

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF JEFFERSON**

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In the Matter of the Application of
DARBY L. GILLESPIE, Individually, and on behalf of all
other Individuals similarly situated,

Petitioners,

Index No.:

For a Judgment Pursuant to Article 78 of the Civil Practice
Law and Rules

Petition

Against

KATHY HOCHUL, in her Official
Capacity as Governor of the State of New York,
HOWARD ZUCKER, in his Official Capacity as
Commissioner of the New York State Department of Health,
ATTORNEY GENERAL of the State of New York,
and STATE OF NEW YORK,

Respondents.

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Petitioner, and all other Individuals similarly situated, through their attorneys, The
Mermigis Law Group, P.C., as and for their Article 78 Petition against KATHY HOCHUL, in her
Official Capacity as Governor of the State of New York, HOWARD ZUCKER, in his Official
Capacity as Commissioner of the New York State Department of Health, ATTORNEY
GENERAL of the State of New York, and STATE OF NEW YORK, as set forth herein,
respectfully state and allege, upon information and belief, as follows:

PRELIMINARY STATEMENT

1. This action is brought pursuant to Article 78 of the CPLR to vacate, void and
annul Respondents’ decision on August 26, 2021 to remove the religious exemption from the
Vaccine Mandate which ordered the COVID-19 vaccination of the “personnel” of all “covered

entities” in the field of medical and health services, including the Petitioner and those similarly situated and all the hospitals, clinics, or private practices with which they are associated.

2. Respondents’ Order is fundamentally unfair, arbitrary and capricious, and constitutes an abuse of discretion. The Respondents have also assumed a legislative function and are preempted by Federal Law.

3. The legislature cannot surrender its power to make law to an unelected bureaucrat, by constitutional tradition in a republican form of government. This case is about whether the New York State Department of Health and its Commissioner can abolish representative government in the creation of public health laws, and whether it can authorize the removal of a constitutional right and/or First Amendment right based on the unfettered opinion of an unelected official.

4. On June 25, 2021, two months before his last day in office, Governor Cuomo finally rescinded his declaration of a “State disaster emergency”—fifteen months after it was issued— along with all the executive orders that followed. There is no longer a public health emergency in the State of New York.

5. Just days after the end of the Cuomo administration, solely on the pretext of what the DOH’s Public Health and Health Planning Council (“the Health Council”) deems “a concerning national trend of increasing circulation of the SARS-CoV-2 Delta variant,” Zucker and the DOH, with the assistance of defendant Attorney General Letitia James and the approval of Governor Hochul as the State’s unelected chief executive, are now enforcing the Health Council’s proposed COVID-19 “emergency” regulation, the aforesaid Vaccine Mandate, on August 26, 2021.

6. The Vaccine Mandate orders the COVID-19 vaccination of the “personnel” of all “covered entities” in the field of medical and health services, including the Petitioner and those similarly situated and all the hospitals, clinics, or private practices with which they are associated. *See* Exhibit A to this Complaint and NYCRR, Title 10, Part 2, § 2.61 (“the Vaccine Mandate”).

7. The Amended Vaccine Mandate *excludes any religious exemption from COVID-19 vaccination but permits medical exemptions*. Yet, only days before, the superseded Public Health Order issued in the waning days of the Cuomo administration (the “prior Health Order”)—one of the few things he got right—provided a broad and indeed constitutionally required religious exemption:

Religious exemption. Covered entities *shall grant a religious exemption* for COVID-19 vaccination for covered personnel if they hold a genuine and sincere religious belief contrary to the practice of immunization, subject to a reasonable accommodation by the employer. Covered entities shall document such exemptions and such reasonable accommodations in personnel records or other appropriate records in accordance with applicable privacy laws by September 27, 2021, and continuously, as needed, thereafter.

8. As pleaded more particularly below, the “Amended” Vaccine Mandate is “Arbitrary and Capricious” and an “Abuse of Discretion.”

9. With caution thrown to the winds, everyone—the young and healthy, the old, the previously recovered and naturally immune, even pregnant and breastfeeding women—is now being pressured by governments, businesses and educational institutions to submit to COVID 19 vaccination with no assessment of the risks or benefits for each individual or any consideration of medical necessity or contraindication in each particular case. Even the smallest children, at

virtually no risk from the virus, are to be vaccinated as soon as a rushed approval can be obtained from the FDA.

