NO. _____

IN THE

Supreme Court of the United States

MICHAEL KANE, individually, and for all others similarly situated, et al.,

Petitioners,

v.

CITY OF NEW YORK, et al.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

JAMES A. CAMPBELL
JOHN J. BURSCH
Counsel of Record
CAROLINE C. LINDSAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

[Additional counsel listed on next page]
Counsel for Petitioners

BARRY BLACK
NELSON MADDEN
BLACK LLP
475 Park Avenue South
Suite 2800
New York, NY 10016

SUJATA S. GIBSON
GIBSON LAW FIRM PLLC
120 E. Buffalo Street
Suite 2
Ithaca, NY 14850

QUESTION PRESENTED

Petitioners are hardworking public educators who were pushed out of their jobs because of their religious beliefs. Respondents implemented a post-pandemic vaccine mandate that denied religious accommodations to educators like Petitioners with "personal" religious beliefs or whose religious leaders had "publicly" endorsed vaccination, while granting accommodations to those affiliated with other "established religious organizations." Under this discriminatory scheme, Christian Scientists received automatic accommodation while Catholics were ineligible.

The Second Circuit initially rejected this discriminatory approach, mandating a "fresh review" under Title VII and local nondiscrimination standards. But City officials just reaffirmed the original denials, continuing to deny beliefs as "too personal" and alternatively claiming it would be an undue hardship to accommodate anyone. This resulted in more unconstitutional discrimination: Unlike those accommodated under the original policy, Petitioners had to prove no undue hardship.

The court below rubber-stamped this discrimination under rational-basis review, dissolving a unanimous circuit consensus that applies strict scrutiny to similar discretionary accommodation schemes. The question presented is:

Whether strict scrutiny applies to a discretionary religious-accommodation scheme that turns on whether individuals follow organized religion and whether their personal religious beliefs differ from the beliefs of their religious leaders.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Michael Kane, William Castro, Margaret Chu, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Trinidad Smith, Amaryllis Ruiz-Toro, Matthew Keil, John De Luca, Sasha Delgado, Dennis Strk, Sarah Buzaglo, Edward (Eli) Weber, Carolyn Grimando, Amoura Bryan, Joan Giammarino, and Benedict Loparrino.

Respondents are the City of New York, Eric L. Adams, in his official capacity as Mayor of the City of New York, Ashwin Vasan, in his official capacity as Health Commissioner of the City of New York, the New York City Department of Education, and Melissa Aviles-Ramos, in her official capacity as chancellor of the New York City Department of Education.

LIST OF ALL PROCEEDINGS

U.S. Supreme Court, No. 22A389, *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, order denying emergency application issued November 10, 2022.

U.S. Supreme Court, No. 21A398, *Keil* v. *City of New York*, order denying emergency application issued February 11, 2022.

U.S. Supreme Court, No. 21A398, *Keil* v. *City of New York*, order denying emergency application issued March 7, 2022.

U.S. Court of Appeals for the Second Circuit, Consolidated Appeal No. 22-1876, *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, opinion affirming dismissal and denying preliminary injunction

issued November 13, 2024, amended on January 10, 2025. Mandate issued March 11, 2025.

U.S. Court of Appeals for the Second Circuit, Consolidated Appeal No. 22-1876, *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, order denying injunction pending appeal entered October 11, 2022.

U.S. Court of Appeals for the Second Circuit, Consolidated Appeal Nos. 21-3043 and 21-3047, *Keil* v. *City of New York*, order affirming denial or preliminary injunction entered March 3, 2022.

U.S. Court of Appeals for the Second Circuit, Consolidated Appeal Nos. 21-2678 and 21-2711, *Kane* v. *de Blasio* and *Keil* v. *City of New York*, opinion vacating order denying preliminary injunction and remanding entered November 28, 2021.

U.S. Court of Appeals for the Second Circuit, Consolidated Appeal Nos. 21-2678 and 21-2711, *Kane* v. *de Blasio* and *Keil* v. *City of New York*, order providing interim relief entered November 15, 2021.

U.S. District Court for the Southern District of New York, Consolidated Case No. 1:21-cv-7863 (VEC), *Kane* v. *de Blasio* and *Keil* v. *City of New York*, order dismissing complaint and denying preliminary injunction entered August 26, 2022.

U.S. District Court for the Southern District of New York, No. 1:21-cv-7863 (VEC), *Kane* v. *de Blasio*, order denying preliminary injunction entered October 12, 2021.

U.S. District Court for the Southern District of New York, No. 1:21-cv-08773-NRB, *Keil* v. *City of New York*, order denying preliminary injunction entered October 28, 2021.

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The Second Circuit's opinion affirming the district court's dismissal order is reported at 125 F.4th 319 and reprinted at App.1a–30a.

STATEMENT OF JURISDICTION

The Second Circuit entered judgment on November 13, 2024, and amended that judgment on January 10, 2025. Petitioners moved for rehearing, which the Second Circuit denied on February 19, 2025. Petitioners received an extension to file a petition for a writ of certiorari until July 21, 2025. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Relevant city mandates and related materials are reprinted in the Appendix at 365a–427a.

INTRODUCTION

The First Amendment prohibits the government from choosing which religious beliefs are protected. *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). It cannot prefer particular religions. *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968). And for good reason: Our Nation was founded by religious dissenters who knew such favoritism makes religious minorities "outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 309 (2000).

Petitioners are hardworking teachers and education administrators. They sacrificed to serve New York students. But City officials pushed them out of their jobs—and even out of the City—because Petitioners had the "wrong" faith. After the pandemic, Respondents issued a vaccine mandate for public-education employees. It exempted "Christian Scientists" and others affiliated with "recognized" religions that "publicly" opposed vaccination. But it refused accommodation for anyone with "personal" religious beliefs or anyone whose faith leader—like Pope Francis—had publicly endorsed the vaccine.

Forced to choose between their faith and their job, Petitioners sued and won interim relief. This relief was no reward. The court of appeals said the mandate unconstitutionally discriminated against Petitioners because of their religion, but it refused to remedy that discrimination. Instead, it ordered the City to provide "fresh consideration" of Petitioners' accommodation requests before a citywide panel using Title VII and local non-discrimination standards. These standards would require Petitioners to prove their accommodations would cause the City no undue hardship.

As a result, over 100 educators belonging to certain "recognized" faiths (like Christian Scientists and Jehovah's Witnesses) *remained* accommodated by the City—regardless of how their accommodations affected the Department of Education—while Petitioners were forced to jump through extra hoops. To make matters worse, almost every Petitioner was summarily denied again. These denials were often justified on the same grounds as before: that a Petitioner's "personal" religious beliefs, unmoored from the official teachings of an organized church, were "invalid" for an accommodation. But this time, City officials said that even if Petitioners' beliefs *did* qualify, it would be an undue hardship to accommodate them.

Petitioners filed an amended complaint to include this new discrimination, but their claims were dismissed. The Second Circuit affirmed. The court held that the accommodations scheme carried out by the citywide panel was neutral and generally applicable, so rational basis review applied. It then concluded, based on little to no reasoning, that Petitioners had alleged insufficient facts showing unconstitutional religious discrimination under this standard.

That decision forged three circuit splits. First, the Second Circuit split with the Tenth over whether strict scrutiny applies to vaccine-mandate exemptions that disfavor personal religion. *Does 1-11* v. *Regents of Univ. of Colo.*, 100 F.4th 1251, 1269–70 (10th Cir. 2024). In *Does*, the court condemned a public university for similarly giving blanket exemptions to members of denominations that opposed vaccinations (like Jehovah's Witnesses and Christian Scientists) while rejecting Catholics, Buddhists, and those who came to personal religious decisions about the vaccine.

Next, the Second Circuit split with the Third, Sixth, and Tenth Circuits over whether strict scrutiny applies to vaccine mandates that allow discretionary "individualized exemptions." *Does 1-11*, 100 F.4th at 1273; *Spivack* v. *City of Phila.*, 109 F.4th 158, 167 (3d Cir. 2024); *Dahl* v. *Board of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021) (per curiam).

Finally, the Second Circuit split in principle with the Sixth, Seventh, and Eighth Circuits over whether religious accommodation procedures that disfavor personal religion are consistent with First Amendment principles. *Lucky* v. *Landmark Med. of Mich., P.C.*, 103 F.4th 1241, 1242–44 (6th Cir. 2024); *Passarella* v. *Aspirus, Inc.*, 108 F.4th 1005, 1009–10 (7th Cir. 2024); *Ringhofer* v. *Mayo Clinic, Ambulance*, 102 F.4th 894, 901–02 (8th Cir. 2024).

In sum, the Second Circuit approved a discretionary religious-accommodation scheme that disfavors personal religion. The Constitution forbids discretionary government "actions that favor certain religions" unless they pass strict scrutiny. *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 145 S. Ct. 1583, 1590–91 (2025); see *Fulton* v. *City of Phila.*, 593 U.S. 522, 533–34 (2021). The Court should resolve this conflict before it deepens.

Review is urgently needed. People of faith should be free to work without fear of religious discrimination no matter where they live or work. The Court should grant the petition, resolve the circuit split, and reinstate Petitioners' claims. Alternatively, it should summarily reverse the decision below and restore the prior circuit consensus that faithfully applied this Court's precedents.

STATEMENT OF THE CASE

Petitioners are civil servants who dedicated their careers to educating New York children. They have worked tirelessly and endured hardship to ensure students receive the best education possible—especially through the pandemic. App.125a–129a. That ordeal brought out the best in them. One petitioner summed up their view well: "anything you need me to do, I will do it" for these students. App.185a. Nothing was easy. But hope arose in June 2021 when Governor Andrew Cuomo declared the emergency had ended. App.137a. That hope was quickly dashed. A few months later, New York City Mayor Bill de Blasio announced a sweeping mandate: *all* City employees must become vaccinated—no exceptions. App.137a–139a. Petitioners were forced to comply within a month or lose their jobs. App.139a–140a.

Mass protests and legal action ensued. App.140a. On September 1, a labor union challenged the mandate. *Ibid*. Arbitration followed, and on September 10, an order was issued requiring the Department to allow religious exemptions. App.140a–142a. As a result, the City adopted a religious-accommodation policy that facially discriminated against certain religions. While exemption requests would "be considered for … established religious organizations (e.g., Christian Scientists)," they would be automatically denied to those with "personal" beliefs opposing the vaccine and anyone whose religious leader had "spoken publicly in favor of the vaccine," like Pope Francis. App.142a. Requests were due in 10 days, but after the Department adopted this policy, officials waited until two days (or less) before the deadline to notify most employees. App.149a, 157a–158a.

This process was a disaster. Most Petitioners and thousands of their colleagues scrambled to file exemption requests. App.158a. But the electronic filing system crashed, leaving many unable to apply. *Ibid.* That mattered little because all submitted applications were immediately denied through an autogenerated email. Everyone denied an exemption—which was all applicants—had one day to appeal. App.159a. But the system crashed again. Many who tried to appeal could not. *Ibid.* Fortunate few received a 15-minute Zoom call in which they pled their case to an arbitrator but were routinely denied without explanation. *Ibid.*

Almost no Petitioner succeeded. Meanwhile, over 100 Christian Scientists and others of certain "recognized" faiths were accommodated no matter the accommodation's impact on the Department. App.118a.

