IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

MICHAEL CORRIN STRONG, Plaintiff

vs.

HOWARD ZUCKER, MD, in his official capacity as Commissioner of the New York State Department of Health, Defendant

Case No. 21-CV-6532

REPLY TO DEFENDANT'S LEGAL MEMORANDUM AGAINST PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Submitted Electronically by
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Introduction

Defendants Legal Memorandum in response to Plaintiff's motion for a Temporary Restraining Order and/or Preliminary Injunction consistently misstates Plaintiff's legal arguments, the meaning and effect of the state's own regulations and the facts of the case. Here are the main problems with Defendants arguments:

A. Defendant repeatedly tries to claim that the regulations adopted on Dec. 10, 2021 provide a "mask option" for the Unvaccinated. There is no such "mask option" since the regulations clearly allow owners and managers of ''indoor public spaces" the option to bar the Unvaccinated from premises whether they offer to mask or not. This is the way the regulations are being interpreted and enforced by many businesses across the state, without any indication from the State that this is incorrect.

B. Defendant repeatedly tries to characterize the Plaintiff's case as somehow against the "mask mandate" and spends a large amount of effort arguing that mask mandates are legal. The Plaintiff took no position on this issue and thus these argument are irrelevant. Plaintiff's complaint is about the fact that the recent regulations and other state policies are being applied unequally across classes of people who have similar or lesser risk of spreading the virus, making the whole structure of the State's response irrational and unconstitutional.

C. Defendant repeatedly states that Plaintiff's Amended Complaint filed in October was only about the issue of the Excelsior Pass, and Plaintiff's Motion for a TRO is only about the Dec. 10 regulations. Neither is correct. Plaintiff clearly stated in his Amended Complaint that he was objecting to all Discriminatory actions by the State, including unequal testing protocols between the Vaccinated and Unvaccinated. Likewise, Plaintiff seeks additional relief in his TRO motion beyond the Dec. 10 regulations, including the elimination of the Excelsior Pass, Unequal Testing Protocols and "any future discriminatory regulations against the Unvaccinated."

Although the Defendant's Legal Memorandum does not contain numbered paragraphs, Plaintiff will discuss each error and other problems with the Defendants case in more detail in chronological order as they appear in the memo:

1. In the Preliminary Statement at Page 1, Defendant glosses over the fact that the new regulations adopted on Dec. 10 allows and encourages owners and managers of any non-residential property in the state to bar unvaccinated people from their "indoor public spaces." This is the crux of Plaintiff's complaint about these regulations. It is similar to the rule that started this litigation and was repealed on Aug. 27, only worse. This discrimination against Unvaccinated people has no scientific basis and grievously violates their most basic constitutional rights and liberties.

2. Further in the Preliminary Statement at Page 2, Defendant claims that deaths in New York could have been "far higher" without previous restrictions on indoor activities. There is no evidence that this conjecture is true or that New York has "flattened the curve." In the very same paragraph, Defendant notes that cases have increased "10-fold" since July 2021. That doesn't sound like a very flat curve! Although it is not critical to Plaintiff's case to prove that the State's efforts have been totally ineffective, the evidence lies more in that direction.

3. In the Preliminary Statement at bottom of Page 2, Defendant claims that the State has "carefully calibrated its response to insure that activities with a high risk of spreading contagion do not imperil public health." How is a blanket requirement affecting "all indoor spaces" other than private residences in any way "carefully calibrated?" Further, if they truly wanted to carefully calibrate their regulations they would not of set up a two-tier set of rules that apply stricter requirements on Unvaccinated people who have equal or lesser likelihood of "spreading contagion," particularly with regard to those who have "Natural Immunity,"

4. In the Preliminary Statement at Page 3, Defendant claims that the Dec. 10 regulations provide a "layered mitigation strategy" that provides a "masking alternative to the unvaccinated." This paragraph totally misstates how the Dec. 10 regulations work. As noted above, for those property owners who choose to require proof of vaccination to enter, there is no "masking alternative" for the Unvaccinated. They are quite simply barred from entry while the vaccinated can enter without masks.