10. The Respondents state, “Covid-19 Vaccines are safe and effective. They offer the benefit of helping to reduce the number of covid-19 infections, which is critical to protecting public health. Unvaccinated personnel have an unacceptable high risk of transmitting the virus to colleagues and patients.” *See* Exhibit A to this Complaint and NYCRR, Title 10, Part 2, § 2.61 (“the Vaccine Mandate”).

11. On August 5, 2021, CDC Director Dr. Rochelle Walensky told CNN’s Wolf Blitzer that **the Covid-19 vaccine cannot prevent the transmission of the disease.**

<https://www.thegatewaypundit.com/2021/08/cdc-director-tells-cnn-covid-vaccines-cant-prevent-transmission-video/>

BLITZER: But what about all the fully vaccinated people who get the breakthrough infection? Can they pass it on? Could they pass it on to their children? Could they pass the virus on to older people, especially more vulnerable people with underlying health conditions?

WALENSKY: And that’s exactly the point that we made in our guidance.

So, yes, they can with the delta variant. And that was the reason that we changed our guidance last Tuesday. Our vaccines are working exceptionally well. They continue to work well with delta with regard to severe illness and death. They prevent it.

But what they can’t do anymore is prevent transmission. So if you are going home to somebody who has not been vaccinated to somebody who can’t get vaccinated, somebody who might be immunosuppressed or a little bit frail, somebody who has co-morbidities that put them at high risk, I would suggest you wear a mask in public indoor settings.

12. The Mandate excludes personnel who are covid recovered and have natural immunity even though having SARS-CoV-2 confers much greater immunity than a vaccine.

13. A recent study showed that natural immune protection after a SARS-CoV-2 infection offers a considerably more of a shield against the variants of the pandemic coronavirus than two doses of the Pfizer vaccine. See the “Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections” Study as Exhibit B.

14. In one analysis in the aforementioned study, comparing more than 32,000 people in the health system, the risk of developing symptomatic covid-19 was 27 times higher among the vaccinated, and the risk of hospitalization was eight times higher. See Study as Exhibit B.

15. “Recovered COVID patients have strong, long-lasting protection against severe disease if reinfected, and evidence about protective immunity after natural infection is at least as good from the vaccines. Hence, it makes no sense to require vaccines for recovered patients. For them, it simply adds a risk, however small, without any benefit.” (Declaration of Dr. Martin Kuldorff and Dr. Jay Bhattacharya attached as Exhibit C, ¶ 15).

16. “There is no reason to presume that vaccine immunity provides a higher level of protection than natural immunity. There is stronger evidence for long lasting immunity from natural infection than from vaccines.” (Declaration of Dr. Martin Kuldorff and Dr. Jay Bhattacharya, ¶ 15).

17. A Hearing was initially scheduled for September 2, 2021 to give Petitioner and those similarly situated an opportunity to be heard but the Hearing was cancelled and never held and Plaintiff and those similarly situated were never given an opportunity to be heard.

PARTIES

18. Petitioner Darby L. Gillespie is a medical professional whose sincere religious beliefs compel her to refuse vaccination with the available COVID-19 vaccines, all of which employ aborted fetus cell lines in their testing, development, or production. Plaintiff is also covid-recovered and has natural immunity. Plaintiff resides in Jefferson County. Petitioner and those similarly situated were terminated from their employment in health care because of Respondents' Order without an opportunity to be heard while employees with medical exemptions were allowed to continue employment. Petitioner and those similarly situated also have natural immunity which has been shown to confer much greater immunity than the vaccine.

19. Respondent Kathy Hochul (Hochul) is Governor of the State of New York who, as the State's chief executive, is responsible for the execution of its laws and regulations, including the challenged vaccine mandate, and for the approval of all executive branch policies and directives, including those of the DOH pertaining to the vaccine mandate. At all pertinent times Hochul has acted and will act under color of state law. Defendant Hochul's principal place of business is located at the State Capitol Building, Albany, New York. She is sued in her official capacity.

20. Respondent Howard A. Zucker (Zucker) is Commissioner of Health for the DOH. He is responsible for promulgation and enforcement of the challenged vaccine mandate. At all pertinent times Zucker has acted and will act under color of state law.

21. The Attorney General for the State of New York is the State's highest-ranking law enforcement officer charged with overall supervision of the enforcement of the challenged vaccine mandate and other laws of the State of New York.