Petitioners were suspended without pay starting October 4. App.160a. They had two options: (1) quit but remain eligible for health insurance for a year and receive compensation for unused vacation days, or (2) extend unpaid leave for a year, remain eligible for health insurance, and refuse employment elsewhere. App.160a–161a. Either way, Petitioners would be forced to sign a waiver disclaiming any right to challenge their termination. *Ibid.* They had until October 29 to choose the first option and until November 30 to choose the second. *Ibid.*

Instead, Petitioners sued. App.162a. And they immediately sought a preliminary injunction, claiming the mandate violated their rights under the First and Fourteenth Amendments. The district court denied relief. *Ibid.* Petitioners appealed. App.163a.

On November 28, the Second Circuit gave Petitioners interim relief, holding that Petitioners would likely succeed on their constitutional challenge. App.163a. The court held that the mandate was facially neutral and generally applicable but ruled that the accommodation policy was likely unconstitutional as applied: "Denying an individual a religious accommodation based on someone *else's* publicly expressed religious views—even the leader of her faith—runs afoul" of the First Amendment. App.98a (emphasis added). And because officials exercised "substantial discretion over whether to grant" exemptions, the mandate lacked general applicability. App.99a.

But instead of eliminating the religious discrimination and requiring equal process for Christian Scientists and Catholics, the appeals court subjected individuals with "personal" faith to more discrimination. On remand, a citywide panel was told to apply Title VII and local non-discrimination standards to those denied under the first policy. So unlike Christian Scientists who remained accommodated under the prior policy, Petitioners had to show *their* request would not cause the Department undue hardship. App.164a–165a. No matter how the citywide panel decided individual cases, those receiving "fresh review" would be treated worse than those already accommodated under the prior standard. And predictably, the panel—controlled entirely by City officials—denied nearly all Petitioners again, often for the same (or nearly the same) reasons given before. App.163a.

Take Michael Kane. He taught special education for over 14 years. App.180a. After battling addiction and depression for years, he found solace in Buddhist and Catholic teachings—deriving his religious beliefs

from personal communion with God, meditation, and prayer. App.180a–181a. He does not look to one spiritual leader. App.180a. And his faith instructs him to decline pharmaceutical intervention—a belief he credits for freeing him from addiction and despair. App.180a–181a.

Kane has declined vaccines for decades. App.181a. So after the Department's mandate, he sought a religious accommodation. *Ibid.* Officials found that Kane's religious beliefs were sincere but denied his accommodation request because the Pope—whom Kane does not follow—publicly approved the vaccine. App.181a–182a. On "fresh review," the citywide panel again denied Kane's request because it found that while Kane's religious beliefs were sincere, they came from prayer, not denominational teaching. App.182a.

Or take Margaret Chu. She lives in Brooklyn after her family immigrated to the United States while fleeing communist China. App.190a. Chu, who taught English in East Harlem public schools, is Catholic. She attended Catholic schools, completed all the sacraments, and follows the Bible. *Ibid.* Per her religious beliefs, Chu declined the COVID-19 vaccine and sought a religious accommodation to continue working. *Ibid.* Chu's parish supported her request. *Ibid.* But like Kane's, her request was denied because the Pope—whom Chu disagrees with on this issue—publicly endorsed the vaccine. App.190a–191a. On remand, the citywide panel accepted that Chu had sincere religious beliefs but denied her accommodation request because it viewed Chu's religious beliefs—which come from her "moral conscience"—as "personal" and therefore not "religious." *Ibid.*

Protestants fared no better. Stephanie DiCapua taught physical education on Staten Island. App.196a. She declined vaccination consistent with her religious beliefs, which track the official teachings of her church. *Ibid*. Though DiCapua's pastor penned a letter supporting her accommodation request, DiCapua, too, received a form denial. *Ibid*. She appealed but was denied without a hearing and suspended without pay. *Ibid*. On remand, she submitted a six-page letter and church documents detailing her (and her church's) long-held religious objection to vaccines. App.197a. The citywide panel inexplicably denied her an accommodation, saying she *politically* opposed the mandate and gave nothing beyond the "most general" basis for her request. App.197a–198a. It seems the panel "never even read her materials" which contained no reference to politics. App.198a.

Or consider Robert Gladding. He taught Manhattan students for over 17 years. App.200a. Gladding is a Christian committed to constant prayer. *Ibid*. Based on those prayers, he has declined vaccination for years. App.201a. Submitting a pastoral letter to support his belief, Gladding sought a religious accommodation. *Ibid*. His request was denied. *Ibid*. On fresh review, Gladding again detailed his conviction and said: "I have sought guidance directly from God.… He has answered me. … [I]t is a sin to get vaccinated, and I cannot do it." App.202a. But the citywide panel denied his request, saying "religious beliefs derived from prayer are not religious in nature." *Ibid*.

It was the same for Jews. Sarah Buzaglo taught in New York City for years. App.253a. She is an Orthodox Jew who prays daily, follows a strict kosher diet, and declines vaccines, consistent with her rabbi's counsel. App.254a, 257a. Buzaglo provided a half-dozen reasons that vaccination contradicts her religious beliefs. App.257a–262a. She believes Torah says human blood must not mix with animal blood, and because COVID-19 vaccines were developed using animal tissue cultures, she declines them. App.257a–258a. Buzaglo also treasures human life because it is created in God's image. App.258a. Because COVID-19 vaccines were developed using aborted human fetal cells, she declines them as that would force her to participate in "sin"—the destruction of human life. To her, that would be "blasphemous." App.258a–259a. So she requested a religious accommodation. App.262a.

Buzaglo was denied an accommodation. *Ibid.* On appeal, she said requiring a rabbinic letter to support her beliefs was unconstitutional, but she gave one regardless. It read: "[O]ur congregation categorically opposes this vaccine as a matter of religious tenet." App.263a. And though Buzaglo explained that individual Jewish communities have "differing levels of religious observance," Department counsel said that the Sephardic Chief Rabbi of Israel—whom Buzaglo does not follow—publicly supported the vaccine. App.263a–264a. So Buzaglo was denied. App.264a. On remand, the citywide panel again denied Buzaglo, saying her beliefs were "non-religious" because they arise from factual beliefs that conflict with the City's and her disagreement with the mandate. App.265a–266a. That's wrong. But regardless, that would not void Buzaglo's sincere religious beliefs.

Eli Weber taught New York City students over 20 years. App.268a. He is a Chassidic Jew, who daily prays, attends synagogue, and meticulously adheres to Jewish law, under which he must obey his rabbi's teaching. App.269a. His rabbi condemned accepting the COVID-19 vaccine, so Weber sought an accommodation, providing a letter from his rabbi saying, "It is categorically forbidden by Jewish religious law to be injected with [the COVID-19] vaccine. …" App.270a. Weber's union representative told him this letter "was the strongest he had seen." *Ibid*. It wasn't enough. Weber was denied, and he chose to sue rather than appeal because, per Department officials, the mandate did not cover "his personal religious beliefs." App.272a. Weber later reupped his request, but the citywide panel never responded. App.273a.

In addition to rejecting all "unofficial" beliefs, the City left no room for maturing faith. Ingrid Romero taught in Queens over 18 years as a first-generation American. App.206a–207a. Though she grew up religious, she did not take her faith seriously as an adult until her husband contracted cancer before the pandemic. App.208a. She then started praying over every medical decision. *Ibid*. From such guidance, Romero declined vaccination and sought an accommodation. *Ibid*. She was denied. *Ibid*. On remand, Romero was denied again because the citywide panel found she had received a flu shot many years before she had recovered her faith. *Ibid*. That past sunk her request.

Sasha Delgado, a tenured 15-year teacher, was similarly denied. App.236a. Delgado is a Christian. App.237a. She regularly prays, fasts, attends church, and reads the Bible. *Ibid*. Delgado believes all human life is precious. App.238a. She also believes her body

is God's temple, so she avoids alcohol and pork as well as unnatural beauty products. *Ibid*. Per her beliefs, she declines COVID-19 vaccines because they were developed using human fetal cells and would pollute her body. App.238a–239a. Delgado sought a religious accommodation to continue working but was denied. App.239a, 242a. On remand, she was denied again. The citywide panel acknowledged that Delgado declines anything she knows has been developed using objectionable matter. But the panel found that because she—like many Americans—researched vaccines more scrupulously than other things, her belief was not "valid" for accommodation. App.242a–243a.

Others had "valid" religious beliefs but were still not accommodated. Take Matthew Keil, who served the Department over 20 years. App.220a. Keil is ordained in the Russian Orthodox Church. App.221a. While visiting a local monastery, he talked to monks who said their spiritual leader condemned vaccination. App.222a–224a. This caused Keil to study the issue himself, after which he concluded that God forbids taking vaccines developed using animal or aborted fetal cells. *Ibid*. After learning COVID-19 vaccines were so developed, Keil sought an accommodation. App.225a. He was denied. *Ibid*. On appeal, the Department asked whether Keil knew Tylenol and Advil were developed like COVID-19 vaccines. App.226a. Keil did not but said he had studied and declined other medicines because of his religious belief. App.226a–227a. No dice. App.227a. The citywide panel denied Keil, but unlike for Delgado, it assumed that Keil had "valid" beliefs—the panel invoked undue hardship instead. App.228a–229a.

That variability highlights another constitutional basis for applying strict scrutiny. The panel exercised substantial and unchecked discretion. The panel's architect admitted decisions were truly "individualized" and constrained by *no* objective criteria. App.165a; ROA-A432, A435-36, A452, A455, A466, A474. Classroom teachers like Petitioner Keil were denied accommodations for "undue hardship" presumably because they would be near students. App.228a–229a. But other Petitioners *who worked remotely* were also denied for "undue hardship." App.281a–282a.

Consider Petitioner Amoura Bryan. She worked remotely and personally interacted with no one. App.282a. She sought a religious accommodation to continue working but was denied for "undue hardship." App.281a. On appeal, she gave a letter from her principal saying she could continue working remotely without issue. App.286a. But to Bryan's surprise, she was denied again. The citywide panel followed suit, alleging "undue hardship." Such inconsistency shows that the Department used its discretion to claim "undue hardship" as a pretext for discrimination.

The other Petitioners' stories mirror those above. App.203a–206a; 209a–213a; 216a–220a; 230a–236a; 245a–253a; 273a–280a; 288a–298a. All were denied an accommodation save one, and even he suffered harm from Respondents' unconstitutional actions. Petitioner William Castro is a public-school administrator who personally interacts with students. App.182a–183a. He is a Christian who believes all life is precious. Following this conviction, Castro declines COVID-19 vaccines because they were developed using aborted fetal cells. App.186a–187a. He was denied a religious accommodation. App.186a.

