NEW YORK SUPREME COURT
COUNTY OF NEW YORK

-- X

In the Matter of the Application of:

THE NEW YORK CITY MUNICIPAL LABOR COMMITTEE; HARRY NESPOLI as President of UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, IBT; HENRY GARRIDO, as Executive Director of DISTRICT COUNCIL 37, AFSCME; MICHAEL MULGREW, as President of UNITED FEDERATION OF TEACHERS; MARK CANNIZZARO as President of COUNCIL OF SCHOOL SUPERVISORS AND ADMINISTRATORS; GREGORY FLOYD as President of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 237; JOSEPH MANNION as President of SANITATION OFFICERS' ASSOCIATION, LOCAL 444; JOSEPH COLANGELO as President of SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 246; MARTIN LYDON as Civil Service Director of DISTRICT COUNCIL OF CARPENTERS; CHRIS MONAHAN as President of CAPTAINS ENDOWMENT ASSOCIATION; LOUIS TURCO as President of LIEUTENANTS BENEVOLENT ASSOCIATION; WILLIAM LYNN as Business Manager of INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 30; DALVANIE POWELL as President of UNITED PROBATION OFFICERS ASSOCIATION; JAMES MCCARTHY as President of UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854, I.A.F.F.; IGNAZIO AZZARA as President of UNIFORMED SANITATION CHIEFS ASSOCIATION; JOSEPH AZZOPARDI as Business Manager and Secretary Treasurer of DISTRICT COUNCIL NO. 9 PAINTERS & ALLIED TRADES; and GLORIA MIDDLETON as President of COMMUNICATIONS WORKERS OF AMERICA LOCAL 1180,

Petitioners,

Index No. 158368/2021

Hon. Laurence L. Love, J.S.C.

Motion Seq. No. 1

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

-against-

THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE; THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

-- X

MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' CROSS MOTION TO DISMISS THE VERIFIED PETITION

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400
Co-counsel for Petitioners

DISTRICT COUNCIL 37
125 Barclay St.
New York, New York 10007
(212) 815-1000
Co-counsel for the MLC and District Council 37

GREENBERG BURZICHELLI GREENBERG P.C.
3000 Marcus Avenue, Suite 1W7
Lake Success, New York 11042
(516) 570.4343
Co-counsel for the MLC, Local 246, CEA, LBA, Local 30, UPOA, UFOA, USCA, and DC9

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. RESPONDENTS' CROSS MOTION TO DISMISS DISREGARDS THE VACCINATION MANDATE'S UNCONSTITUTIONAL DEPRIVATION OF SUBSTANTIVE DUE PROCESS RIGHTS TO BODILY INTEGRITY 4

II. PETITIONERS HAVE SHOWN IRREPARABLE AND IMMINENT HARM 7

A. Petitioners' Health Concerns Are Not Speculative 8

B. The Loss of Livelihood, Healthcare, and Other Benefits Are Irreparable Harms Necessitating Injunctive Relief 9

III. THE EQUITIES FAVOR INJUNCTIVE RELIEF 11

IV. ANY ISSUED ARBITRATION AWARDS DO NOT MOOT PETITIONERS' ARGUMENTS 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

C.F. v. New York City Dep't of Health & Mental Hygiene,
191 A.D. 3d 52 (2d Dep't 2020) 6, 11

Communications Workers of Am., Dist. One, AFL-CIO v. NYNEX Corp.,
898 F.2d 887 (2d Cir. 1990) 10

Connecticut Dep't of Envt'l Prot. v. O.S.H.A.,
356 F.3d 226 (2d Cir. 2004) 7

Cruzan v. Director, Missouri Department of Health,
497 U.S. 261 (1990) 5

Evans v. Blue Cross of Rochester Area, Inc.,
No. 6844-95, 1996 WL 466531 (Sup. Ct. Albany Cnty. 1996) 10, 11