CLASS ACTION ALLEGATIONS

22. This action meets all the requirements of a class action under C.P.L.R. § 901.

23. The putative Class consists of all health care employees, who have been terminated from their employment because of Respondents' Order and their sincerely held religious beliefs. The putative Class continues to be permanently removed from their employment, with no return date in sight.

24. Excluded from the Class are Respondents.

25. While Petitioner does not know the exact number of the members of the Class, Plaintiff believes there are several hundred members.

26. The legality of the enforcement of the Order and in the continued enforcement of the Order constitute questions common to the Class, and predominates over any question affecting only individual members.

27. The claim to vacate, void and annul Respondents' decision on August 26, 2021 to remove the religious exemption from the Vaccine Mandate which ordered the COVID-19 vaccination of the "personnel" of all "covered entities" in the field of medical and health services, including the Petitioner and those similarly situated and all the hospitals, clinics, or private practices with which they are associated, as the Class representative, are typical of the claims of the members of the Class. Petitioner and all members of the Class are similarly affected by Respondents' Order and their enforcement thereof.

28. Petitioner, as a class representative, will fairly and adequately protect the interests of the Class. Petitioner's claims arise out of the same common course of conduct giving rise to the claims of other members of the Class. Petitioner's interests are coincident with, and not antagonistic to, those of the other members of the Class. Petitioner is represented by counsel who is competent and experienced in the prosecution of Article 78 claims.

29. A class action is superior to any other method for the resolution of this dispute, in that, among other things, such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would engender. The benefits of proceeding through the class mechanism, including providing injured gyms and fitness centers with a method of obtaining redress for claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in the management of this class action.

30. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent and varying adjudications, establishing incompatible standards of conduct for Respondents.

JURISDICTION AND VENUE

31. Pursuant to 42 U.S.C. § 1983, this Court has jurisdiction to enforce the provisions of the United States Constitution.

32. Pursuant to authority vested in it by state law, this Court has jurisdiction to enforce the New York State Constitution and its statutes and to find and declare any unconstitutional either on its face or as applied.

33. Venue is proper in Jefferson County because Petitioner resides in Jefferson County, State of New York.

COUNT I - PROCEDURAL DUE PROCESS and
ABUSE OF DISCRETION

34. Petitioner incorporates paragraphs 1-33 as if fully set forth herein.

35. “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” 42 U.S.C. § 1983.

36. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1, cl. 3.

37. The procedural component of the Due Process Clause prohibits government from depriving Petitioner and members of the putative Class of liberty and property interests without providing any process before or after the deprivations occurred.

38. To establish a procedural due process claim under 42 U.S.C. § 1983, Plaintiff and Class member must show that (1) they had a life, liberty, or property interest protected by the

Due Process Clause; (2) they were deprived of this protected interest; and (3) the state did not afford them adequate procedural rights. See *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 904 (6th Circ. 2014).

39. Petitioner and the putative Class members have a protected liberty interest in the right to live without arbitrary governmental interference with their liberty and property interests. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1988).

40. Liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (emphases added).

41. Petitioner and members of the putative Class have protected liberty and property interests, which Respondents infringed through the Order:

- a. Petitioner and those similarly situated have been denied their First Amendment Free Exercise of Religion rights by Respondents.

42. Respondents did not provide any procedural due process before issuing Order. Nor do Respondents provide any mechanism for post-deprivation review.

43. Respondents acted under color of State Law in an official capacity and within the scope of their official duties when issuing the Order.

44. As a direct and proximate cause of the failure to provide any pre- or post-deprivation process, Petitioner and members of the putative class suffered prejudice and were terminated from their employment.

45. By failing to provide any pre- or post-deprivation review of the order, Petitioner and members of the putative Class are suffering substantial losses of liberty and property.

46. The prejudice that Petitioner and members of the putative Class have suffered would not have occurred but for Respondents' deprivations of their liberty and property interests.

47. Petitioner and members of the putative Class seek a declaration that the Order violates the procedural component of the Due Process Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

COUNT II. - SUBSTANTIVE DUE PROCESS
AND ABUSE OF DISCRETION

48. Petitioner incorporates paragraphs 1-47 as if fully set forth herein.

49. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

50. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1, cl. 3.

51. The substantive component of the Due Process Clause prohibits government from taking action that “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty.” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (cleaned up).