5. In Section 1, at Page 4, Defendant argues that the case should be dismissed because the TRO is "wholly unrelated" to Plaintiff's Amended Complaint filed in October of 2021. This is simply not true for many reasons:

A. Plaintiff in his Motion for the TRO/Preliminary Injunction and his Legal memorandum in support specifically stated that he was not merely filing against the Dec. 10 regulations but against a consistent pattern of discriminatory conduct by the State. Plaintiff's Legal memorandum at Paragraph 5 says, "The fact is, however, that the most recent regulations are merely the latest iteration of an ongoing and consistent strategy of the State to discriminate against the Unvaccinated by a series of regulations and policies."

B. Defendant claims that the Plaintiff's Amended Complaint filed in October was limited to the Excelsior Pass program. This is not the case. In Paragraph 10 of the Amended Complaint, Plaintiff, "... reasserts his complaint against the NYS Health Departments continued operation of the Excelsior Pass and other programs that continue to discriminate against the Unvaccinated." Such other programs complained of include unequal Covid testing protocols encouraged or ordered by the state.

C. Further Defendant states that the regulations passed on Dec, 10, "...is not related to the Excelsior Pass." This is untrue, since the Excelsior Pass was widely touted on the State's own web site and in press releases as the perfect tool to enforce the "Vaccinated Only" entry option. The state's attempt to depict each additional tightening of the noose around the necks of the Unvaccinated as a separate unrelated regulation is disingenuous to say the least, as they are all part of a consistent plan that has been rolled out starting in March of 2021 with the introduction of the Excelsior Pass program.

6. In Paragraph III (A) 1, starting at Page 5, Defendant brings up the Jacobson case as supposed precedent for the state's regulation. In addition to the arguments made in Plaintiff's Legal Memorandum that the Jacobson case is obsolete with respect to modern medical technology, it is worth noting that this is not a case about mandatory vaccination, and there is at present no law or regulation requiring mandatory vaccination in the State of New York. Therefore Jacobson is not on point.

7. In Paragraph III (A) 1, starting on Page 6, Defendant claims that the Dec. 10 regulations, "allow for either masking or proof of vaccination." Again, if this is what the regulations stated, the Defendant might have a better case, but they do not! Sub-paragraph 7b of the Dec. 10 regulations state that the new mask mandate, "shall not apply to any indoor public

area that requires proof of vaccination as a condition of entry." Many local businesses have reasonably read that rule to allow them to use a "Vaccinated only" entry policy, thus giving no option for Unvaccinated people to enter, masked or not. The State must surely be aware that this is the way many businesses in the state are choosing to interpret the regulations and have made no move to correct it.

8. All the cited cases referencing the Jacobson precedent are not on point with the instant case, as the infringement of Plaintiff's fundamental rights to conduct his life in a free manner is in this case, much more severe. For example, in *Hopkins Hawley LLC v. Cuomo*, the Plaintiff was challenging an emergency order shutting all restaurants. Certainly a rule that affects just one industry has less impact than a rule that potentially bars a large segment of the population from all "indoor spaces." Also in *Doe v. Franklin Square Union Free Sch. Dist*., the Plaintiffs were complaining of a mask ordinance in a school. This case is not about a mask ordinance applicable to all students, but rather a gross discrimination against the Unvaccinated. Likewise, *Forbes v. Cty. of San Diego* is also a challenge to a universal mask mandate, and so again does not relate to this Equal Protection claim.

9. In Paragraph III (A) 2, starting at Page 7, Defendant again misstates the meaning and effect of their own regulations. As already covered above, these regulations do not provide a masking option for the Unvaccinated in any case where the property owner adopts a "vaccinated only" policy.

10. Also in Paragraph III (A) 2, on Pages 8-9, and continuing in Paragraph III (A) 3, on Pages 9-11 Defendant argues that a "Rational Basis" standard should apply to this case because "no fundamental rights" are being violated and "no suspect class" is discriminated against. Plaintiff argues at length in his Legal Memorandum that this is not the proper standard, so will not repeat those arguments here.

