UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

WOMEN OF COLOR FOR EQUAL JUSTICE, et al.

Plaintiffs,

v.

THE CITY OF NEW YORK, MAYOR ERIC L. ADAMS, COMISSIONER ASHWIN VASAN, MD, PHD DEPARTMENT OF HEALTH AND MENTAL HYGIENE, DEPARTMENT OF EDUCATION, AND DOES 1-20

Defendants.

INDEX No.: 1:22 CV 02234-EK-LB

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS APPLICATION FOR PRELIMINARY INJUNCTION

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I. SUMMARY OF THE REMAINING ISSUE & PREEMPTION

On September 13, 2022, this Court ordered - as outlined below - the City of New York (the "City") to provide briefing on the question of whether the City's nine (9) Vaccine Orders were invalid based on federal preemption by the OSH Act. The City's responsive motion utterly fails to provide one federal or state law or case to answer that essential question which is decisive for all pending motions before this Court, including Plaintiff's request for injunctive relief. See Def. MOL P. 15, Section D.

> THE COURT: "It does sound to me like this preemption question is a key question for all three motions, preliminary injunction, motion to dismiss, summary judgment." See Exhibit 1, September 13, 2022 Hearing Transcript, Page 7, Lines 13-16
>
> THE COURT: All right. But so you're not necessarily able, correct me if I'm wrong, to point to decided cases in the Eastern or Southern Districts of New York or the Second Circuit that reached the question of whether OSHA preempts this mandate? I understand that maybe you think it's an easy question to resolve, but has any court decided that question? See Exhibit 1, September 13, 2022 Hearing Transcript, Page 8, Lines 17-23
>
> MS. ROSEN: No court to my knowledge has addressed specifically the issue of OSHA and the vaccine mandates, your Honor.
>
> THE COURT: Okay. So I'm going to need briefing at least on the OSHA preemption question..... See Exhibit 1, September 13, 2022 Hearing Transcript, Page 9, Lines 1-4

While the City points out that New York State has an approved OSHA State Plan, (which was pointed out in Plaintiffs' Motion) the City does not dispute the fact that the PESHA Plan does not contain a specific OSHA approved plan for the management of communicable and/or respiratory diseases and that the PESHA Plan expressly states that OSHA only has authority to regulate in workplace safety areas not covered by the PESHA plan. See Pl. MOL Pg. 12, §27, see specifically Exhibit 25. Moreover, the City does not dispute that PESHA, an agency within the New York State Department of Labor, adopted the OSHA Respiratory Standards in 2015 and specifically adopted the OSHA Covid-19 Respiratory Guidelines on May 18, 2021. See Pl. MOL P.1, ¶ 26-27 Rather than provide any case law or facts to answer this Court's question on preemption, the City's response merely regurgitates the same claim, (which this Court stated, "sounded preposterous" Exhibit 1, P.

23 Line) articulated at the September 13, 2022 hearing that the City's vaccine mandate is a "condition of employment." However, the City's Opposition Motion places the blame for the preposterous notion on the Second Circuit Court of Appeals who in the case *We The Patriots USA*, 17 F.4th 266, 293 (2d Cir. 2021) was never presented with the issue of whether the New York State Department of Health vaccine mandate for healthcare workers was invalid based on OSH Act preemption. The Second Circuit merely held as a preliminary matter that the NY State DOH healthcare vaccine mandate on its face did not expressly target religion. The case was never tried on its merits; therefore, that ruling has no application in this case.

The City is not and has never been ignorant of OSHA's authority to preemptively control workplace safety for states, municipalities, and private sector, especially when an employer does not first seek OSHA's approval to utilize in the workplace unauthorized safety methods like the Covid-19 Vaccine. During the Covid-19 Pandemic from 2020 to 2021, the City vigorously fought Black New York City Firefighters in two separate cases in this Federal Eastern District Court for almost three (3) years from 2019 -2021 - to the Second Circuit – to enforce OSHA's respiratory standards so that they could refuse to grant the Black firefighters religious exemptions based on their Muslim religious practice of wearing a beard. See Bey v. City of New York 999 F.3d 157 (2d Cir. 2021) and Hamilton v. City of New York 563 F. Supp. 3d 42 (E.D.N.Y. 2021) (both Black firefighter Free Exercise cases)

With the City's history of violating employee constitutional free exercise rights and the undisputed facts regarding OSHA's exclusive authority to regulate workplace safety methods specifically for communicable diseases, this Court must declare the City's "unauthorized" Vaccine Orders illegal as of the day they were issued based on federal preemption.