52. Petitioner and members of the putative Class have a protected liberty interest in the right to live without arbitrary governmental interference with its liberty and property interests. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1988).

53. Liberty “denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972) (emphases added).

54. The Order shocks the conscience and interferes with Petitioner’s and members of the putative Class deeply-rooted liberty and property rights, including their free exercise of religion, the right to work, right to contract, and right to engage in commerce.

55. There is no compelling reason any longer since the virus is under control and that the State of Emergency is over to deprive Petitioner and members of the putative Class of their liberty and property interests and their First Amendment rights.

56. Respondents acted under color of State law in an official capacity and within the scope of their official duties when issuing the Order.

57. Petitioner and members of the putative Class seek a declaration that the Order violates the substantive component of the Due Process Clause, and an injunction against further infringements of their rights under this Clause as described in the Prayer for Relief.

THIRD CLAIM FOR RELIEF
Arbitrary and Capricious Under Article 78

58. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs of this Petition as though fully set forth herein.

59. Petitioner and those similarly situated commenced this special proceeding under CPLR §§ 3001 and 7803.

60. For the reasons set forth herein above, the Respondents' Order is unquestionably arbitrary and capricious under Article 78 of the CPLR.

61. Respondents' decision is unquestionably arbitrary and capricious under Article 78 of the CPLR because Respondent has declared that the State of Emergency in New York was over on June 24, 2021.

62. Removing the Religious Exemption while allowing Medical Exemptions is unquestionably Arbitrary and Capricious under Article 78 of the CPLR.

63. Respondents' continued deprivation of Petitioner's and those similarly situated rights and continued enforcement of the Order despite Petitioner and those similarly situated having natural immunity which is greater immunity than the vaccine is also arbitrary and capricious under Article 78 of the CPLR.

64. Respondents have no scientific or other credible evidence upon which to continue to enforce the Order.

65. The only demonstrable impact from Respondents' continued implementation and enforcement of the Order has been to inflict irreparable and continuing harm upon Petitioner and those similarly situated.

66. By reason of the foregoing, Respondents should be enjoined from further implementing the Order.

FOURTH CLAIM OF RELIEF
Abuse of Discretion under Article 78

67. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs of this Petition as though fully set forth herein.

68. Petitioner and those similarly situated commenced this special proceeding under CPLR §§ 3001 and 7803.

69. Respondents have inappropriately assumed a legislative function.

70. The Respondents have acted without legislative guidance.

71. By implementation and enforcement of the Order, the Respondents have also preempted the Federal and State Constitution by removing a religious right and violating Petitioner and those similarly situated Free Exercise of Religion rights.

72. By implementation and enforcement of the Order, the Respondents have also preempted Title VII of the Civil Rights Act as well as New York State Human Rights Law.

73. Respondents have no scientific or other credible evidence upon which to continue to enforce the Order.

74. The only demonstrable impact from Respondents' continued implementation and enforcement of the Order has been to inflict irreparable and continuing harm upon Petitioner and those similarly situated.

75. By reason of the foregoing, Respondents should be enjoined from further implementing the Order.

WHEREFORE, Petitioner and those similarly situated respectfully ask this Honorable Court to grant Petitioner and those similarly situated the following relief:

- A. Designation of this action as a class action;
- B. Designation of Petitioner as a representative Petitioner of all health care workers that have been unconstitutionally, arbitrarily and capriciously harmed by the Order; ;
- C. A declaratory judgment that the Order violates Petitioner's and Members of the Putative Class' constitutional rights as set forth in this Petition;
- D. A declaratory judgment that the Order is arbitrary and capricious and an abuse of discretion; and

- E. A declaratory judgment that Respondents' continued enforcement and extension of the Order is arbitrary and capricious under Article 78 of the C.P.L.R. and preliminarily during the pendency of this proceeding, and permanently thereafter, enjoining Respondents from enforcing the Order; and
- F. Enjoin Respondents from enforcing Order as an abuse of discretion; and
- G. Grant a preliminary injunction enjoining the enforcement and further extension of Order; and
- H. Award Petitioners their reasonable attorneys' fees, costs, and expenses under applicable state and or federal law; and
- I. Any other such further relief to which Petitioners may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

Dated: Syosset, New York
December 26, 2021

THE MERMIGIS LAW GROUP, P.C.

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