

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

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|------------------------------|---|-----------------------|
| 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.¹

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

¹ *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

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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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/ [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

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New York Codes, Rules and Regulations

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[Search Title 18 \(/search-title-18\)](/search-title-18)

[Proposed Rule Making \(/regulations/proposed-rule-making\)](/regulations/proposed-rule-making)

[Emergency Regulations \(/regulations/emergency\)](/regulations/emergency)

[Recently Adopted Regulations \(/regulations/recently-adopted\)](/regulations/recently-adopted)

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

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 >



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

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Translations

Arabic Translation

الترجمة إلى العربية

(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)

Chinese Translation

中文翻譯

(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)

Italian Translation

Traduzione italiana

(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)

Polish Translation

Polskie tłumaczenie

(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)

Spanish Translation

Traducción al español

(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)