On appeal, Castro was denied again because the Pope—whom he does not follow—publicly supported the vaccine. App.186a–187a. Castro was later restored to his job—likely to boost the City's litigation position. App.160a, 187a. But by then, his health had declined. App.187a–188a. He could not sleep because of financial concerns, App.188a; he took out a loan to make ends meet, *ibid.*; and he was unable to adjust his health plan—forcing his pregnant wife to travel alone for care because New York barred unvaccinated people from joining family medical visits. *Ibid.*

The harm was more devastating for those who lost their jobs. DiCapua has suffered debilitating stress, fear, and hopelessness. App.198a. All she wanted was to become a teacher. *Ibid.* Lacking outside help, she took out a loan to attend school and accumulated $50,000 in debt. App.199a. Until losing her job, DiCapua was on track to secure loan forgiveness through an income-based repayment plan. *Ibid.* Now she does not qualify. *Ibid.* She had planned her wedding and hoped to start a family, but losing her job nixed that plan; she could no longer afford it. *Ibid.*

Petitioner Trinidad Smith is a single mother. App.212a. Before losing her job, she achieved her dream of buying a home. *Ibid.* Now she cannot afford Christmas presents, much less to pay the mortgage. *Ibid.* Each Petitioner has suffered tremendous loss.

As the harm grew, Petitioners filed an amended complaint and sought preliminary relief, claiming the citywide panel continued to violate their constitutional rights. The City moved to dismiss. The district court denied Petitioners relief and dismissed their complaint. App.31a. Petitioners appealed and the

Second Circuit ordered an "expedited" oral argument. Two days before that argument, the City declared it was rescinding the mandate, then claimed the appeal was moot. App.13a. Petitioners waited for relief.

Almost *two years* later, the Second Circuit issued its opinion denying Petitioners' request for injunctive relief as moot and affirming the dismissal below. App.4a–30a. It held that the Department's mandate was facially neutral and generally applicable, so rational basis—not strict scrutiny—applied. App.17a–27a. It further held that Petitioners failed to plausibly allege religious discrimination by the citywide panel, despite the complaint's detailed descriptions of the disparate treatment that penalized Petitioners who arrived at their personal beliefs through devoted prayer or belonged to a denomination with a leader who had publicly supported the vaccine.

Petitioners sought rehearing at the Second Circuit, but that request was denied. Now they request this Court' review.

As things stand, Catholics in Denver and Jews in Newark may serve their communities as public educators without one day having to choose between their faiths and their jobs. But coreligionists in New York may not. Only this Court can fix that. It should grant this petition and resolve the circuit conflicts. Alternatively, this Court should summarily reverse to restore a nationwide consensus. Countless people of faith need this Court to protect their rights.

REASONS FOR GRANTING THE WRIT

The ruling below broke a unanimous circuit consensus holding that strict scrutiny applies to discretionary accommodation schemes, particularly those whose application turns on whether individuals follow organized or independent religion and whether their personal religious beliefs differ from the beliefs of their leaders. *Does 1-11*, 100 F.4th at 1269–73; *Spivack*, 109 F.4th at 167; *Dahl*, 15 F.4th at 733. The Second Circuit alone accepts accommodation rules that disfavor personal religion. The Court should grant this petition and reverse on plenary review.

Alternatively, this Court should summarily reverse. *E.g. American Tradition P'ship, Inc.* v. *Bullock*, 567 U.S. 516, 516 (2012) (per curiam) (summarily reversing lower-court ruling contradicting precedent). Last Term, this Court reaffirmed that the First Amendment forbids government "actions that favor certain religions." *Catholic Charities*, 145 S. Ct. at 1591. When government treats one religious belief worse than another, that is "textbook" religious "discrimination." *Ibid*. Here, the Department's religious-accommodation scheme burdened personal religious beliefs more than "official" religious beliefs. And it did so while allowing individualized exemptions. So strict scrutiny applies. *Ibid*.; *Fulton*, 593 U.S. at 534.

Either through plenary review or summary reversal, this Court should restore the nationwide consensus affirming that discretionary religious-accommodation rules cannot discriminate against personal religious beliefs without passing strict scrutiny. This case is an ideal vehicle to provide that relief.

I. The Second Circuit's decision created multiple circuit splits over the protection and scrutiny that the First Amendment requires.

The decision below created multiple circuit splits, dissolving a consensus over whether a discretionary religious-accommodation scheme triggers strict scrutiny when it discriminates against personal religion, making denominational preferences.

A. The Second Circuit's decision forged a circuit split over whether strict scrutiny applies to a religious-accommodation rule that disfavors personal religion.

The decision below broke with the Tenth Circuit on whether strict scrutiny applies to public vaccine mandates that allow religious accommodations but impose a more difficult burden for accommodating so-called personal religion. The Tenth Circuit says it does. *Does 1-11*, 100 F.4th at 1269–72. But the Second Circuit held that the City's religious-accommodation scheme favoring "established" religion was neutral and generally applicable and triggered only rational-basis review as applied to Petitioners. *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, 125 F.4th 319, 330–35 (2d Cir. 2024) (per curiam). (This action was consolidated with *New Yorkers for Religious Liberty* below. But because *New Yorkers* was not a final judgment of dismissal, the plaintiffs in this action alone seek this Court's review.) The Second Circuit's ruling accepts that government may discriminate against beliefs not recognized or "shared by all" members of similar faith. *Holt* v. *Hobbs*, 574 U.S. 352, 362 (2015) (quoting *Thomas* v. *Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 715–16 (1981)).

The Tenth Circuit is right. It condemned a religious-accommodation scheme indistinguishable from the Department's here. A public school in Colorado adopted a materially identical policy denying religious accommodations based on beliefs inconsistent with "the official doctrine of an organized religion … as announced by the leaders of that religion." *Does 1-11*, 100 F.4th at 1257. "An applicant whose religious beliefs departed from the 'official doctrine' of their religion [did] not qualify." *Id.* at 1269. "An applicant who did not adhere to 'an organized religion' [did] not qualify." *Ibid.* "An applicant whose 'religion' did not have official 'leaders' [did] not qualify." *Ibid.* And an "applicant whose religious 'leaders' did not publicly 'announce[ ]' the religion's 'official doctrine' with respect to vaccines [did] not qualify." *Ibid.* In short, the school held that personal "religious beliefs" had no protection. *Ibid.*

Like here, the rule allowed "Christian Scientists" to be accommodated, but Buddhists, Catholics, and others following personal "religious practices" were ineligible. *Id.* at 1269–70. The latter individuals were denied because officials deemed their beliefs "insufficiently organized, … official, or … comprehensive." *Ibid.* (citation modified). That's the same line Respondents used to deny Petitioners here.

The Tenth Circuit rejected that line. *Id.* at 1272. It said that the school's rule triggers strict scrutiny because it "presupposes the illegitimacy of [personal] religious beliefs." *Id.* at 1269. And because officials had insufficient reason to favor "organized religion," the Tenth Circuit held this rule "plainly unconstitutional" under both Religion Clauses. *Id.* at 1269–72 (citation modified).

Just like here, the Colorado school then offered a mid-litigation remedial review to those denied under the original facially discriminatory policy, resulting in an affirmation of denial, this time ed on undue hardship. The Tenth Circuit rejected this workaround, holding that the remedial policy was plausibly applied "to reach precisely the same results" as the prior rule favoring organized religion. *Id*. at 1276. When reevaluating accommodation requests under the new rule, the school "conducted the same sort of inquiry it had under the" old rule. *Id*. at 1276. It determined whether an accommodation request was "based on a sincerely-held religious beliefs" or "beliefs the [school] deemed 'personal' in nature." *Ibid*. And to no surprise, the school—*almost exactly like the City here*—"reached precisely the same results as it had" under its first discriminatory rule. *Ibid*. The Tenth Circuit said it is "unreasonable to think" this rerun aired by "accident." *Id*. at 1277.

The Tenth Circuit alternatively applied strict scrutiny based on lack of general applicability because the school's undue-burden rule imposed a heavier burden on people of faith generally. It required applicants seeking a medical exemption only to show that their requested accommodation did not pose "a direct threat to the health or safety of others." *Ibid*. But it required applicants seeking a religious exemption to prove their requested accommodation did not "unduly burden[ ] the health and safety of other individuals." *Ibid*. This imposed "a lower threshold for denying religious exemptions," favoring "secular motivations" over "religious motivations." *Id*. at 1277–78 (citation modified).

Similarly here, the City's mandate provided a lower threshold for denying accommodations to applicants with personal religious beliefs, favoring organized-religious motivations over personal ones. But unlike the Tenth Circuit, the Second held that such a scheme is generally applicable and neutral and failed to apply strict scrutiny. *Id.* at 1278. This case mirrors *Does*, but the Second Circuit ruled incorrectly. That forged a clear circuit split. In Denver, Petitioners would have kept their job and pursued their claims. *Id*. at 1281. But not in New York.

B. The Second Circuit's decision forged a 3-1 circuit split over whether strict scrutiny applies to religious-accommodation procedures that give officials broad discretion to make individualized decisions.

The decision below also upset a circuit consensus over whether strict scrutiny applies to religious-accommodation procedures that give officials broad discretion to make individualized exceptions. The Third, Sixth, and Tenth Circuits hold that procedures allowing discretion to grant individualized exemptions trigger strict scrutiny. *Does 1-11*, 100 F.4th at 1273; *Spivack*, 109 F.4th at 167, *Dahl*, 15 F.4th at 733. The Second Circuit now disagrees.

In Petitioners' interlocutory appeal, the Second Circuit rejected under strict scrutiny the Department's original mandate as applied to Petitioners for lack of general applicability. App.98a–99a. Petitioners had "offered evidence that the arbitrators reviewing their requests for religious accommodations had substantial discretion over whether to grant those requests," *ibid*., requiring fresh review, App.163a.

But without explanation, the Second Circuit used rational-basis analysis for the merits review, even though City officials exercised limitless discretion in the remedial reviews. The citywide panel—by its architect's admission—made "individualized" decisions based on *no* objective criteria. App.165a; ROA-A432, A435-36, A452, A455, A466, A474.

The results support this admission. Consider the diverse ways that the panel treated the same religious belief. Petitioner Delgado believes human life is sacred, and that her body is God's temple. App.238a. So she declines vaccines developed using human fetal cells and that would pollute her body. *Ibid*. Delgado sought a religious accommodation but was denied. App.239a, 242a. The panel acknowledged that Delgado declines *anything* she knows has been made using an objectionable substance. But the citywide panel found that because she researched vaccines more carefully than other items, her religious belief was not "valid" for accommodation. App.243a. In contrast, the panel accepted that Petitioner Keil's nearly identical religious belief was "valid" even though he also studied vaccines more closely than other items. App.220a–229a. These are not "conclusory allegations," App.25a, but well-pled facts showing the citywide panel's unfettered discretion.

Yet the Second Circuit refused to subject the Department's religious-accommodation scheme to strict scrutiny. That Circuit now stands alone. In contrast, the Tenth Circuit held that a similar procedure triggered strict scrutiny because it determined accommodations "on a case-by-case basis." *Does 1-11*, 100 F.4th at 1273. Officials "did not ask *whether* an applicant had a sincerely held religious belief prohibiting her

from receiving the COVID-19 vaccine." *Ibid*. Instead, they "asked *why* the applicant held" her belief. *Ibid*. Officials judged the "reasons" for the applicant's religious beliefs and provided "'individualized exemptions' to applicants whose religious beliefs" they liked. *Ibid*. That triggered "strict scrutiny," *ibid*. (citation modified), in conflict with the decision here.

