am an employee of St. Joseph's Hospital, Syracuse, New York;
4. I am a committed and practicing member of the Roman Catholic Church;
5. I wholly subscribe to the teachings of the Catholic moral tradition as it pertains to the sanctity of all life, born and unborn, and, in particular, with respect to the intrinsic evil of abortion and all of its fruits.
6. I object to putting into my body any of the available COVID-19 vaccines which relied, in whole or in part, upon the use of fetal cell lines procured from electively aborted fetuses, for development, manufacturing or testing.
7. I will not comply with New York's regulation requiring all healthcare workers to be vaccinated for COVID-19 unless they have a medical exemption because it will violate my religious beliefs.
8. My employer has informed me that, if I choose to remain faithful to my conscience, it will rescind my current religious exemption from the COVID-19 vaccine and terminate my employment on September 21, 2021 because it is required to do so by New York State Health Regulation, Title 10, §2.61.

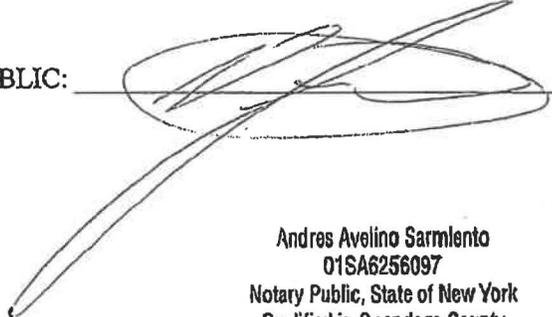
9. Not only will I be terminated from my current employment, but the new regulation bars me from obtaining other employment in my career field unless I receive the COVID-19 vaccination first.

Signed on 9/10/21 at Dewitt New York  
(DATE) (LOCATION)

NAME OF AFFIANT (PRINT): Michelle Synakowski

SIGNATURE OF AFFIANT: Michelle Synakowski

NOTARY PUBLIC (PRINT): Andres Sarmiento

SIGNATURE OF NOTARY PUBLIC: 

Andres Avelino Sarmiento  
01SA6256097  
Notary Public, State of New York  
Qualified in Onondaga County  
My commission expires FEBRUARY 21st, 2024

**EXHIBIT D TO  
DECLARATION OF  
CAMERON L. ATKINSON**

**U.S. District Court  
Eastern District of New York (Brooklyn)  
CIVIL DOCKET FOR CASE #: 1:21-cv-04954-WFK-RER**

We The Patriots USA, Inc. et al v. Hochul et al  
Assigned to: Judge William F. Kuntz, II  
Referred to: Magistrate Judge Ramon E. Reyes, Jr  
Cause: 42:1983 Civil Rights Act

Date Filed: 09/02/2021  
Jury Demand: None  
Nature of Suit: 440 Civil Rights: Other  
Jurisdiction: Federal Question

**Plaintiff****We The Patriots USA, Inc.**

represented by **Norman Alexander Pattis**  
The Pattis Law Firm  
383 Orange Street  
New Haven, CT 06511  
203-393-3017  
Fax: 203-393-9745  
Email: npattis@pattisandsmith.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff****Diane Bono**

represented by **Norman Alexander Pattis**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff****Michelle Melendez**

represented by **Norman Alexander Pattis**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Plaintiff****Michelle Synakowski**

represented by **Norman Alexander Pattis**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant****Kathleen Hochul****Defendant****Howard A. Zucker, M.D.**