Gibouleau v. Society of Women Eng'rs,
127 A.D.2d 740 (2d Dep't 1987) 10, 11

Griswold v. Connecticut,
381 U.S. 479 (1965) 5

Int'l Union of Operating Eng'rs, Local No. 463 v. City of Niagara Falls,
191 Misc.2d 375 (Sup. Ct. Niagara Cnty. 2002) aff'd sub nom
Bathurst v. City of Niagara Falls, 298 A.D.2d 1010 (4th Dep't 2002) 10, 11

Jacobson v. Massachusetts,
197 U.S. 11 (1905) 4, 5, 6, 11

Jolly v. Coughlin,
76 F.3d 468 (2d Cir. 1996) 7

Lawrence v. Texas,
539 U.S. 558 (2003) 5

Loving v. Virginia,
388 U.S. 1 (1967) 5

Montgomery-Costa v. City of New York,
26 Misc. 3d 755 (Sup. Ct. N.Y. Cnty. 2009) 10

Noble v. Schmitt,
87 F.3d 157 (6th Cir. 1996) 5

Obergefell v. Hodges,
576 U.S. 644 (2015) 5

Roe v. Wade,
410 U.S. 113 (1973) 5

Roman Cath. Diocese of Brooklyn v. Cuomo,
141 S. Ct. 63 (2020) 4, 6, 11

Statharos v. N.Y.C. Taxi & Limousine Comm'n,
198 F.3d 317 (2d Cir. 1999) 7

Washington v. Harper,
494 U.S. 210 (1990) 5

Whelan v. Colgan,
602 F.2d 1060 (2d Cir. 1979).....9

Statutes

N.Y. Educ. Law § 3020-a 11

Other Authorities

COVID-19 Vaccines for People with Allergies, Centers for Disease Control and Prevention (Mar. 25, 2021, last accessed Sept. 23, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/specific-groups/allergies.html 8

Selected Adverse Events Reported after COVID-19 Vaccination, Centers for Disease Control and Prevention (Sept. 20, 2021, last accessed Sept. 23, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html 8

Breakthrough Infections FAQ, New York City Department of Health and Mental Hygiene (last accessed Sept. 23, 2021), https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-breakthrough-infections-faq.pdf 9

PRELIMINARY STATEMENT

Respondents obscure the tangible violations of constitutional due process rights and medical risks raised by Petitioners' members by costuming these harms as mere "speculation." Indeed, Respondents do not even address Petitioners' allegations concerning the unconstitutional violations of substantive due process rights to bodily integrity, personal autonomy, and refusal of unwanted medical treatment. Rather, Respondents attempt to obfuscate Petitioners' claims and CDC-supported evidence by suggesting that Petitioners tout pseudoscience. Such misrepresentation is inappropriate in any litigation – let alone a suit concerning the government-mandated inoculation of tens of thousands City employees.

Respondents' attempt to brush aside CDC-acknowledged medical complications to vaccination as "marginal data" that "eschew[s] sound science, expert medical opinion, and public policy," (Brown Aff. ¶9), is a smokescreen.[1] Petitioners are not engaged in a battle of experts; rather, they state – accurately – that vaccinations carry medical risks for some percentage of the population and that the CDC acknowledges those risks. Petitioners do not dispute that the CDC also recommends vaccination, which prevents severe illness and death for the majority of those who are vaccinated. The question evaded by Respondents and, with respect, not understood by the Court, is whether the Constitution requires the Court to balance the rights of individuals to determine their own personally-acceptable level of risk against public health concerns that can be – and are currently – addressed by other City agencies (whose employees have significant contact with children) and schools outside the City, in a manner that does not impermissibly burden those individual rights.

[1] Similarly, Respondents' claim that certain non-DOE Petitioners lack standing is a distraction. Brown Aff. ¶42. Respondents concede that the remaining Petitioners have standing, Brown Aff. ¶42 n.12, which insulates this proceeding from dismissal on those grounds.