Similarly, the Third Circuit subjected to strict scrutiny a religious-accommodation procedure that exempted "employees with verifiable, sincerely held religious" objections because accommodation requests were "evaluated on a case-by-case basis" using "individualized" discretion. *Spivack*, 109 F.4th at 162 (citation modified). That procedure, indistinguishable from the one the citywide panel used to deny Petitioners here, allowed officials to pick and choose whose religious beliefs deserved relief from an employer's vaccine rule. *Id*. at 172 (citing *Kane* v. *De Blasio*, 19 F.4th 152, 169 (2d Cir. 2021)); App.165a; ROA-A432, A435-36, A452, A455, A466, A474. Officials could "unilaterally" determine the validity and worth of an applicant's religious belief. *Spivack*, 109 F.4th at 172 n.8 (citing *Does 1-11*, 100 F.4th at 1273). So "strict scrutiny" applied. *Id*. at 172.

Finally, the Sixth Circuit also subjected to strict scrutiny a religious-accommodation procedure that exempted student-athletes on "an individual basis" from their school's vaccine mandate. *Dahl*, 15 F.4th at 730; see *id*. at 733. The mandate said "'all student-athletes' must provide proof of at least one dose of a COVID-19 vaccine 'to maintain full involvement in the athletic department.'" *Ibid*. But then it said "religious exemptions" would be "considered on an individual basis." *Ibid*.

Applying *Fulton*, the Sixth Circuit held that because the mandate allowed a "mechanism for individualized exemptions," it was not "generally applicable" no matter how applied, triggering strict scrutiny. *Id.* at 733–34 (quoting *Fulton*, 593 U.S. at 533).

In sum, the Second Circuit's decision below split the circuits over whether strict scrutiny applies to religious-accommodation procedures that give officials broad discretion to issue accommodations on a case-by-case basis. The Third, Sixth, and Tenth Circuits have it right. Review is warranted.

C. The Second Circuit's decision forged a 3-1 circuit conflict in principle over whether Title VII allows an employer to disfavor personal religion.

The decision below also conflicts in principle with another circuit consensus. Three Circuits—the Sixth, Seventh, and Eighth—hold that Title VII prohibits religious-accommodation schemes that discriminate against personal religion. *Lucky*, 103 F.4th at 1242–44; *Passarella*, 108 F.4th at 1009–10; *Ringhofer*, 102 F.4th at 901–02. The Second Circuit ruling undermines that logic, destabilizing protection for religious workers nationwide. This is an important conflict "in principle," warranting review. Stephen M. Shapiro et al., *Supreme Court Practice* § 6-31 (11th ed. 2019).

The Second Circuit held that the fresh consideration fixed the original constitutional problem by applying Title VII standards—even though the court acknowledged that City officials continued to reject personally held religious beliefs in the remedial review. No other circuit allows that discrimination.

Start with the Eighth Circuit, which reinstated a complaint challenging a religious-accommodation procedure that rejected personal religion as applied. In *Ringhofer*, plaintiffs declined the COVID-19 vaccine because they believed it was developed using human fetal cells; taking the vaccine would violate their religious beliefs that human life is precious and their bodies are God's temple. 102 F.4th at 898, 901. The plaintiffs sought an accommodation but were denied. *Ibid*. They sued under Title VII—invoking the same rule the citywide panel was told to apply to Petitioners here. *Ibid*.; App.163a. The district court dismissed, calling the plaintiffs' beliefs secular because "many Christians" don't share them. 102 F.4th at 901.

The Eighth Circuit reversed and reinstated the plaintiffs' claim. The "district court erred" by rejecting plaintiffs' beliefs—affirming that the First Amendment protects from discrimination both official *and* personal religious beliefs. *Id*. at 901–902 (quoting *Holt*, 574 U.S. at 362; *Thomas*, 450 U.S. at 716). The court expressly credited the following allegations:

- Plaintiff 1's "religious beliefs prevent her from putting into her body the Covid-19 vaccines ... because they were all produced with or tested with cells from aborted human babies. Receiving the vaccine would make her a participant in the abortion that killed the unborn baby." *Id*. at 901.
- Plaintiff 2's request for a "religious exemption was based on opposition to the use of vaccines produced with or tested by aborted baby cells. [She] believes in the

sanctity of life from conception until natural death. She lives her life according to her sincerely held religious beliefs. ... She is Christian and has determined she cannot, consistent with her conscience, take the Covid-19 vaccine, and to do so would make her complicit in the killing of the unborn babies from whom the cells used in the vaccines came." *Ibid*.

- Plaintiff 3 believes "his body is a Temple to the Holy Spirit and is strongly against abortion. [He] believes the Vaccine Mandate violates his religious beliefs ... because the [Covid-19] vaccines were produced with or tested with fetal cell lines. [He] ... [believes] that 'Using the fetal cells in the development of it, knowing about it, is against [his] religion.'" *Ibid*.
- Plaintiff 4 says "the Holy Spirit dwells in her and she believes her body is a temple for the Holy Spirit that she is duty bound to honor. She does not believe in putting unnecessary vaccines … into her body, or going to the doctor or allowing testing of her body when it is not necessary. Accordingly, it violates her conscience to take the vaccine or to engage in weekly testing or sign a release of information that gives out her medical information." *Id*. at 902.
- Plaintiff 5 says: "My faith is in my Creator who is my Healer (Ex 15:26). Faith is belief combined with action (Jam 2:17). Shifting my faith from my Creator to

> medicine is the equivalent of committing idolatry-holding medicine in greater esteem [than] Elohim (Col 3:5). I believe it is legitimate to utilize modern medicine for life-saving purposes; however, there is a fine line between using it and abusing it.... Excessive procedures, vanity surgeries, and redundant intrusive testing of healthy, asymptomatic humans is irresponsible and crosses the line violating my conscience ...." *Ibid.*

In conflict with the Second Circuit here, the Eighth Circuit affirmed that religious beliefs need not "be uniform across all members of a religion or 'acceptable, logical, consistent, or comprehensible'" to warrant constitutional protection. *Ibid.* (quoting *Thomas*, 450 U.S. at 714). It accepted the allegations above—materially identical to Petitioners' here—as "adequately pled" to establish religious belief. *Ibid.*

The Seventh Circuit likewise reinstated a complaint alleging that a religious-accommodation procedure disfavored personal religion in its application. In *Passarella*, a hospital fired two medical professionals who declined COVID-19 vaccines for religious reasons. The hospital issued a mandate requiring all employees to become vaccinated or lose their job. 108 F.4th at 1007. One plaintiff declined because she believes her body "is [the Lord's] dwelling place," and that "[a]fter prayerful consideration, [she did not] feel at peace about receiving the … vaccine." *Ibid.* The plaintiff added that she believes the vaccine is dangerous and "may be toxic to [her] body." *Id.* at 1008.

Her co-plaintiff similarly declined because she believes her "body is a temple of the Holy Spirit," and after "pray[ing] about" the treatment, she could not in good conscience receive it. *Ibid*. This plaintiff also said she did not trust the vaccine because it "was developed too quickly." *Ibid*. Both were fired.

These plaintiffs sued under Title VII. The district court dismissed because in its view, neither plaintiff "articulate[d] any religious belief that would prevent [them] from taking the vaccine if [they] believed it was safe." *Ibid*. They objected to the "mandate as a matter of medical judgment rather than religious conviction." *Ibid*. The court said "that 'the use of religious vocabulary does not elevate a personal medical judgment to a matter of protected religion.'" *Ibid*.

The Seventh Circuit reversed and reinstated the complaint. The court corrected two errors. First, unlike the district court, it accepted that the plaintiffs connected their "objection … with [their] Christian beliefs [about] the sanctity of the human body." *Id*. at 1009. It did not matter that the plaintiffs objected "on both religious and non-religious grounds." *Ibid*. Whether a religious-accommodation request invokes both religious and "secular considerations does not negate its religious nature." *Id*. at 1010. Otherwise, courts would "inevitably" be forced to distinguish requests based "'primarily' or 'mostly' or 'minimally' or 'tangentially' … on religion"—a practice fraught with First Amendment "peril." *Ibid*.; cf. *Welsh* v. *United States*, 398 U.S. 333, 342 (1970) (recognizing as protected religious beliefs objections "based [even] in part" on religion).

Second, the court warned against rejecting personal religion. Religious-accommodation requests are drafted by non-lawyers. Courts must not "dissect religious beliefs … because [they] are not articulated with the clarity and precision that a more sophisticated person" or institution "might employ." *Passarella*, 108 F.4th at 1011 (citation omitted); see *id.* at 1010. And they must not favor one religious view over another. Under the Free Exercise Clause, courts must not inquire—much less decide—whether plaintiffs or their fellow believers have the upper hand on "scriptural interpretation." *Id.* at 1010 (quoting *Thomas*, 450 U.S. at 716); see *ibid.* (citing *Frazee* v. *Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989) (the orthodoxy of a claimant's belief is constitutionally "irrelevant")).

In conflict with the Second Circuit here, the Seventh Circuit held that while a religious-accommodation procedure may consider the "sincerity" of a claimant's beliefs, it cannot judge "orthodoxy." *Passarella*, 108 F.4th at 1012 (citation modified); see *id.* at 1010–11. The court accepted that the plaintiffs plausibly alleged that at least some aspect of their accommodation request—like those Petitioners submitted here—was based on their religious beliefs. *Id.* at 1009. It correctly reinstated their complaint. *Id.* at 1012.

Turn finally to the Sixth Circuit, which also reinstated a complaint challenging a religious-accommodation procedure that discriminated against personal religion as applied. In *Lucky*, a medical group refused to hire a Christian plaintiff who declined the COVID-19 vaccine because she sees her body as God's "temple" and believes, through guidance from prayer, that receiving the vaccine would cause her "spiritual harm." 103 F.4th at 1242.

In her employment interview, the employer "spoke positively" about the plaintiff's potential and even discussed with her the job's "starting salary;" but after the plaintiff revealed that she declined vaccination for religious reasons, the employer ended the interview, saying it "would not make any accommodations in that regard." *Ibid.*

The plaintiff sued under Title VII. The district court dismissed her complaint, saying she "had not alleged that 'her religion has a specific tenet or principle that does not permit her to be vaccinated.'" *Id.* at 1243 (quoting district court). Mirroring the Second Circuit here, the district court said the plaintiff alleged insufficient facts. *Ibid.* The Sixth Circuit reversed and reinstated the complaint. The following allegations were sufficient to show religious motivation:

- Plaintiff is "a non-denominational Christian" who believes she "should not have any vaccination enter her body such that her body would be defiled, because her body is a temple."
- Plaintiff "seeks to make all decisions, especially those regarding vaccination and other medical decisions, through prayer."
- "God spoke to [Plaintiff] in her prayers and [told] her that it would be wrong to receive the COVID-19 vaccine."
- And Plaintiff declined to receive the vaccine because of these beliefs.