The rest of the City's Opposition Motion is a game of mental gymnastics that either assumes this Court will ignore the undisputed fact that the City's Vaccine Orders have and continue to cause a deprivation of City employee and private sector employee First Amendment Free Exercise rights to

practice their faith in the workplace, or assumes that this Court reads motions while watching Sponge Bob Square Pants because the City makes more preposterous claims that:

1.) the Vaccine Orders are not preempted because they apply to "all employees equally" making them "generally applicable laws" not subject to preemption;

2.) Plaintiffs have not suffered irreparable harm and that monetary damages alone can compensate constitutional deprivations of an employee's First Amendment right to freely exercise one's faith in the workplace; and

3.) Plaintiffs should be denied injunctive relief because of delay in filing their motion for injunctive relief and because prior courts have denied injunctive relief in other cases that challenged the City's vaccine mandates based on "due process" claims.

Plaintiffs addresses these preposterous misrepresentations of law and fact by first focusing on the substance and merits of Plaintiffs legal claims.

II. PLAINTIFFS HAVE SHOWN A CLEAR AND SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Undisputed Facts Establish a "Clear" and "Substantial" Likelihood of Success on the Merits of Their Substantive Constitutional § 1983 Claim

The heart of Plaintiffs' case is their substantive constitutional §1983 claims for the City's violation of their First Amendment Free Exercise rights and guaranteed Human Right to a safe workplace provided under the OSH Act. See Pl. Third Amended Complaint P. 22 ¶ 115-140. Section 1983 states as follows:

> Every person who, **under color of any statute**, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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…. (Emphasis added)

"Section 1983 creates a private right of action against 'persons' who, acting 'under color of [law],' violate a plaintiff's constitutional rights—regardless of whether that person was acting pursuant to an unconstitutional state law, regulation, or policy. 42 U.S.C. § 1983." See *Tanvir v. FNU Tanzin*, 894 F.3d 449, 462 (2nd Cir. 2018) Both an official who misuses power in violation of federal law, and an official who enforces a state law which violates federal law, act under color of state law. See *Lugar v. Edmondson Oil Company*, 457 U.S. 922, 940 (1982).

In order to prevail on a claim against a municipality under Section 1983 based on acts of a public official, a plaintiff is required to prove: (1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the constitutional injury. *Monell v. Dep't of Social Servs*., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The fifth element — the "official policy" element — can only be satisfied where a plaintiff proves that a "municipal policy of some nature caused a constitutional tort." Id. at 691, 98 S.Ct. 2018. *Roe v. City of Waterbury*, 542 F.3d 31 (2nd Cir. 2008)

Where a plaintiff seeks to hold a municipality liable for a "single decision by [a] municipal policymaker," *Pembaur v. Cincinnati*, 475 U.S. at 480, 106 S.Ct. 1292 (1986), the plaintiff must show that the official had final policymaking power, see *St. Louis v. Praprotnik*, 485 U.S. at 123, 108 S.Ct. 915 (1988) (explaining that "only those municipal officials who have `final policymaking authority' may by their actions subject the government to § 1983 liability"). Moreover, the challenged actions must be within that official's area of policymaking authority. Id. (explaining that, pursuant to Pembaur "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business"); see also *Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir.2000) (explaining that the government official must be a final policymaker with respect to the particular conduct challenged in the lawsuit).

An official has final authority if his decisions, at the time they are made, "may fairly be said to represent official policy." *McMillian v. Monroe County, Alabama*, 520 U.S. 781, 784, 117 S.Ct.

1734, 138 L.Ed.2d 1 (1997); see Anthony v. City of New York, 339 F.3d 129, 139 (2d Cir.2003). *Roe v. City of Waterbury*, 542 F.3d 31 (2nd Cir. 2008)

While Section 1983 provides a cause of action for Plaintiffs against the City, the Ex parte Young Doctrine abrogates a municipal's sovereign immunity shield to provide claimants remedy for the enforcement of statutes that violate federal law. The Ex parte Young Doctrine stands for the principal that sovereign immunity does not prevent people harmed by state agencies acting in violation of federal law from suing the officials in charge of the agencies in their individual capacity for injunctive relief. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 S.Ct. 714 (1908) The Supreme Court further held in *Verizon Md. Inc. v. Public Serv. Comm'n of Md*., 535 U.S. 635 (2002), that "[i]n determining whether the doctrine of Ex parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." Id. at 645.