Respondents' depiction of irresponsible staff taking no COVID-19 precautions – thereby exposing children to the virus to the detriment of the public welfare – is not true. Consider a school employee who already had COVID-19 and now has natural immunity: That employee wears a mask and follows all other social distancing, hand washing and sanitization requirements. Additionally, that employee can readily be required to test twice weekly. The current mandate still requires that employee to take on the additional risk of vaccination or face termination. Meanwhile, a vaccinated employee who has not had COVID-19 could contract a breakthrough infection, be symptom-free, and pass on the virus to students because they are not subject to any testing. Therefore, the burden on individual rights is considerable while the benefit to overall public health is not as clear as Respondents would have the Court believe.

Moreover, Respondents' mandate is, indeed, coercive, in that the threat of summary termination and attendant loss of benefits – including healthcare coverage – creates no choice at all for the thousands of employees who need these jobs to live. Yet Respondents postulate that anything goes during a pandemic – with little-to-no real constitutional review available.

Nor does DOHMH's amended order remedy the situation. Respondents themselves concede that the only substantive change to the Order wrought by its September 15, 2021 amendment is the language "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law." Brown Aff. ¶39. This does nothing to address the summary deprivation of property rights or violation of bodily integrity.

Respondents' argument is most flawed on the issue of irreparable harm. The reflexive retort that money damages can suffice is inapposite to this situation where an employee is faced with the loss of job, licensure, and benefits, including healthcare. How is a member supposed to survive the years it could take to bring this proceeding to final appellate resolution? Nor is

Respondents' attempt to avoid the issue by arguing that Petitioners cannot show irreparable harm because certain Petitioners[2] and the City have engaged in separate impact arbitrations any better founded. This argument first ignores myriad other Petitioners in this proceeding not subject to those awards, and, second, those arbitrations concern the *implementation* of the vaccine mandate, as opposed to the instant suit that challenges the mandate's facial validity and constitutionality. The ability to pursue that claim was expressly preserved in the impact bargaining and recognized by the Arbitrator in his decision. In the Matter of the Arbitration between Bd. of Educ. of the City Sch. Dist. of the City of New York and United Fed'n of Tchrs., Local 2, AFT, AFL-CIO, Office of Labor Relations, at 4 n.1 (Sept. 10, 2021) (the "Scheinman Award").[3]

Petitioners again stress that they support vaccination and encourage all members to vaccinate if they are able – but not everyone is able or willing to take on the additional risk, and Respondents ignore that population of their workforce as an inconvenience. Nor is the theoretical availability of an accommodation a panacea, and Petitioners' members should not be forced to roll the dice on vaccination and their wellbeing when other, equally-viable options are available.

Accordingly, Respondents' motion to dismiss the Petition should be denied, and the relief sought by Petitioners should be granted.

---

[2] All terms have the meanings ascribed to them in Petitioners' Amended Verified Petition (NYSCEF Doc. No. 25).

[3] Brown Aff. Ex. B.

ARGUMENT

I. RESPONDENTS' CROSS MOTION TO DISMISS DISREGARDS THE VACCINATION MANDATE'S UNCONSTITUTIONAL DEPRIVATION OF SUBSTANTIVE DUE PROCESS RIGHTS TO BODILY INTEGRITY

Respondents ignore the issue of Petitioners' members' constitutional rights to bodily integrity, which they label "legally deficient liberty interests." Brown Aff. ¶60. Their disregard for the concept of liberty and bodily integrity is both disconcerting and unsupported by the law. Respondents' reliance on Jacobson v. Massachusetts, 197 U.S. 11 (1905), to argue that vaccine mandates are *per se* constitutional, is too facile, for it refuses to recognize the evolution of constitutional precedent holding that forced medical treatment violates an individual's constitutional right to bodily integrity. Petitioners ask this Court to reconsider the important fundamental right to make personal decisions regarding bodily integrity against the backdrop of Justice Gorsuch's concurrence in Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 69 (2020). There, Justice Gorsuch cautioned that Jacobson should not be mistaken for "towering authority that overshadows the Constitution during a pandemic." Id. at 69, 71 (Gorsuch, J., concurring).