Ibid. The court said those "allegations of particular facts—she prayed, she received an answer, she acted accordingly"—suffice. *Ibid.* The district court should

not have required the plaintiff to identify "a specific tenet or principle that does not permit her to be vaccinated." *Ibid*. Courts may not judge the "validity" or "plausibility of a religious claim," nor "question the centrality of particular beliefs or practices to [a person's] faith." *Id*. at 1243–44 (quoting *Hernandez* v. *Commissioner of Internal Revenue*, 490 U.S. 680, 699 (1989) and *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990)). Since the district court "presumed such authority," the Sixth Circuit reversed. *Id*. at 1244.

Here, the record shows the citywide panel continuously made all these same errors, for example, rejecting Smith, Buzaglo, and others because their abortion related concerns were allegedly too idiosyncratic or "wrong", rejecting Kane, Chu, Gladding and others because their guidance from prayer was too "personal," and rejecting Delgado, DiCapua and others for allegedly having political or scientific concerns as well as religious. With evidence of these systematic discriminatory reasons offered as a but for cause of most of the citywide panel denials, the Second Circuit should have reinstated Petitioners' complaint here, too. If Petitioners worked in Detroit, Duluth, or Dane County, they would have kept their job and pursued their claims. But Petitioners worked in New York. Such geographical difference should not dictate religious-liberty rights.

II. The Second Circuit's decision conflicts with this Court's First Amendment precedents.

Just last Term, the Court reaffirmed that the First Amendment forbids government "actions that favor certain religions." *Catholic Charities*, 145 S. Ct. at 1591. When the government disfavors certain religious beliefs, that is "textbook" religious "discrimination," and "strict scrutiny" applies. *Ibid.* The Second Circuit's decision conflicts with that principle by approving without heightened scrutiny a religious-accommodation scheme that disfavored personal religion.

First, the Department's religious-accommodation rule discriminated against personal religion. While accommodation requests would "be considered for … established religious organizations (e.g., Christian Scientists)," they would be denied to those with "personal" beliefs and anyone whose religious leader had "spoken publicly in favor of the vaccine." App.142a. This rule established "a preference for [organized] religions based on [their] … religious doctrine." *Catholic Charities*, 145 S. Ct. at 1591. Those with personal religious beliefs—including those whose beliefs differ from their spiritual leader—would be denied an accommodation, while Christian Scientists and others whose denominational leadership did not publicly support the vaccine were approved. "Such official differentiation on theological lines is fundamentally foreign to our constitutional order." *Ibid.*

That rule's real-world effects confirmed this discrimination. Officials routinely denied Petitioners' accommodation requests because they rejected Petitioners' personal religious beliefs.

Take Petitioner Kane. His religious beliefs come from a mixture of Buddhist and Catholic teachings—derived ultimately from personal communion with God. App.180a. He does not have one spiritual leader. *Ibid*. Yet officials denied his accommodation request because the Pope—*whom Kane does not follow*—publicly approved the vaccine. App.181a–182a. The beliefs of other Petitioners were similarly rejected. See pp. 7–14. Rejecting those requests while accepting those from individuals whose beliefs are officially endorsed is "paradigmatic" religious "discrimination." *Catholic Charities*, 145 S. Ct. at 1591.

The Second Circuit's interim relief made the situation worse. The court identified two problems with the Department's mandate. First, "[d]enying an individual a religious accommodation based on someone else's publicly expressed religious views—even the leader of her faith—runs afoul" of the First Amendment. App.98a. That's undeniably correct. Second, because New York officials exercised "substantial discretion over whether to grant" exemptions, the mandate lacked general application. App.99a. Again, that was exactly right. So the court vacated the ruling below. But instead of demanding equal treatment, the court of appeals remanded the case for "fresh consideration of [Petitioners'] requests for a religious" exemption before a "citywide panel." App.163a. It instructed this panel to apply Title VII and local nondiscrimination standards in their review. App.163a.

That might be acceptable if applied to everyone. But the court of appeals dictated a two-track accommodation scheme. Christian Scientists and others of "recognized" faiths were accommodated without having to overcome an undue-burden bar. But Petitioners

had to prove they cleared that hurdle. App.164a–165a. No matter how the citywide panel decided individual cases, Petitioners and others receiving "fresh review" faced more scrutiny and were treated worse than individuals accommodated under the original standard. Under this two-track scheme, religious accommodations were not "available on an equal basis" to all Department employees. *Catholic Charities*, 145 S. Ct. at 1593. And predictably, the citywide panel—controlled by City officials—subjected Petitioners to even more religious discrimination. App.163a.

On fresh review, that panel routinely denied religious-accommodation requests because it found that Petitioners' religious beliefs were underinformed, App.266a, overinformed, App.243a, derived from prayer, App.182a, 202a, or inconsistent with decisions Petitioners made before coming to faith. App.208a. And for nearly all Petitioners whose beliefs the panel considered "valid," the panel denied an accommodation because it would supposedly cause the Department "undue hardship." App.228a–229a, 281a. None of these reasons disqualified employees adhering to "recognized" religions. App.142a. Like the original mandate, the citywide panel discriminated against Petitioners' personal religion as applied. Because religious accommodations were not equally available to all Department employees, strict scrutiny applies. *Catholic Charities*, 145 S. Ct. at 1593.

Equally problematic is the Department's religious-accommodation scheme allowing officials broad discretion to grant individualized exemptions, which officials used to discriminate against Petitioners. On fresh review, the panel—by its architect's own admission—issued "individualized" exemptions based on no

objective criteria. App.165a; ROA-A432, A435-36, A452, A455, A466, A474; see § I.B. This Court has held that a city mandate "is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 593 U.S. at 533 (citation modified). That too triggers strict scrutiny. *Ibid.*; accord *Smith*, 494 U.S. at 884.

In sum, the decision below cuts against this Court's First Amendment precedents. Rather than hold that Petitioners' complaint plausibly alleged unconstitutional religious discrimination, consistent with the consensus of other circuits, the Second Circuit dismissed Petitioners' complaint and affirmed "textbook" religious "discrimination" without applying strict scrutiny. *Catholic Charities*, 145 S. Ct. at 1591. That warrants this Court's immediate review.

Alternatively, because the Second Circuit's decision plainly violates this Court's precedents, the Court should summarily reverse and restore the prior consensus. A GVR in light of *Catholic Charities* is insufficient; Petitioners have suffered enormous harm and can't afford to wait another two years, as they did between the "expedited" oral argument below and the Second Circuit panel's decision. Immediate action is needed to reaffirm key First Amendment protection. As shown below, countless people of faith in the Second Circuit risk suffering harm if the Court waits.

III. The Second Circuit's decision has devastating and far-reaching consequences.

The decision below opens the door to rampant religious discrimination in employment. Because the Second Circuit told the citywide panel to apply Title VII, then blessed its discrimination against personal religion, public employers will be emboldened to discriminate against religions they disfavor when deciding accommodation requests. That risk is "beyond … academic" because courts use First Amendment precedents to ensure Title VII is properly applied. *Rice* v. *Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); § I.C.

Imagine a city bus line that operates seven days a week. It adopts a rule requiring employees to work on weekends. But the city has a religious-accommodation policy that exempts from this rule "Seventh-day Adventists" and others of "recognized" religions whose leader has publicly called for a weekend day of rest. At the same time, the policy requires others to prove to the city's satisfaction that their religious belief is valid and causes the city no undue hardship. A denial under that policy triggers strict scrutiny. See *Fulton*, 593 U.S. at 533. But in the Second Circuit, a Protestant could assert that she cannot work on Sunday based on a belief formed by prayer, be denied an accommodation because her denominational leadership says Sunday work is o.k., sue for religious discrimination, and be dismissed under rational-basis review. Cf. *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (applying strict scrutiny in a similar situation).

That's the essence of what happened to Petitioners. Most lost a job. Some lost more. They lost health, sleep, and companionship. App.187a–188a. They were deprived of a wedding and a chance to cancel debt. App.198a–199a. They could not afford Christmas, much less pay the mortgage. App.212a. Each Petitioner has suffered stunning loss with no remedy.

The decision below risks expanding this loss to others. Some ten million people live and work in the Second Circuit. U.S. Bureau of Labor Statistics, *Graphics for Economic News Releases* (May 2025), http://bit.ly/4eE1rPs. Many are people of faith whose religious exercise may be chilled or punished if the decision below stands. See John L. Carbonari, *Why Courts Should Recognize Constitutional Chilling Under the Free Exercise Clause*, 61 Hous. L. Rev. 181, 185 (2023).

Northeast workers should fear no more than others that they will lose their jobs because they follow the "wrong" religion. Immediate review is warranted.

IV. This case is an ideal vehicle to resolve the circuit conflicts and provide critical clarity for First Amendment freedoms.

This case cleanly presents for resolution whether a discretionary religious-accommodation scheme triggers strict scrutiny when it discriminates against personal religion. There are no disputes of material fact. The record is confined to the complaint and decisions below. The constitutional issue is unavoidable. And the Second Circuit's conclusions broke a unanimous consensus of multiple circuits. No additional percolation is needed.

Finally, Petitioners seek no future relief, only past loss, so the case will not become moot. It is a clean vehicle worthy of the Court's review.

In sum, this case presents a critically important question. Religious workers should be free to work without fear of unjust discrimination because the government disapproves of their personal faith. Those who work in New York should have no less constitutional protection than coreligionists working across state lines. The ruling below is wrong, and this Court should realign the circuits with its precedents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB P. WARNER
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

BARRY BLACK
NELSON MADDEN BLACK LLP
475 Park Avenue South
Suite 2800
New York, NY 10016

JULY 2025

JAMES A. CAMPBELL
JOHN J. BURSCH
Counsel of Record
CAROLINE C. LINDSAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@ADFlegal.org

SUJATA S. GIBSON
GIBSON LAW FIRM PLLC
120 E. Buffalo Street
Suite 2
Ithaca, NY 14850

APPENDIX

APPENDIX TABLE OF CONTENTS

22-1801-cv(L)
New Yorkers for Religious Liberty v. City of New York

In the
United States Court of Appeals
For the Second Circuit

August Term 2022
Argued: February 8, 2023
Decided: November 13, 2024
Amended: January 10, 2025

Nos. 22-1801, 22-1876

NEW YORKERS FOR RELIGIOUS LIBERTY, INC., GENNARO AGOVINO, CURTIS CUTLER, LIZ DELGADO, JANINE DEMARTINI, BRENDAN FOGARTY, SABINA KOLENOVIC, KRISTA ODEA, DEAN PAOLILLO, DENNIS PILLET, MATTHEW RIVERA, LAURA SATIRA, FRANK SCHIMENTI, JAMES SCHMITT, MICHAEL KANE, individually, and for all others similarly situated, WILLIAM CASTRO, individually, and for all others similarly situated, MARGARET CHU, individually, and for all others similarly situated, HEATHER CLARK, individually, and for all others similarly situated, STEPHANIE DI CAPUA, individually, and for all others similarly situated, ROBERT GLADDING, individually, and for all others similarly situated, NWAKAEGO NWAIFEJOKWU, individually, and for all others similarly situated, INGRID ROMERO, individually, and for all others similarly situated, TRINIDAD SMITH, individually, and for all others similarly situated, AMARYLLIS RUIZ-TORO, individually, and for all

others similarly situated, NATASHA SOLON, individually, and for all others similarly situated,

Plaintiffs-Appellants,

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, BENEDICT LOPARRINO, JOAN GIAMMARINO, AMOURA BRYAN, EDWARD WEBER, CAROLYN GRIMANDO,

Consolidated Plaintiffs-Appellants,

V.