In addition, the Second Circuit holding in *Tanvir v. FNU Tanzin*, 894 F.3d 449 (2nd Cir. 2018) stands for the proposition that punitive damages may be available under Section, which permits the recovery of "damages," because the court "follow[s] the 'general rule' that courts should award 'any appropriate relief in a cognizable cause of action brought pursuant to a federal statute," particularly when the claim is for a violation of a federal statute. (quoting Franklin, 503 U.S. at 71, 112 S.Ct. 1028).

The City does not and cannot dispute the following facts that clearly establish that Plaintiffs can prevail on the merits of their Section 1983 claim:

1. The City's nine illegal/invalid Vaccine Orders were issued by the Commissioner for the City's Department of Health pursuant his/her authority designated in Section 17-104 of the Administrative Code of the City of New York and Public Health Law ¶ 225 (See Pl. MOL Pg. 12, ¶3-5 and MOL Exhibits ECF #17-19 to #17-28, See also Pl. Third Amendment Complaint ¶ 115-121)

2. The enforcement of the illegal/invalid Vaccine Orders caused Plaintiffs to be deprived of their Constitutional First Amendment right to Free Exercise and their statutory right to obtain an "automatic religious exemption" under the OSH Act pursuant to 29 U.S.C. 669 Section 20(a)(5) because they were not allowed to exercise their right to remain unvaccinated in their jobs based on religious grounds. (See Affidavits of Plaintiffs in Exhibits ECF#17-6 to #17-18 to Pl. MOL)

3. The deprivation of their right to remain unvaccinated based on religious grounds resulted in Plaintiffs employed by the City being placed on indefinite involuntary leave without pay, benefits, and denial of unemployment benefits, along with experiencing professional stigmatization, unemployability, along with severe emotional distress; and, Plaintiffs employed in private sector jobs in the City were terminated from their jobs, denied unemployment benefits and they suffer professional stigmatization, unemployability along with severe emotion distress (See Affidavits of Plaintiffs in Exhibits ECF#17-6 to #17-18 to Pl. MOL); and

4. The invalid Vaccine Orders were ratified by the Mayor of the City, Eric Adams, by the Provost of the Department of Education and enforced by private sector employers. See Third Amended Complaint P. 2, ¶ 3 (Note: neither Mayor Adams nor the current NYCHDOH commissioner has repealed the Vaccine Orders)

5. The City's enforcement of the invalid/illegal Vaccine Orders continues until this day to deprive Plaintiffs of their right to exercise their constitutional and statutory rights because Plaintiffs are still employees of the City who have continually been locked out of their jobs by being placed on indefinite leave without pay. Plaintiffs allege a continuing violation. See Pl. MOL P. 15, ¶ 43 – 47 and see Complaint P.2 ¶ 3.

Once this Court determines that the Vaccine Orders are invalid, the forgoing undisputed facts establish clear and substantial evidence that Plaintiffs will prevail on their Section 1983 claim.

B. Plaintiffs Will Succeed on their State Law Claim

Plaintiffs' state law claims pursuant to the New York City Human Rights Law (NYCHRL) are based on the exact same set of continuing violations under their Section 1983 claim. The NYCHRL, however, also protects individuals from acts of religious harassment, which includes "quid pro quo" arrangements wherein employers require employees to abandon their faith in exchange for employment benefits. See N.Y.C. Admin. Code § 8-502. Plaintiff's motion for preliminary injunctive relief is primarily based on the continued harassment of Plaintiffs by the City through its act of continually sending letters to Plaintiffs falsely claiming they have been terminated and offering Plaintiffs their jobs in exchange for taking the Covid-19 vaccine (the quid pro quo).

See Pl. MOL P. 2.

C. The City Misrepresents the Law of "General Applicability"

Without citing any case law, the City's claim that the Vaccine Orders are "generally applicable" because the orders apply to "all employees" equally. This claim misrepresents the law which has been in place for over 100 years and is just as preposterous as their claim that the vaccine orders are just "conditions of employment." The historic 1905 Jacobson case, which is one of two cases in American history involving a state adult vaccine mandate,[1] has clearly established that vaccine mandates can only be "generally applicable" if the mandate applies to "all adults" and not just to a class of adult City or private sector employees. See *Jacobson v. Massachusetts*, 197 U.S. ____ (S. Ct. 1905) The City's selective amnesia regarding the law is astonishing especially since the City's 2019 measles vaccine mandate was upheld by the New York State Court of Appeals in the case *C.F. v. N.Y.C. Dept of Health & Mental Hygiene*, 191 A.D.3d 52 (N.Y. App. Div. 2020). The New York Court of Appeals upheld the City's measle vaccine mandate because it applied to "all" City residents from the age of 6 months and older. Notwithstanding this material misrepresentation of the law, the City admission that the Vaccine Orders apply exclusively to "all employees" confirms that the City was aware that the Vaccine Mandate triggered the preemptive scheme of the OSH Act due to the City's failure to seek a "new method" variance as required by the OSH Act at 29 U.S.C. 655 Section 6(c).