In Jacobson, the Supreme Court upheld the imposition of a $5 fine for those who chose not to get vaccinated for smallpox under the state's police power. In doing so, the Court acknowledged that, in certain circumstances, the police power should "yield" to rights given and secured by the Constitution. See Jacobson at 25–26. Although the scales in Jacobson tipped in favor of upholding the smallpox vaccine mandate, the calculus is different where school-based employees risk their livelihood, licensure, healthcare, and other benefits if they do not vaccinate.

Indeed, recent decisions have changed the legal landscape since Jacobson,[4] and have held that the government violates an individual's substantive due process rights where, like here, it forces an individual to undergo unwanted medical treatment. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 278 (1990), is instructive. There, the Supreme Court addressed whether an individual in a coma had a right to refuse food and water based on their protected liberty interests under the due process clause. The Supreme Court held that the "notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment" and "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment." Id. at 269, 277. In reliance on Cruzan, courts have found that incarcerated individuals enjoy protectable liberty interests to be free from bodily restraint, and to refuse medical treatment such as the administration of drugs, even when doctors believe the drugs beneficial. See Noble v. Schmitt, 87 F.3d 157, 161 (6th Cir. 1996); Washington v. Harper, 494 U.S. 210, 229 (1990) ("[F]orcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty"). Recognizing that Petitioners are not incarcerated or incapacitated, the choice between loss of healthcare or benefits during a pandemic or forced inoculation is similarly coercive, particularly for the tens of thousands of school-based employees who earn comparatively less. Indeed, if such protections are afforded to prisoners, why should Petitioners' members – many of whom risked their own health and safety during the darkest, early days of the pandemic – be entitled to anything less?

---

[4] The recent decisions extend beyond Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Lawrence v. Texas, 539 U.S. 558 (2003); (same sex intimate sexual relations); Obergefell v. Hodges, 576 U.S. 644 (2015) (same sex marriage), to uphold the substantive due process right to bodily integrity.

As such, the Order is a far more serious infringement to bodily integrity than the $5 fine (today $140 dollars[5]) at issue in Jacobson.

Although this Court has signaled that mandatory vaccine requirements do not violate substantive due process rights, the cases relied upon, respectfully, are inapposite. See Order – Interim (Motion Related) at 4-5, ECF Doc. # 36 (citing Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015); Caviezel v. Great Neck Pub. Schs., 500 F. App'x 16, 19 (2d Cir. 2012); C.F. v. New York City Dep't of Health & Mental Hygiene, 191 A.D. 3d 52, 69 (2d Dep't 2020)). All of the cases involved mandatory vaccines for children attending public schools. The analysis is not applicable to determining whether school-based employees' constitutional rights will be violated by stripping them of their livelihood, licensure, and healthcare should they elect not to get vaccinated.

Finally, Respondents' reliance on C.F., 191 A.D. 3d 52, underscores the deficiencies in the Order itself. There, DOHMH adopted a resolution stating that, due to the active outbreak of measles among people residing within certain areas of Brooklyn, any person over the age of six months who was living, working, or attending school or childcare in the affected areas had to be immunized against measles, absent a medical exemption. The court upheld DOHMH's resolution as reasonable because prior measures to stem the outbreak had proven unsuccessful, and because the consequence was in all likelihood a $1,000 fine. Id. at 68. By contrast, here, the City abandoned its prior vax-or-test policy before it was even implemented. The failure to follow through with a less restrictive and also CDC-proven measure to stem the COVID-19 pandemic highlights the unreasonableness of the Order. The inability to work in any school – public, private or charter – located in a DOE facility, together with the loss of pay and benefits,

[5] See Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 70 (noting approximate cost in the present day).

is significantly more burdensome and coercive than the measures in any of the cases relied upon by Respondents.