Date Filed	#	Docket Text
		App.115

09/02/2021	<a href="#">1</a>	NOTICE of Appearance by Norman Alexander Pattis on behalf of All Plaintiffs (aty to be noticed) (Pattis, Norman) (Entered: 09/02/2021)
09/02/2021	<a href="#">2</a>	COMPLAINT against All Defendants filing fee \$ 402, receipt number ANYEDC-14805603 Was the Disclosure Statement on Civil Cover Sheet completed -Yes,, filed by We The Patriots USA, Inc., Michelle Synakowski, Michelle Melendez, Diane Bono. (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Exhibit B) (Pattis, Norman) (Main Document 2 replaced on 9/2/2021) (Neptune, Pierre). (Entered: 09/02/2021)
09/02/2021	<a href="#">3</a>	Civil Cover Sheet.. by Diane Bono, Michelle Melendez, Michelle Synakowski, We The Patriots USA, Inc. (Neptune, Pierre) (Entered: 09/02/2021)
09/02/2021		Case Assigned to Judge William F. Kuntz, II and Magistrate Judge Ramon E. Reyes, Jr. Please download and review the Individual Practices of the assigned Judges, located on our <a href="#">website</a> . Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. (Neptune, Pierre) (Entered: 09/02/2021)
09/02/2021	<a href="#">4</a>	This attorney case opening filing has been checked for quality control. See the attachment for corrections that were made, if any. (Neptune, Pierre) (Entered: 09/02/2021)
09/02/2021	<a href="#">5</a>	In accordance with Rule 73 of the Federal Rules of Civil Procedure and Local Rule 73.1, the parties are notified that <b>if</b> all parties consent a United States magistrate judge of this court is available to conduct all proceedings in this civil action including a (jury or nonjury) trial and to order the entry of a final judgment. Attached to the Notice is a blank copy of the consent form that should be filled out, signed and filed electronically <b>only if all</b> parties wish to consent. The form may also be accessed at the following link: <a href="http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO085.pdf">http://www.uscourts.gov/uscourts/FormsAndFees/Forms/AO085.pdf</a> . <b>You may withhold your consent without adverse substantive consequences. Do NOT return or file the consent unless all parties have signed the consent.</b> (Neptune, Pierre) (Entered: 09/02/2021)
09/12/2021	<a href="#">6</a>	Emergency MOTION for Temporary Restraining Order , Emergency MOTION for Preliminary Injunction by Diane Bono, Michelle Melendez, Michelle Synakowski, We The Patriots USA, Inc.. (Attachments: # <a href="#">1</a> Memorandum in Support, # <a href="#">2</a> Exhibit A, # <a href="#">3</a> Exhibit B, # <a href="#">4</a> Exhibit C, # <a href="#">5</a> Exhibit D, # <a href="#">6</a> Exhibit E, # <a href="#">7</a> Exhibit F, # <a href="#">8</a> Exhibit G) (Pattis, Norman) (Entered: 09/12/2021)
09/12/2021	<a href="#">7</a>	CERTIFICATE of Counsel re <a href="#">6</a> Emergency MOTION for Temporary Restraining Order Emergency MOTION for Preliminary Injunction <i>Pursuant To Fed. R. Civ. P. 65</i> by Norman Alexander Pattis on behalf of Diane Bono, Michelle Melendez, Michelle Synakowski, We The Patriots USA, Inc. (Attachments: # <a href="#">1</a> Exhibit A, # <a href="#">2</a> Exhibit B, # <a href="#">3</a> Exhibit C, # <a href="#">4</a> Exhibit D, # <a href="#">5</a> Exhibit E) (Pattis, Norman) (Entered: 09/12/2021)
09/12/2021		ORDER denying <a href="#">6</a> Motion for TRO; denying <a href="#">6</a> Motion for Preliminary Injunction. So Ordered by Judge William F. Kuntz, II on 9/12/2021. (Kuntz, William) (Entered: 09/12/2021)
09/12/2021	<a href="#">8</a>	NOTICE OF APPEAL as to Order on Motion for TRO, Order on Motion for Preliminary Injunction by Diane Bono, Michelle Melendez, Michelle Synakowski, We The Patriots USA, Inc.. Filing fee \$ 505, receipt number ANYEDC-14829014. (Pattis, Norman) (Entered: 09/12/2021)
09/13/2021		Electronic Index to Record on Appeal sent to US Court of Appeals. <a href="#">8</a> Interlocutory Notice of Appeal, Documents are available via Pacer. For docket entries without a hyperlink or for documents under seal, contact the court and we'll arrange for the document(s) to be made available to you. (Jones, Vasean) (Entered: 09/13/2021)
09/13/2021	<a href="#">9</a>	Emergency MOTION to Stay <i>Enforcement Of NYS Health Regulation 2.61 Pending Appeal</i>

	by Diane Bono, Michelle Melendez, Michelle Synakowski, We The Patriots USA, Inc.. (Attachments: # <a href="#">1</a> Memorandum in Support, # <a href="#">2</a> Exhibit A, # <a href="#">3</a> Exhibit B, # <a href="#">4</a> Exhibit C, # <a href="#">5</a> Exhibit D, # <a href="#">6</a> Exhibit E, # <a href="#">7</a> Exhibit F, # <a href="#">8</a> Exhibit G) (Pattis, Norman) (Entered: 09/13/2021)
09/13/2021	ORDER denying <a href="#">9</a> Motion to Stay. So Ordered by Judge William F. Kuntz, II on 9/13/2021. (Kuntz, William) (Entered: 09/13/2021)

<b>PACER Service Center</b>			
<b>Transaction Receipt</b>			
09/13/2021 21:38:04			
<b>PACER Login:</b>	normpattis	<b>Client Code:</b>	
<b>Description:</b>	Docket Report	<b>Search Criteria:</b>	1:21-cv-04954-WFK-RER
<b>Billable Pages:</b>	3	<b>Cost:</b>	0.30

**EXHIBIT E TO THE  
DECLARATION OF  
CAMERON L. ATKINSON**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

WE THE PATRIOTS USA, INC.,	:	
DIANE BONO,	:	
MICHELLE MELENDEZ,	:	Dkt. No.: 1:21-cv-4954
MICHELLE SYNAKOWSKI,	:	
Plaintiffs,	:	
v.	:	
	:	
KATHLEEN HOCHUL - GOVERNOR	:	
OF NEW YORK; HOWARD	:	
ZUCKER, M.D, - COMMISSIONER,	:	
NEW YORK STATE DEPARTMENT	:	
OF HEALTH	:	
Defendants.	:	SEPTEMBER 12, 2021

**NOTICE OF APPEAL**

The Plaintiffs – We The Patriots USA, Inc., Diane Bono, Michelle Melendez, Michelle Synakowski – hereby give notice that they appeal the Court’s September 12, 2021 order denying their motion for a temporary restraining order and a preliminary injunction.

THE PLAINTIFFS  
/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[npattis@pattisandsmith.com](mailto:npattis@pattisandsmith.com)

/s/ Cameron L. Atkinson /s/  
CAMERON L. ATKINSON, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
[catkinson@pattisandsmith.com](mailto:catkinson@pattisandsmith.com)

/s/ Earl A. Voss /s/  
EARL A. VOSS, ESQ.  
*Pro hac vice pending*  
PATTIS & SMITH, LLC  
383 Orange Street  
New Haven, CT 06511  
Tel: (203) 393-3017  
Fax: (203) 393-9745  
avoss@pattisandsmith.com

**CERTIFICATE OF SERVICE**

I hereby certify that on the date above a copy of the foregoing was served by certified mail, email, and/or by fax upon Governor Hochul and Dr. Zucker or their proper representatives designated by law.

/s/ Norman A. Pattis /s/  
NORMAN A. PATTIS, ESQ.