In addition, the City's claims that other courts, including the Second Circuit, have held that the Vaccine Orders were constitutional and generally applicable, are equally misleading because none of the cases cited involved claims attacking the validity of the orders under OSHA, which the City admitted at the September 13, 2022 hearing. Also, most – if not all - of the holdings were

[1] All cases cited by the City in this case and other cases have been cases involving child vaccination in public schools and have not involved mandatory adult vaccination in the workplace. This narrative that vaccine mandates have been the law of the law for decades is only true as it relates to child vaccinations. Since 1970 the OSHA Act has always been the law of the land regarding the administration of adult vaccination in private and public workplaces.

rulings on preliminary injunctions that do not provide the law of the case because the Court did not rule on the merits of the claims.

Finally, and of most importance to this Court is the precedential case on vaccine bans by the U.S. District Court for the Western District of Pennsylvania in 2016 wherein that court entered a permanent injunction that forever banned flu vaccine mandates directed at adults working in the healthcare facility of Saint-Vincent Health Center. See *U.S. EEOC v. Saint Vincent Health Center*, Civil Action No. 1:16-cv-234 (W.D. PA 2016)[2]. The ban under the Federal Title VII law, permanently prohibited employee vaccines as a "condition of employment". Id. P.4, ¶5 Federal and statutory bans on adult vaccination in the workplace are nothing new or novel (see Pl. MOL P. 7, ¶5, New York Public Health Law §206 ban on adult vaccination), particularly in the healthcare industry that is regulated by OSHA. Consequently, the City's Vaccine Orders should be declared by this Court preempted and a permanent injunction should be granted.

D. Plaintiffs Will Prevail On Their Establishment Clause Claim

The City is correct that the U.S. Supreme Court has set a new standard for reviewing Establishment Clause claims by looking at the historical context of the clause. See Kennedy v. Bremerton School District, 597 U.S. slip opinion (2022) What the City failed to point out is that the Supreme Court's new standard of review focuses on whether government action results in coercion for or against religious practices, as pointed out by the Supreme Court as follows:

> "[T]his Court has long held that government may not, consistent with a historically sensitive understanding of the Establishment Clause, make a religious observance compulsory. Government may not coerce anyone to attend church, nor may it force citizens to engage in a formal religious exercise." (Internal references omitted)
>
> We are aware of no historically sound understanding of the Establishment Clause that begins to "mak[e] it necessary for government to be hostile to religion….."

[2] See case docket at https://www.courtlistener.com/docket/4528788/us-equal-employment-opportunity-commission-v-saint-vincent-health-center/

This new standard makes clear that governments shall not coerce any one religious practice – as mandated by the first clause of the First Amendment, which states that "Congress shall make no law respecting an establishment of religion, and that government shall not prohibit or be "hostile" to the Free exercise thereof. Finally, the Supreme Court has long ago held, consistent with the broad historical standard of review for the Establishment Clause, "that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions… Citing *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30, 25 S.Ct. 358, 360-361(1905),..." See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990).

The undisputed facts in this case clearly establish that the City has been "hostile" to the religious practices of Plaintiffs by denying them the right to remain on the job unvaccinated based on religious grounds when the vaccine was not "necessary" based on the OSH Act variance requirements. Sometime in December 2021, former New York City Mayo Deblasio disclosed that less than 5% of the entire City workforce, or approximately 12,000 employees requested religious exemptions. See Pl. MOL, P. 15, ¶46 Based on those small numbers, the City could have complied with the OSHA standards and provided the appropriate safety methods – remote work or PAPR's to all employees that requested an exemption based on religious grounds, without having to violate the Establishment Clause through the City's coercive tactics of placing Plaintiffs on LWOP to force them to take the Covid-19 vaccine.