II. PETITIONERS HAVE SHOWN IRREPARABLE AND IMMINENT HARM

Respondents ignore the coercive effects their mandate has on the human beings who work in DOE school facilities – the danger of losing one's lifelong career, healthcare, potentially even life – by virtue of forcing people to choose between employment and a compulsory inoculation. Rather, the impingement of constitutional rights – such as the right to property in a permanently-appointed occupation, or bodily integrity – are *per se* irreparable. See Statharos v. N.Y.C. Taxi & Limousine Comm'n, 198 F.3d 317, 322 (2d Cir. 1999). See also, e.g., Connecticut Dep't of Envt'l Prot. v. O.S.H.A., 356 F.3d 226, 231 (2d Cir. 2004) ("[W]e have held that the alleged violation of a constitutional right triggers a finding of irreparable injury." (internal quotation marks and citations omitted)); Jolly v. Coughlin, 76 F.3d 468, 482 (2d Cir. 1996) ("it is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm" (emphasis in original)).

Moreover, the harm to Petitioners' members is neither speculative[6] nor redressable with subsequent individualized litigations for monetary compensation,[7] and arguments to the contrary ignore the realities of working life. The deprivation of benefits can have immediate negative effects on the health and wellbeing of workers and their families, and courts have granted preliminary injunctions when such benefits are at stake. See infra at II.B.

[6] As Respondents claim at Brown Aff. ¶60.

[7] Brown Aff. ¶84.

A. Petitioners' Health Concerns Are Not Speculative

The myriad, CDC-recognized risks to vaccination – which Respondents cast as "speculative safety concerns" "eschew[ing] sound science, expert medical opinion, and public policy," Brown Aff. ¶¶9, 60 – cannot be denied. Although the Pfizer, Moderna, and J&J vaccines are safe for the majority of people, some individuals with certain allergies and other preexisting medical conditions may suffer from mild-to-severe side effects, including:

a. Anaphylaxis and other allergic reactions. Those with allergies to polyethylene glycol (PEG) should not receive the Pfizer or Moderna vaccines, while those with a polysorbate allergy should not receive the J&J vaccine;
b. Thrombosis with thrombocytopenia syndrome ("TTS") - blood clots that can result in heart attack, stroke, and other infarctions, which have been seen in a small number of J&J recipients, and two Moderna recipients;
c. Guillain-Barré Syndrome, where the body's immune system damages nerve cells, resulting in muscle weakness and possible paralysis. While most fully recover, some have permanent nerve damage. This side effect has been seen in a small number of J&J recipients; and
d. Myocarditis and pericarditis - inflammation of the middle and outer layers of the heart, respectively, which have been seen in a small number of Pfizer and Moderna recipients.

Amended Petition ¶72 (citing to the CDC).[8]

[8] Selected Adverse Events Reported after COVID-19 Vaccination, Centers for Disease Control and Prevention (Sept. 20, 2021, last accessed Sept. 23, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html; COVID-19 Vaccines for People with Allergies, Centers for Disease Control and Prevention (Mar. 25,

These populations must be accounted for, and the City's disregard for the needs of the people in its workforce is an unsettling trend in its arguments here.

Nor do Petitioners – as Respondents suggest – "testify" or offer evidence contradicting the need for mass vaccination. Brown Aff. ¶¶45-46. This is not a battle of experts or conflicting data. Rather, Petitioners point to uncontroverted medical fact from the same medical source that Respondents rely upon – the CDC.

Furthermore, as recognized by the CDC *and Respondent DOHMH*,[9] the vaccine is not a magic bullet. Breakthrough infections occur with some regularity, and the vaccinated are still capable of spreading the virus to the vaccinated and unvaccinated alike. See Amended Petition ¶¶43-45. Accordingly, an effective way to safeguard against viral spread is extensive and consistent testing, followed by quarantine of the infected – a way that, as the Court deems needed, protects public health yet avoids the constitutional violation to Petitioners.

B. The Loss of Livelihood, Healthcare, and Other Benefits Are Irreparable Harms Necessitating Injunctive Relief

First, loss of livelihood is not the same as loss of one's job. As explained in the next section, the burden on public employees who work in public schools in this case is much more profound given that the mandate at issue applies to all DOE facilities.