11. In Paragraph III (A) 3 a, on Page 10, Defendant argues at length that mask mandates do not violate "fundamental rights." This is not an issue in this case. Plaintiff has made no argument in any of his filings that mask mandates are unconstitutional. They may be, but that is an unrelated issue, since what is complained of here is not the mask mandates in general, but the unequal imposition of rules that allow the vaccinated entry into some indoor spaces without masks, while

allowing unvaccinated people to be banned entirely whether masked or not.

12. In Paragraph III (A) 3 b, on Pages 10-11, Defendant argues that Unvaccinated people are not members of a suspect or quasi-suspect class. Plaintiff has discussed this issue at length in his Legal Memorandum, so again will not repeat those arguments here. Defendant does dispute the final sentence in that section that there is, "No history of discrimination against the Unvaccinated." Plaintiff has shown multiple examples of discrimination against the Unvaccinated starting with the state's own ongoing campaign of coercion against them, encouraged by prejudicial statements made by the highest officials in the state and federal government. This discrimination has worsened even in the last few weeks with more reports of Unvaccinated people being denied basic medical services.

13. In Paragraph III (C), in Pages 11-15, Defendant argues that the State's regulations meet a "Rational Basis" test. While Plaintiff does not think that is the proper standard of scrutiny, he also argues that the State fails even that modest test. To begin with many of the claims made by Defendant in this section supporting a "rational basis" are incomplete, illogical or simply untrue, as follows:

A. In Paragraph III (C), on Page 13, defendant cites a number of medical exhibits about the supposed value of Covid vaccines in preventing "severe illness, hospitalizations and deaths." Notably they make no claim in the Legal Memorandum that the vaccines do anything to prevent the spreading of the virus. This is probably because scientific evidence has shown that they do not, and in fact, the vaccinated are just as likely (or as recent evidence suggests may even be more likely) to catch and spread the virus as the Unvaccinated. This inconvenient fact makes mincemeat out of the argument that there is any need to apply "layered mitigation strategies" any more urgently against the Unvaccinated.

B. In Paragraph III (C), on Page 14 Defendant again claims that the Dec. 10 regulations provides a "masking alternative" to the Unvaccinated. As stated above multiple times, this is simply not a fair reading of the regulations. Again, the issue is not whether Unvaccinated people should wear masks, but rather if it is legal to ban them from certain "public indoor spaces" at the option of the owner, merely because of the lack of vaccination. There is no rational basis to make such a harsh penalty against those who have a equal or lesser risk of spreading the virus.

C. Further down in Paragraph III (C), on Page 14-15, Defendant again makes a lengthy argument that mask mandates are legal and have a rational basis. Again this is not the issue in this case. In conclusion, the State has failed to show any rational basis for discriminating against the Unvaccinated in the way that the Dec. 10 regulations and other state programs do.

14. In Paragraph IV on Page 16, Defendant alleges that Plaintiff has not made a showing of "irreparable harm." While it is true that Plaintiff did not repeat the specific details of the harm that were included in the Amended Complaint, he did state that the State's policies were, "..restricting his ability to enter a large number of public spaces, including his preferred gym, local restaurants and entertainment venues, thus greatly diminishing his quality of life and physical health."

15. Many times in Plaintiff's Legal Memorandum he referred back to proof and arguments offered in the Amended Complaint. Plaintiff views the motion for TRO/Preliminary Injunction as being not only against the regulations imposed on Dec. 10, but also against the other state policies complained of in the Amended Complaint. This is shown by his demands in the TRO motion for elimination of the Excelsior Pass, unequal testing protocols and any other form of future discrimination against the Unvaccinated. Court rules limiting the Legal Memorandum to 25 pages, prohibited the repetition of large portions of the Amended Complaint in the Legal Memorandum.