CITY OF NEW YORK, ERIC ADAMS, ASHWIN VASAN, in his official capacity as Health Commissioner of the City of New York, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees,[*]

ROBERTA REARDON,

Defendant.

Appeal from the United States District Court
for the Eastern District of New York
No. 22-cv-752, Diane Gujarati, *Judge*.

Appeal from the United States District Court
for the Southern District of New York
No. 21-cv-7863, Naomi R. Buchwald, *Judge*.

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[*] The Clerk of Court is respectfully directed to amend the official case caption accordingly.

Before: JACOBS, LEE, AND PÉREZ, *Circuit Judges*.

In August 2021, after almost a year and a half of rapid spread of COVID-19, New York City's Department of Education prepared to reopen its educational facilities following the Food and Drug Administration's full approval of a COVID-19 vaccine. The City's Commissioner of Health and Mental Hygiene then instituted a requirement that all Department of Education staff and other City employees and contractors working in person in school settings get vaccinated for COVID-19. In the months and years since, the City—at times following legal challenges requiring our intervention—updated and revamped its mandate policy and religious exemption process. The two cases in this appeal present yet another test of the constitutionality of the City's approach.

Appellants are New York City public sector employees challenging, both facially and as applied, New York City's COVID-19 vaccination mandates, as amended pursuant to this Court's prior directive in *Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021). In the appeal from the Southern District of New York, Appellants challenge the denial of a preliminary injunction and the dismissal of their consolidated amended complaint on the merits. In the appeal from the Eastern District of New York, Appellants challenge the denial of a similar preliminary injunction motion.

Given the overlapping nature of the claims and motions below, and the relief sought on appeal, we consolidated our review of these cases. For the reasons set forth herein, we **AFFIRM IN PART** and **DISMISS IN PART** the denials of preliminary

injunction, **AFFIRM** the dismissal of the facial challenges, and **AFFIRM IN PART** and **VACATE** and **REMAND IN REMAINING PART** the dismissal of the as-applied challenges.

FOR PLAINTIFFS-APPELLANTS:	JOHN J. BURSCH, *Bursch Law PLLC*, Caledonia, MI (Barry Black, *Nelson Madden Black LLP*, New York, NY; Sujata Sidhu Gibson, *Gibson Law Firm PLLC*, Ithaca, NY, *on the brief*).
FOR DEFENDANTS-APPELLEES:	SUSAN PAULSON (Richard Dearing, Devin Slack, *on the brief*), *for* Hon. Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York, New York, NY.

PER CURIAM:

In August 2021, after almost a year and a half of rapid spread of COVID-19, the Department of Education of New York City ("the City") prepared to reopen its educational facilities following the Food and Drug Administration's full approval of a COVID-19 vaccine. To combat the further spread of the virus as the City returned to "normal," the City's Commissioner of Health and Mental Hygiene instituted a COVID-19 vaccine requirement for all Department of Education staff and other City employees and contractors working in person in school settings. In the months and years since, the City—at times following legal challenges requiring

our intervention—updated and revamped both its mandate policy and religious exemption process. The two cases consolidated in this appeal present yet another test of the constitutionality of the City's approach.

Appellants are New York City public sector employees contesting the constitutionality, both facially and as applied, of New York City's COVID-19 vaccination mandates, as amended pursuant to this Court's prior directive in *Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021) ("*Kane I*"). In the appeal from the Southern District of New York, Appellants challenge the denial of a preliminary injunction based on a consolidated amended complaint and the dismissal of that complaint on the merits. In the appeal from the Eastern District of New York, Appellants challenge the denial of a similar preliminary injunction motion.

Given the overlapping nature of the proceedings below, and the relief sought on appeal, we consolidated our review of these cases. For the reasons set forth herein, we **AFFIRM IN PART** and **DISMISS IN PART** the denials of preliminary injunctions, **AFFIRM** the dismissal of the facial challenges, and **AFFIRM IN PART** and **VACATE** and **REMAND IN REMAINING PART** the dismissal of the as-applied challenges.

I. BACKGROUND

The facts pertaining to this appeal are comprehensively set forth in our November 28, 2021 per curiam opinion in *Kane I*, which concerned a challenge by some of the same parties in this appeal of the Southern District's initial denial of their earlier motions to preliminarily enjoin enforcement of the

City's COVID-19 vaccination mandate ("Vaccine Mandate" or "Mandate"). *See Kane I*, 19 F.4th at 159–63. Accordingly, we assume the parties' familiarity with the facts and record of prior proceedings, which we summarize and reference only as necessary for review of the instant appeal.

A. Our Prior Decision in *Kane I*

In *Kane I*, we held that "[t]he Vaccine Mandate, in all its iterations, [wa]s neutral and generally applicable." 19 F.4th at 164. We also found that the Vaccine Mandate's exemption policy did not treat secular conduct more favorably than comparable religious conduct. *Id.* at 166. Accordingly, we determined that the *Kane I* appellants (a subgroup of the ones in this appeal) were not likely to succeed in their argument that the Mandate was facially unconstitutional. *Id.* We therefore refused to enjoin the Mandate pending litigation. *Id.*

However, we made the "exceedingly narrow" determination that the *Kane I* appellants were likely to succeed on their as-applied challenges based on the City's own admission of a potential defect in how it initially reviewed requests for religious accommodations for and exemptions from the Mandate (the "Arbitration Award Standards"). *Id.* at 167. *Kane I* arose from a teachers' union challenge to the Vaccine Mandate. *Id.* at 159–60. The union filed a formal objection to the Mandate's lack of medical or religious accommodations. *Id.* at 160. The dispute went to arbitration, which led to an "Arbitration Award" granting an exemption and accommodation request system that imposed standards "for determining . . . religious accommodations to" the

Mandate and an appeals process. *Id.* The Arbitration Award Standards provided that religious exemption "requests shall be denied where the leader of the religious organization [to which the requestor belongs] has spoken publicly in favor of the vaccine, . . . or where the objection is personal, political, or philosophical in nature." *Id.* at 168. In *Kane I*, we took issue with this text because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, *or the validity of particular litigants' interpretations of [their] creeds*." *Id.* (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989)).

Consequently, we kept in place directions from a previous motions panel of this Court ordering the City to reconsider the *Kane I* appellants' religious accommodation requests "by a central citywide panel, which [would] adhere to the standards of, *inter alia*, Title VII of the Civil Rights Act of 1964, rather than the challenged criteria set forth in . . . the [A]rbitration [A]ward." *Id.* at 162 (internal quotation marks omitted). We also did not disturb the remainder of the motions panel's order.

B. Developments Since *Kane I*

After our decision in *Kane I*, the newly constituted City of New York Reasonable Accommodation Appeals Panel ("Citywide Panel" or "Panel") reviewed anew religious accommodation requests. In effect, the Citywide Panel offered employees who had been denied a vaccination-related accommodation a form of administrative appellate review. Each of the named

plaintiffs who were then a part of *Kane I* had their claims reviewed by the Citywide Panel.[1]

In December 2021, after learning the outcome of their appeals before the Citywide Panel, the *Kane I* plaintiffs again filed a series of motions, including for a preliminary injunction, largely on the same grounds as their initial challenge to the Mandate. The Southern District denied all requests, but permitted the plaintiffs to submit a consolidated amended complaint ("CAC"). The *Kane I* plaintiffs filed an immediate interlocutory appeal of the denial of preliminary injunction, and sought to enjoin the accommodation process of the Citywide Panel. A panel of this Court denied the plaintiffs' motion for a preliminary injunction pending appeal and affirmed the district court's decision in its entirety. *Keil v. City of New York*, No. 21-3043-CV, 2022 WL 619694, at *4 (2d Cir. Mar. 3, 2022) (summary order) ("*Keil*"). We noted that because the Citywide Panel was not applying the Arbitration Awards exemption standard, the arguments that the plaintiffs in *Keil* advanced were largely irrelevant to consideration of the preliminary injunction motion concerning the new Citywide Panel. *Id.* at *2. In their later-submitted CAC in the Southern District, the plaintiffs then contested the constitutionality of the new Citywide Panel's process and determinations. *See Kane v. De Blasio*, 623 F. Supp. 3d 339 (S.D.N.Y. 2022)

[1] Plaintiffs-Appellants Carolyn Grimando, Joan Giammarino, Benedict LoParrino, Edward Weber, Amoura Bryan, and Natasha Solon joined this litigation after the prior appeal in *Kane I*.

(Buchwald, J.) ("*Kane II*"). The instant appeal stems from proceedings following the filing of the CAC.

Around the same time, a set of plaintiffs in the Eastern District of New York, largely represented by the same attorneys representing the *Keil* plaintiffs, also challenged the Vaccine Mandate. *See generally* Complaint, *New Yorkers for Religious Liberty, Inc. v. City of New York*, No. 22-CV-752 (E.D.N.Y. Feb. 10, 2022), ECF No. 1 (Gujarati, J.) ("*NYFRL*"). The *NYFRL* plaintiffs principally made the same arguments and sought the same relief as the *Keil* plaintiffs.

The Southern District eventually dismissed the *Keil* CAC with prejudice. And both the Southern and Eastern Districts denied the respective motions for preliminary injunction before them.

C. The District Courts' Decisions

In their dispositions, both district courts relied on our decisions in *Kane I* and *Keil*. In the Eastern District, Judge Gujarati reasoned that the *NYFRL* plaintiffs were unlikely to succeed on the merits of their First Amendment claims and that they failed to show irreparable harm because (1) there was no First Amendment right to an exception from a requirement that public employees get vaccinated to retain their jobs; and (2) adverse employment consequences are generally not irreparable harms.[2]2 *See* Transcript of Oral Argument at 40–41, *New Yorkers for Religious Liberty, Inc. v. City of New York*, No. 22-CV-752

[2] The district court stayed action on the underlying complaint in the Eastern District pending this appeal of the denial of the preliminary injunction.

(E.D.N.Y. Aug. 11, 2022), ECF No. 116 (denying preliminary injunction from the bench). In the Southern District, Judge Buchwald denied the *Keil* plaintiffs a preliminary injunction for largely the same reasons.

In addition, Judge Buchwald rejected the facial challenges to the Mandate by the *Keil* plaintiffs on the merits as having been largely resolved by *Kane I*. She concluded that "statements [regarding religion] made by City and State officials," raised again in the CAC, do not establish "evidence of animus," attributable to those individuals personally, or to the State more generally. *Kane II*, 623 F. Supp. 3d at 355.