Second, despite Respondents' contentions to the contrary, the loss of employee benefits – including healthcare – is sufficient to show irreparable harm. See, e.g., Whelan v. Colgan, 602 F.2d 1060, 1062 (2d Cir. 1979) ("[T]he threatened termination of benefits such as medical coverage for workers and their families obviously raised the specter of irreparable injury."); see

2021, last accessed Sept. 23, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/specific-groups/allergies.html.

[9] See Breakthrough Infections FAQ, New York City Department of Health and Mental Hygiene (last accessed Sept. 23, 2021), https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-breakthrough-infections-faq.pdf.

also Communications Workers of Am., Dist. One, AFL-CIO v. NYNEX Corp., 898 F.2d 887, 892 (2d Cir. 1990) ("Under *Whelan*, acts that result in a denial of covered treatment justify a finding of irreparable harm….The present case thus involves precisely the same effect on employees as existed in *Whelan*."); Gibouleau v. Society of Women Eng'rs, 127 A.D.2d 740, 741 (2d Dep't 1987) (affirming injunction continuing health insurance coverage where employee, "who was suffering from lymphatic cancer, would have been unable to obtain alternate medical coverage"); Montgomery-Costa v. City of New York, 26 Misc. 3d 755, 770 (Sup. Ct. N.Y. Cnty. 2009) (noting that the court had previously granted a preliminary injunction where petitioners argued that they and their families would suffer irreparable harm by losing their health benefits); Int'l Union of Operating Eng'rs, Local No. 463 v. City of Niagara Falls, 191 Misc.2d 375, 380 (Sup. Ct. Niagara Cnty. 2002) aff'd sub nom Bathurst v. City of Niagara Falls, 298 A.D.2d 1010 (4th Dep't 2002) (finding that the loss of a health care coverage "cannot be recovered by an award of monetary damages alone since changing a health care provider may require a change in physicians and a course of treatment . . . . It could also adversely affect the ability to access doctors, prescriptive medications, physiotherapy and other medical needs since co-pays and deductibles may be different among the plans."); Evans v. Blue Cross of Rochester Area, Inc., No. 6844-95, 1996 WL 466531, at *4 (Sup. Ct. Albany Cnty. 1996) (granting injunction in dispute between insured and insurer in light of insured children's ongoing medical condition).

Petitioners' members cannot be viewed as hypothetical people. They are the mothers, daughters, fathers, and sons we see on the street – each with complex and ongoing medical and financial needs, both individual and familial. To strip medical insurance from a father whose daughter suffers from MISC-C or another chronic condition, or from a mother fighting breast

cancer, is an irreparable harm regardless of the possibility of a successful individual judicial outcome in the far-flung future. See, e.g., Gibouleau, 127 A.D.2d at 741; Montgomery-Costa, 26 Misc. 3d at 770; Int'l Union of Operating Eng'rs, Local No. 463, 191 Misc.2d at 380; Evans, 1996 WL 466531, at *4. By the time these families navigate the legal system and either have their healthcare restored, or receive some monetary compensation, the ramifications for their health or finances (in particular from medical bills) could be incalculable.

III. THE EQUITIES FAVOR INJUNCTIVE RELIEF

Respondents assert that the pandemic gives them absolute authority to mandate vaccination, unilaterally terminate occupations, and strip workers of their benefits, including healthcare coverage. This is an overreach of executive power unsupported by precedent, ethics, and common sense. Jacobson and C.F., which Respondents mistakenly rely on for the proposition that vaccination mandates are judicially unassailable, are inapposite. Jacobson concerned a vaccination mandate, the transgression of which was punishable by a $5 fine. See 197 U.S. at 14. The Court has recognized that, adjusted for inflation, that amount is equivalent to about $140 today. See Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 70. A $140 fine is a far cry from the loss of one's income, teaching license, and healthcare coverage.