16. Quoting below from the Amended Complaint (*in Italics*), Plaintiff has suffered the following irreparable harm from the State's regulations of the Unvaccinated:

"A. Plaintiff has for many years been a member of the 24/7 Fitness Club in his hometown of Geneseo, NY. As of the date of this filing (October 2021), the Club's policy is that Vaccinated members do not have to wear masks while Unvaccinated members do. Due to medical issues the Plaintiff has, he can not medically tolerate a mask (especially while working out in a gym!), therefore he is being deprived of a convenient way to maintain his health." (Since the filing of this complaint in October, Plaintiff recently had his membership in a second gym in Avon terminated for being "Unvaccinated.")

"B. Further, Plaintiff operates the Free Soil Farm growing vegetables for sale at local Farmer's Markets. For many years he has sold at the Fairport Farmers Market which is operated by the Village of Fairport. It is in the written policy of that market that unvaccinated vendors must wear a mask, which again he is medically incapable of tolerating for a 6-hour market."

"C. For many years Plaintiff has been an admirer of the music of the Beach Boys and their genius composer Brian Wilson. Mr Wilson was scheduled to appeared at the Kodak Center Theatre in Rochester on Oct. 10, 2021. Plaintiff would have attended that concert but for the requirement that people were required to show proof of vaccination or a recent Covid test to attend. Vaccinated people were not required to have a Covid test. Plaintiff chose not to go to the trouble, expense and possible medical risk of a test or to support a venue that discriminates." (This restriction continues to be employed, or in some cases entertainment venues are opting for "Vaccinated only" admission policies, thus further limiting Plaintiffs rights.)

D. These are just a few of the many ways in which Plaintiff and millions like him across the state are being irreparably harmed by these discriminatory regulations. Plaintiff does not feel he is under any legal obligation to disclose details of his medical disability or condition in a public document, other than he is now a two-time Covid survivor having recently recovered from a mild case of Omicron and thus must have very strong "Natural Immunity." Incidentally, the fact that Omicron has a much less severe prognosis is another fact that appears to be missing in the State's response. In considering the Jacobson precedent, it is worth noting that smallpox in 1905 had a 30% mortality, and that Omicron which defendant admits now comprises 97% of all new cases, has a mortality of practically 0%.

17. Also in Paragraph IV on Page 17, Defendant appears to claim that almost nobody is medically unable to tolerate a face mask. Although this line of argument is not germane to this case, such a claim is preposterous. There are many people with heart or lung conditions who simply can not breath with a mask in place, especially if they are engaged in vigorous activity. Others, particularly women, suffer severe psychological stress from being forced to wear a mask. Again, this line of argument does not apply since there is no "mask option" available in the regulations.

18. In Paragraph V on Page 17, Defendant again claims that there is a "masking option" available to the Unvaccinated, which is not true. Under the State's regulations and policies, the balance of hardship tips totally against the Unvaccinated, as they are massively deprived of basic civil rights without any public health gain.

19. In Paragraph VI on Page 18, Defendant challenges the form of Plaintiff's Statement on Expert Witnesses. As Plaintiff is proceeding "pro se' without any prior litigation experience in federal

court, he freely admits that he was not familiar with Rule 26. In fact, when he filed his motion, Plaintiff was not familiar with Local Rule 65 which required the Expert Witness Statement. In any case, the statement does include a lengthy biography of Dr. McCullough taken from his website, and Plaintiff has listened to numerous video presentations of the doctor given to media and medical audiences, as well as sworn testimony given before a Committee of the United States Senate. The testimony expected to be given was gathered from that, as well as from medical articles and scientific papers that the doctor has published, and is believed to be accurate as to what the doctor would testify to.

20. Further it is not clear that the provisions of Rule 26 apply in this case. Under Paragraph A (2) of the rule, unless otherwise ordered by the court, such disclosure is only required in respect to an expert witness who, "is retained or specially employed to provide expert testimony." It is Plaintiff's understanding that Dr. McCullough will testify without any fee, as the case involves a matter of grave public importance about which he feels strongly. Naturally, an expert witness may expect to have travel costs reimbursed if he is required to appear in person, but he is not being "retained" to provide the testimony. There also does not appear to be any special local rules that pertain to Rule 26. If the court directs Plaintiff to provide a report or declaration signed by the doctor, he will be happy to comply.