On the *Keil* plaintiffs' as-applied claims, Judge Buchwald found that the subset of plaintiffs who had not "avail[ed] themselves of the [amended Citywide Panel] process for seeking a religious exemption" could not challenge that process as unconstitutional. *Id.* at 362. As to the plaintiffs who did go through the Citywide Panel process, she found their allegations too conclusory to state a claim. For the majority of those individuals, the Citywide Panel found it would be an "undue hardship" to accommodate them given the nature of their job functions. *Id.* at 363. The district court stated that the Panel's findings as to this group of plaintiffs "satisfied the requirements of Title VII," and thus the standards articulated in *Kane I*. *Id.* Judge Buchwald noted that only plaintiff Heather Clark's case turned on the Panel's conception of whether Clark had a "sincere religious belief." *Id.* at 362. Nonetheless, she determined the Panel's denial was proper with respect to Clark because it found that Clark had sought an accommodation due not to her religious beliefs, but to her beliefs about

what "non-religious sources" said about the vaccine. *Id.* at 362 n.30.

This consolidated appeal of both cases followed.

II. DISCUSSION

Appellants now ask us to review the denials of preliminary injunction, and the rejection of their facial and as-applied challenges to the Vaccine Mandate and the Citywide Panel's accommodation process for alleged violations of the Free Exercise and Establishment Clauses. We address each issue in turn.

A. Standard of Review

"We review a district court's denial of a preliminary injunction for abuse of discretion, examining the legal conclusions underpinning the decision *de novo* and the factual conclusions for clear error." *Green Haven Prison Preparative Meeting of Religious Soc'y of Friends v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 16 F.4th 67, 78 (2d Cir. 2021).

"We review a district court's grant of a motion to dismiss de novo, 'accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor.'" *Henry v. County of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021) (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013)). To survive a motion to dismiss, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim is plausibly alleged 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged.'" *Matzell v. Annucci*, 64 F.4th 425, 433 (2d Cir. 2023) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

B. Denials of Preliminary Injunction

This is the third time that we sit in review—in one form or another—of motions seeking preliminary injunction against New York City's Vaccine Mandates. Regarding the current version of this challenge, we dismiss as moot the request for relief in the form of recission of the Vaccine Mandate, and we deny on the merits the request for preliminary injunctive relief in the form of reinstatement and backpay.

1. Recission of the Vaccine Mandate

We conclude that Appellants' request to rescind the Vaccine Mandate is moot. "When the issues in dispute between the parties are no longer live, a case becomes moot, . . . and the court—whether trial, appellate, or Supreme—loses jurisdiction over the suit, which must be dismissed[.]" *Lillbask ex rel. Mauclaire v. State of Conn. Dept. of Educ.*, 397 F.3d 77, 84 (2d Cir. 2005) (internal citations and quotation marks omitted). "A case becomes moot 'when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 444 (2d Cir. 2021) (quoting *Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.*, 955 F.3d 314, 319 (2d. Cir. 2020)).

It is true that modification or withdrawal of a COVID-19 restriction during the course of litigation does not necessarily moot the case. *See Tandon v. Newsom*, 593 U.S. 61, 63 (2021) (holding that where

litigants "'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions," they remain entitled to seek emergency injunctive relief (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 68 (2020))). But in order to escape a mootness dismissal, a plaintiff still must demonstrate a reasonable expectation of repetition that is "more than a mere physical or theoretical possibility." *Lillbask ex rel. Mauclaire*, 397 F.3d at 86 (internal quotation marks omitted).

Here, the City officially rescinded the Mandate on February 10, 2023—after we heard oral argument in these cases—and there is no evidence to suggest that Appellants have a reasonable expectation that is more than theoretical of its reinstatement. Accordingly, as numerous other circuits have concluded with regard to rescinded COVID-19-related restrictions, the request for recission of the Mandate is now moot.[3]

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[3] *See*, *e.g.*, *Brach v. Newsom*, 38 F.4th 6, 11 (9th Cir. 2022) (finding moot a challenge to California's suspension of in-person instruction in K-12 schools in 2020–2021 because "there [was] no longer any state order for the court to declare unconstitutional or enjoin" and because the potential reimposition of such restrictions in the future was "speculative"); *Resurrection School v. Hertel*, 35 F.4th 524, 530 (6th Cir. 2022) (en banc) (finding moot a challenge to a statewide mask mandate repealed nearly a year prior because there was "no reasonable possibility" that the state would reimpose a mask mandate in the future); *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 165 (4th Cir. 2021) (declaring a challenge to several state executive orders moot where "there [was] simply no reasonable expectation" that the appellant would again be subjected to executive orders restricting public and private gatherings, after

2. Reinstatement and Backpay

Appellants' request for preliminary injunctive relief in the form of reinstatement and backpay fails on the merits.

"When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Kane I*, 19 F.4th at 163 (quoting *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020)). However, "[i]n government personnel cases, like this one, we apply a particularly stringent standard for irreparable injury and pay special attention to whether the interim relief will remedy any irreparable harm that is found." *Id.* at 171 (internal quotation marks omitted). "[E]xcept in a 'genuinely extraordinary situation,' irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties

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they had expired and the state of emergency related to the COVID-19 pandemic had been lifted); *Cnty. of Butler v. Gov. of Penn.*, 8 F.4th 226, 229–30 (3d Cir. 2021) (finding moot a challenge to three state directives—stay-at-home orders, business closure orders, and orders setting congregation limits in secular settings—based on changed circumstances, including the state of the COVID-19 pandemic and the expiration of the challenged orders); *Hawse v. Page*, 7 F.4th 685, 692 (8th Cir. 2021) (finding moot a challenge to a public health order limiting the number of people who could gather in a single room or space because "it [was] absolutely clear that the County's disputed conduct could not reasonably be expected to recur" and "litigation over a defunct restriction" could not "present a live controversy in perpetuity").

in obtaining other employment." *Am. Postal Workers Union v. USPS*, 766 F.2d 715, 721 (2d Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974)). Thus, "the injuries that generally attend a discharge from employment—loss of reputation, loss of income and difficulty in finding other employment—do not constitute the irreparable harm necessary to obtain a preliminary injunction." *Guitard v. U.S. Sec'y of Navy*, 967 F.2d 737, 742 (2d Cir. 1992).

In *Kane I*, we nevertheless found irreparable harm because "'the threat of permanent discharge' can cause irreparable harm in the First Amendment context." 19 F.4th at 170 (quoting *Am. Postal Workers Union*, 766 F.2d at 722). And importantly, because the appellants had "demonstrated that they were denied religious accommodations . . . and were consequently threatened with imminent termination if they did not waive their right to sue," *id.* at 169–70, we preliminarily enjoined the City from terminating the appellants or requiring them to opt into the extended leave program pending reconsideration of their religious accommodation requests. *Id.* at 162–63.

At the same time, we underscored that our determination did "not cast doubt on the well-established principle that loss of employment does not usually constitute irreparable injury." *Id.* at 170 n.18 (emphasis and internal quotation marks omitted) (quoting *Does 1-6 v. Mills*, 16 F.4th 20, 36 (1st Cir. 2021)). Consequently, we still denied the *Kane I* appellants' request for "an injunction immediately reinstating [plaintiffs] and granting them backpay pending" new "consideration of their requests for

religious accommodations" because they had "not shown they would suffer irreparable harm absent this broader relief." *Id.* at 170; *see also id.* at 171 ("[W]hen irreparable harm arises not from an interim discharge but from the threat of permanent discharge a preliminary injunction is inappropriate because harm would not be vitiated by an interim injunction." (internal quotation marks and alterations omitted)).

Turning to the instant appeal, as of the time of briefing, "all but four of the [thirteen] NYFRL" plaintiffs "and three of the [nineteen] *Kane*" plaintiffs "ha[d] been terminated or forced to resign." Appellants' Br. at 19. The only ones who had not been terminated were either "accommodated" or chose to get "vaccinated." Appellees' Br. at 1. Appellants argue their irreparable harm was the ongoing "coercive condition" of the Mandate because the City "continue[d] to offer new 'last chances' for terminated employees to be reinstated if they [received] the vaccine." Appellants' Br. at 96. Appellants argue that the City's actions imposed a "condition[] on [a] public benefit[]" that "dampen[s] the exercise of [their] First Amendment rights," which they say rises to the level of irreparable injury. *Id.* (alterations omitted) (quoting *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976)).

However, Appellants filed the at-issue motions for preliminary injunctions *after* they were terminated. Therefore, they cannot show the "specific present objective harm or a threat of specific future harm" required of them. *Laird v. Tatum*, 408 U.S. 1, 14 (1972). Appellants' reliance on the Supreme Court's decision in *Elrod* for the proposition that ongoing irreparable harm can exist post-termination is inapt.

See, *e.g.*, Appellants' Reply Br. at 7 ("Most of the *Elrod* plaintiffs were already terminated for failing to comply with a coercive condition when they sought a preliminary injunction."). Although it is true that most *Elrod* plaintiffs had already been terminated, the *Elrod* Court *did not* find irreparable harm *as to the post-termination plaintiffs*. It found irreparable harm only for "one of the respondents [who] was . . . threatened with discharge" and other "class respondents . . . threatened with discharge or [who] had agreed to provide support for the Democratic Party in order to avoid discharge." *Elrod*, 427 U.S. at 373. Because harm for these still-employed plaintiffs was "both threatened and occurring *at the time of [their] motion*" for a preliminary injunction, these plaintiffs could demonstrate irreparable harm. *Id.* at 374 (emphasis added). *Elrod* instructs that because Appellants here had already been terminated at the time of their preliminary injunction motions, they were not suffering ongoing harms or threats of harm. Having already been discharged, their harm is *compensable*, not *irreparable*. Therefore, we deny Appellants' request for injunctive relief in the form of reinstatement and backpay.

C. Dismissal of Facial Challenges in the Consolidated Amended Complaint

The *Keil* Appellants' facial challenges to the Citywide Panel system under the Establishment and Free Exercise Clauses fail because Appellants have offered no more than conclusory allegations that the Citywide Panel was applying unconstitutional standards or was infected with religious animus.

1. Free Exercise Challenge

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This guarantee is incorporated against the states via the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990). "The Free Exercise Clause thus protects an individual's private right to religious belief, as well as 'the performance of (or abstention from) physical acts that constitute the free exercise of religion.'" *Kane I*, 19 F.4th at 163–64 (quoting *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014)). "This protection, however, 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.'" *Id.* at 164 (quoting *Smith*, 494 U.S. at 879). For purposes of a facial claim, a "law that is facially neutral [may] still run afoul of the neutrality principle if it 'targets religious conduct for distinctive treatment.'" *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)). We previously determined that the City's "Vaccine Mandate, in all its iterations, [wa]s neutral[,] generally applicable," and facially constitutional under the Free Exercise Clause. *Id.* That holding from *Kane I* remains binding against Appellants' facial Free Exercise Clause challenge.