Also, Plaintiffs have alleged, in summary, in their Complaint at P. 26, Count VI, ¶ 141, 142 – 170 that the Covid-19 vaccine is a medical treatment according to expert cardiologist Dr. Baxter Montgomery and that the practice of medicine is a religious practice exercised differently in many ancient religious groups. Plaintiff's Complaint further alleges that the City's hostile and coercive tactics of locking out their employees and withholding their pay and benefits is the City's establishment of <u>one</u> religious medical practice of pharmacological medical practice over any other –

which according to many Bible believers and/or Bible scholars is also known as the practice of "pharmakia" which is the Greek word for sorcery used in Revelation 18:3.[3] For many of the Plaintiffs who faith system requires them to practice the religious medical practice of "Plant-Based Lifestyle Medicine" and to rely on plant-based food and herbs for healing, the City's mandate was coercive, based on the Supreme Court's new standard for determining violations of the Establishment Clause. See MOL Affidavit of Amoura Bryan at ECF Doc #17-12

Furthermore, in support of their Partial Motion for Summary Judgment, Plaintiffs will provide the expert testimony of a Dr. Avery M. Jackson, MD, Neurologist and author of the book, "The God Prescription" who is expected to testify that the practice of medicine is a religious practice and that patients place their faith and belief in the hands of doctors as if they are Gods. Dr. Avery is expected to further testify that patients should have the right to choose the medical treatment that aligns with the religious medical practice that they practice and not be coerced to be subjected to the religious medical practice in conflict with their faith and receive hostile treatment by the government that attempts to force them to use only one religious medical practice over their own.

Taking the Plaintiffs allegations in the Complaint as true, Plaintiffs should also prevail on their Establishment Clause claim also.

III. PLAINTIFFS CONTINUE TO SUFFER IRREPARABLE HARM

Once again, the City misrepresents the legal precedent regarding irreparable harm by claiming that monetary damages alone is adequate to redress the egregious constitutional and statutory violations by the City against Plaintiffs. The litany of Supreme Court and Federal Court cases have held over the last 60 years, or more, that constitutional violations by definition cause irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373 (1976); Sampson v. Murray, 415 U.S. 61 (1974), see *Curry v. Baker*, 479 U.S. 1301, 107 S.Ct. 5, 93 L.Ed.2d 1 (1986), see Mitchell v. Cuomo,

[3] See Blue Letter Bible Chapter 18 of Revelation at https://www.blueletterbible.org/kjv/rev/18/1/s_1185001

748 F.2d 804, 806 (2d Cir. 1984) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.")

The 5h Circuit in 1967 held that damages redress is an insufficient remedy even when a plaintiff can demonstrate no practical impairment from defendant’s violation of a constitutional right. See *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967) The U.S. Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U. S. ____ (2020) reiterated this historical precedent when it held that the “loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury.” citing *Elrod v. Burns*, 427 U. S. 347, 373 (1976) Therefore, the City’s denial of all employees their right to the OSHA Auto Religious Exemption unquestionably constitutes irreparable injury regardless of the City’s legal and factul misrepresentations.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST STRONGLY FAVOR INJUNCTIVE RELIEF

Finally, the City’s claims that Plaintiffs are not entitled to injunctive relief because of a 10-month delay in filing for an injunction also misrepresents the law. A parties delay in filing for an injunction is only relevant when irreparable harm is not clearly established, unlike claims asserting constitutional and statutory violation where irreparable harm exists by definition. See *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (Held Citibank’s delay in a trademark infringement claim seeking a preliminary injunction was relevant only to the extent that irreparable harm was not clear.) See *also Benisek v. Lamone*, 138 S.Ct. 1942, 201 L.d 2d 398 (2018) (six-year delay in filing for an injunction in an election law violation case was only “a” factor in the District Court’s denial of injunctive relief). In this case, Plaintiffs have clearly established ongoing constitutional and federal statutory violations. Therefore, the issue of delay can never bar an injunction when there is an ongoing constitutional violations.

V. CONCLUSION

What the Supreme Court held in 1952 still stands true today, which is that "our system does not permit agencies to act unlawfully even in pursuit of desirable ends. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 585–586, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (concluding that even the Government's belief that its action "was necessary to avert a national catastrophe" could not overcome a lack of congressional authorization). See Ala. Ass'n of Realtors v. Dep't of Health & Human Servs., 141 S.Ct. 2485 (2021). This Court must grant Plaintiff's injunctive relief pursuant to the Proposed Preliminary Injunction Order filed contemporaneously with this Reply Motion.

In the event this Court does grant Plaintiffs injunctive relief, Plaintiffs also request that this Court deny any request by the City to stay the injunction pending appeal because the urgency of redressing the constitutional violation outweighs any interest the City has in maintaining the status quo. Due to the City's reckless and wanton disregard for the constitutional and statutory rights of Plaintiffs and major misrepresentations made to the various courts regarding the validity of the Vaccine Orders, the City should bear the burden of restoring Plaintiff's to their positions during the pendency of any appeal. Compliance with Federal law must begin immediately.

Dated: September 30, 2022

Respectfully submitted,

/s/ Jo Saint-George

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