21. Plaintiff has reviewed the many exhibits filed by Defendant with their Legal Memorandum and finds them of little relevance to the case he is making. For example, in Attachment 1, the Declaration of Emily Lutterloh, MD, MPH at Paragraph 18, she makes the same claim made by Defendant in its Legal Memorandum, that the masking order of Dec. 10 provides the Unvaccinated with a "masking option", which is not true in cases where property owners opt for "vaccination only status." It is surprising that the person in charge of drafting these regulations for the State Health Department does not seem to know what they say or how they are being interpreted and enforced by the public.

22. In Paragraph 19 of the Statement, it is stated that being fully vaccinated with boosters is 75% effective in preventing infection with Omicron. This claim has not been confirmed by more recent studies that find that the vaccines are "highly ineffective" against the Omicron variety. (See article published on medRxiv.org (a pre-print server) titled, "Effectiveness of Coivd-19 vaccines against Omicron or Delta infection," by Sarah A. Buchan, et. al. That study also said that adding a booster

shot provided "only slight improvement" in preventing infection. The legal effect of including the booster information is unclear since the state is not currently requiring the booster for the general public to be considered "fully vaccinated" for purposes of these regulations. Further, it is important to remember that health authorities are fond of estimating "relative risk" reduction, which produces a much bigger number than the actual "absolute risk" reduction.

23. The bulk of the Statement consists of assertions that vaccination will help reduce the severity of the disease if contracted. This information has no bearing on the case, unless the Health Department is conceding that the purpose of these regulations is to coerce the Unvaccinated into getting the gene therapy treatment. Since this treatment is still experimental as discussed at length in Plaintiff's Amended Complaint, such a motive is illegal under the Nuremberg Code and subsequent International, Federal and State laws and regulations. Plaintiff also denies the claim made in Paragraph 23 of the Statement that the Pfizer vaccine currently in use is in any way "approved" or not experimental, for reasons explained in detail in previous filings.

24. Finally, Plaintiff disputes the statement made in Paragraph 22 that the Covid-19 vaccines are "safe for almost all patients." That discussion leaves out the alarmingly high number of adverse side effects including death that continue to be reported to the Vaccine Adverse Event Reporting System (VAERS) run by the CDC. While this issue does not directly touch on Plaintiff's Equal Protection claim, it explains why many, especially those with "Natural Immunity," have reasonably opted not to have the vaccine and therefore should not be punished or discriminated against for exercising their right to informed consent.

Conclusion

The court should grant Plaintiff's motion for a Temporary Restraining Order and/or Preliminary Injunction because the Defendant has totally failed to provide even a rational basis for the State's policies that discriminate against the Plaintiff and all unvaccinated people in the State in a most egregious manner. The Plaintiff has met all requirements for the issuance of a TRO/ Injunction. Plaintiff respectfully asks that the court to move forward on this with all deliberate speed since many people are suffering from this ongoing discrimination. Further, the fact that the

Dec. 10 regulations may expire on Feb. 1 should not be any reason for delay as Plaintiff is seeking additional relief beyond the staying of those regulations.

Plaintiff also maintains that this matter affecting such "fundamental rights" of the Plaintiff should be judged by a stricter standard of scrutiny which obviously the State can not meet. Further Plaintiff believes that the recent hostility and prejudice engendered by invidious and false statements by public officials and the media has made the Unvaccinated into at least a "quasi-suspect class."

In that regard, it is worth noting that in a recent Rasmussen national public opinion poll, 59% of Democrats stated that they were in favor of all unvaccinated people being confined to their homes. Since the New York State government is in the complete control of the dominant Democrat party in this state, that provides little comfort that Plaintiff or any like-situated citizens will be able to rely on state government to protect their Constitutional rights. It is up to the federal courts to step in and protect us from this overreach and the passions of the mob.

By

January 19, 2022 s/Michael Corrin Strong

Plaintiff, Pro Se