Likewise, the civil fine for transgression of the measles vaccine mandate in C.F. was presumed to be $1,000. See 191 A.D.3d at 78. None of those litigants were subject to termination, permanent preclusion from their occupations, or the loss of healthcare and other benefits during a pandemic, as Petitioners' members are here. Instead, here, should a teacher be subject to charges under N.Y. Educ. Law § 3020-a for failure to vaccinate and be found guilty, that teacher will lose their license. Therefore, the assertion that "[a]ny such member who elects

against vaccination can pursue their profession in a plethora or schools or sectors"[10] is patently false. This fiction is further undermined by the fact that all public and charter schools in DOE facilities are subject to the same mandate; hence, non-teachers, or those who retain their teaching licenses, will have to leave their geographic areas to search for employment.

Additionally, Respondents' suggestion that Petitioners' members can "tak[e] a[n unpaid] leave of absence or resign[ ] from their position with the DOE"[11] ignores that this option is available only to those covered by the existing arbitration awards. Even then, this is a burdensome financial proposition, particularly for those tens of thousands of Petitioners' members who earn comparatively less.

Although the pandemic has created myriad complexities for our society, those complexities do not justify the blasé attitude Respondents now take with regard to wellbeing of their employees and employees' families.

IV. ANY ISSUED ARBITRATION AWARDS DO NOT MOOT PETITIONERS' ARGUMENTS

Respondents suggest that any harm to Petitioners have been addressed by arbitration awards issued in matters between Respondents and Petitioners UFT, CSA, and Local 237. This is incorrect. Those arbitral proceedings concerned only the implementation of the vaccination mandate as to the aforementioned Petitioners, in the event that the mandate survived the instant challenge; they did not address the facial validity of the mandate. See Scheinman Award 4 n.1 (noting that Arbitrator Scheinman's "jurisdiction is limited to the issues raised during impact bargaining and not with regard to the decision to issue the underlying 'Vaccine Only' order"). Accordingly, those arbitrations do not obviate the need for a ruling on the mandate's underlying

---

[10] Brown Aff. ¶87.

[11] Brown Aff. ¶84.

substantive due process violations for all Petitioners, and do not impact the claims of other Petitioners not party to those awards – such as DC37, which has some 20,000 members working in City schools, many of whom are unvaccinated.

CONCLUSION

For the reasons set forth herein Petitioners respectfully request that the Court deny Respondents' motion to dismiss and grant the Petition.

Dated: September 24, 2021

Respectfully submitted,

/s/ ALAN M. KLINGER

STROOCK & STROOCK & LAVAN LLP
Alan M. Klinger, Esq.
Dina Kolker, Esq.
Arthur J. Herskowitz, Esq.
Elizabeth C. Milburn, Esq.
180 Maiden Lane
New York, New York 10038
(212) 806-5400
aklinger@stroock.com
dkolker@stroock.com
aherskowitz@stroock.com
ecmilburn@stroock.com

Co-counsel for Petitioners

-and-

Robin Roach, Esq.
DISTRICT COUNCIL 37
125 Barclay St.
New York, New York 10007
(212) 815-1000
rroach@dc37.net

Co-counsel for the MLC and District Council 37

-and-

GREENBERG BURZICHELLI GREENBERG P.C.
Harry Greenberg, Esq.
3000 Marcus Avenue, Suite 1W7
Lake Success, New York 11042
(516) 570.4343
hgreenberg@gbglawoffice.com

Co-counsel for the MLC, Local 246, CEA, LBA, Local 30, UPOA, UFOA, USCA, and DC9

WORD COUNT CERTIFICATE

I hereby certify that this memorandum complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court. This certificate certifies that the document complies with the word count limit. Compliance relied on the word count of the word-processing system used to prepare the document. The total number of the words in this affirmation, exclusive of the caption, table of contents, table of authorities and signature block, is 3,528 words.

Date: September 24, 2021

/s/ ALAN M. KLINGER
Alan M. Klinger, Esq.