2. Establishment Clause Challenge

That leaves Appellants' facial Establishment Clause challenge. The Establishment Clause prevents the enactment of laws that have the "purpose" or "effect" of "advancing or inhibiting religion." *Agostini v. Felton*, 521 U.S. 203, 222–23 (1997) (affirming that "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion"). Laws that "grant[] a denominational preference" by preferring one religion over another violate the Establishment Clause, too. *Larson v. Valente*, 456 U.S. 228, 244-46 (1982). Appellants argue that the Citywide Panel system violates the Establishment Clause both by privileging some religious beliefs over others and by being infected with religious animus. We reject both contentions.

At oral argument, Appellants asserted that the Citywide Panel effectively continued to have multiple tracks for handling appeals from members of different faiths and therefore that certain faiths received preferential treatment over others. But the CAC pleads no facts about this. At best, the only relevant allegations are statements by the City's former mayor, which predate *Kane I* and the existence of the Citywide Panel. *See*, *e.g.*, App'x at 80, 94–95 (stating that "Mayor de Blasio" said in "press briefings . . . that the City would be openly preferencing Christian Scientists," and that the Arbitration Award Standards enjoined in *Kane I* would provide exemptions only "for recognized and established religious organizations (e.g., Christian Scientists)").

Even if these allegations in the CAC demonstrated an Establishment Clause issue with the now-stricken Arbitration Award Standards, Appellants have failed to allege an Establishment Clause violation with respect to the Citywide Panel or the City's *current* processes, which were implemented after our remand in *Kane I*. There, we rejected the assertion that certain government officials' statements purportedly preferring certain faiths were relevant to the neutrality of the Mandate and exemption standards under the First Amendment. *Kane I*, 19 F.4th at 165 n.13 ("While Mayor de Blasio said that only Christian Scientists and Jehovah's Witnesses could receive religious accommodations, the City has granted accommodations to members of many other faiths."); *id.* at 165 (finding that Mayor de Blasio's statements "reflect nothing more than the Mayor's personal belief that religious accommodations will be rare" and that he "did not have a meaningful role in establishing or implementing the Mandate's accommodations process"); *see also We the Patriots*, 17 F.4th 266, 283 (2d Cir.), *op. clarified* 17 F.4th 368 (2021) ("Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers[.]"). Ultimately, these statements were made *before* the Panel process was even contemplated. And crucially, Appellants do not plead any tangible connection between the statements and the Panel's processes. For these reasons, the statements are not relevant to our assessment of the Citywide Panel process.

Appellants assert that the Citywide Panel failed to abide by the *Kane I* standards, but their CAC fails to include any well-pleaded factual allegations to support this argument. Rather, all the CAC pleads in this regard are conclusions unsupported by facts. *See Vullo*, 49 F.4th at 713 ("To determine whether a claim is plausible, we must separate the complaint's factual allegations from its conclusions and then determine whether the remaining well-pleaded factual allegations plausibly allege entitlement to relief."). For example, the CAC states that although "the Citywide Appeals Panel was supposed to apply standards" as set forth in *Kane I*, which "includ[e] . . . the standards established by Title VII," "the Citywide Appeals Panel did not apply these standards, and is simply using this 'fresh look' process to try and justify their original unlawful discriminatory suspensions in bad faith." App'x at 112. These legal conclusions are insufficient to state a claim and cannot carry Appellants past a motion to dismiss. *See Twombly*, 550 U.S. at 555 (noting that "courts are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)).

The CAC also alleges only legal conclusions regarding the reasoning provided by the Citywide Panel for its religious accommodation denials. Appellants received an email response following their request for more information about why each *Keil* plaintiff who appealed to the Panel was denied. Appellants assert that, "[u]pon information and belief, the[] 'reasons' [provided by DOE Attorneys] were an afterthought" and a "sham." App'x at 113. But a "litigant cannot merely plop 'upon information and belief' in front of a conclusory allegation and

thereby render it non-conclusory." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018). These allegations, too, fail to satisfy Appellants' pleading burden.

In fact, contrary to Appellants' conclusory allegation that the Citywide Panel "rubber-stamped," App'x at 226, the previous denials in "bad faith," *id.* at 112, the CAC alleges that the Citywide Panel frequently *credited* the personal religious beliefs about vaccination held by Appellants of different faiths.[4]

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[4] *See*, *e.g.*, App'x at 277 (reversing denial of accommodation request because Appellant William Castro, of unspecified Christian faith, "has sufficiently established that he holds sincerely held religious beliefs, of which he and his family have consistently adhered to, that require [him] to abstain from vaccination"); *id.* at 275 (finding that Appellant Nwakaego Nwaifejokwu, of unspecified faith, "holds sincerely held religious beliefs sufficient to justify a reasonable accommodation" but finding that accommodating the classroom teacher would present an "undue hardship"); *id.* at 276 (finding that Appellant John De Luca, a Catholic, "holds sincerely held religious beliefs sufficient to justify a reasonable accommodation," but finding that accommodating the classroom teacher would present an "undue hardship"); *id.* at 273 (reflecting the finding of the one panelist who reached the question that Appellant Matthew Keil, a Russian Orthodox Christian, "articulated a sincerely held religious belief that precludes vaccination," but that all panelists agreed that accommodating the classroom teacher would present an "undue hardship"); *id.* at 154 (granting Appellant Amaryllis Ruiz-Toro, a member of a "minority church[]," a religious accommodation under the Exemption Standards). These statements undermine Appellants' contention that the Citywide Panel preferred certain religions over others or treated religion with hostility broadly.

Because the CAC asserts no facts to suggest that the Citywide Panel preferred certain religions over others or was infected with religious animus, we affirm the district court's dismissal of the facial challenge.[5]

D. Dismissal of As-Applied Challenges in the Consolidated Amended Complaint

The *Keil* Appellants also challenge the district court's dismissal of their as-applied claims. They contend that the denial of their religious accommodation requests violated their First Amendment rights either because the City failed to show that it would suffer an undue hardship, or inappropriately preferred some religious beliefs over others.

Whether an applicant has a (1) sincere and (2) religious belief regarding vaccination are questions of fact that are subject to examination when an employment accommodation is sought. However, we do not "sit in judgment on the verity of an adherent's religious beliefs." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). Rather, our task is "to determine whether religious beliefs are 'sincerely held.'" *Jackson v. Mann*, 196 F.3d 316, 321 (2d Cir. 1999).

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[5] Appellants also advance Equal Protection claims. As we have explained before, "[w]hen a free exercise challenge fails, any equal protection claims brought on the same grounds are subject only to rational-basis review." *See Kane I*, 19 F.4th at 167 n.14 (quoting *Does 1-6 v. Mills*, 16 F.4th 20, 35 (1st Cir.), *application for injunctive relief denied sub nom. Does 1-3 v. Mills*, 142 S. Ct. 17 (2021)). Accordingly, because Appellants' claims cannot survive rational-basis review, their Equal Protection Clause challenge must fail.

Importantly, "[l]ocal boards and courts . . . are not free to reject beliefs because they consider them 'incomprehensible.'" *United States v. Seegar*, 380 U.S. 163, 184–85 (1965). In other words, the Citywide Panel could deny accommodations if it concluded a claimant was not personally devout in the belief underlying the objection, but it could not deny accommodations because it cast judgment on the nature of the religious objection raised. We assess on review whether the Citywide Panel engaged in the appropriate task.

Further, under Title VII "when an employee has a genuine religious practice that conflicts with a requirement of employment," the employer typically must offer the employee a "reasonable accommodation, *unless* doing so would cause the employer to suffer an undue hardship." *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002) (emphasis added). In order to demonstrate an "undue hardship," an employer must show that the burden of granting an accommodation "is substantial in the overall context of [the] employer's business." *Groff v. DeJoy*, 600 U.S. 447, 468 (2023).

For the reasons below, we find that most of the appellants have also failed to state plausible as-applied claims, with the exceptions of Natasha Solon and Heather Clark.

1. The Claims of Buzaglo, Delgado,[6] Di Capua, Romero, Smith, and Strk

We start with the six Appellants who have stated constitutional claims arising from the denial of their requested accommodations, on the basis of undue hardship to the City.[7] "Because Plaintiffs have not established, at this stage, that they are likely to succeed in showing that the Vaccine Mandate [wa]s not neutral or generally applicable on its face, rational basis review applies." *Kane I*, 19 F.4th at 166. For the reasons below, these Appellants have failed to state claims.

For each of these Appellants, the Citywide Panel found that, irrespective of their sincerely held religious beliefs, their requests presented an "undue hardship" because each individual "is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population." App'x at 273–77. None of these plaintiffs can make out a constitutional claim for religious discrimination without first making a more-than-conclusory allegation that the finding of undue hardship was erroneous or pretextual. *See Vega v. Hempstead*

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[6] This Section refers to Sasha Delgado, an individual whose accommodation request was reheard by the Citywide Panel, not Liz Delgado, another Plaintiff-Appellant.

[7] Other Appellants' requests for religious accommodations were also denied by the Panel; however, the CAC either does not challenge those decisions, or otherwise fails to offer any non-conclusory allegations that the denials were related to the Appellants' religious beliefs. Accordingly, we affirm the dismissal of their as-applied constitutional claims.

Union Free Sch. Dist., 801 F.3d 72, 83 (2d Cir. 2015). This is necessary to survive the low threshold of rational basis review. *See Kane I*, 19 F.4th at 166.

The CAC on its face identifies the Panel's undue-hardship rationale, but does not plead allegations that contradict that finding. Instead, the CAC offers only threadbare conclusions. *See*, *e.g.*, App'x at 147 ("Ms. Smith does not pose a direct threat to anyone based on her vaccine status[.]"); App'x at 138 (Di Capua's conclusory allegation that "she poses no direct threat to anyone"). As a result, the district court properly dismissed their religious accommodation claims on that basis.[8] *Cf. Iowa Pub. Emps.' Ret. Sys. v. MF Glob., Ltd.*, 620 F.3d 137, 145 (2d Cir. 2010) (explaining that an "affirmative defense may be raised by a pre-answer motion to dismiss under Rule 12(b)(6) . . . if the defense appears on the face of the complaint" (quoting *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998))); *see Lowman v. NVI LLC*, 821 F. App'x 29, 31–32 (2d Cir. 2020) (summary order) (affirming the dismissal of a

[8] The First Circuit similarly affirmed dismissal of a case last year concerning individuals fired for refusing to comply with vaccine mandates where the plaintiffs did not plead facts to challenge the undue-hardship determination. *See Lowe v. Mills*, 68 F.4th 706, 723 (1st Cir. 2023) ("The plaintiffs assert generally that whether their requested accommodation would constitute an undue hardship is a question of fact not suitable for determination on a motion to dismiss. As discussed above, however, we conclude that the complaint's allegations and the relevant Maine law permit no reasonable inference but that granting the plaintiffs their requested accommodation would have exposed the Providers to a substantial risk of license suspension and other penalties, creating an undue hardship." (internal quotation marks omitted)).

complaint based on undue hardship where the requested accommodation would violate federal law).

Accordingly, we affirm the dismissal of the as-applied challenges by these six Appellants who were denied an accommodation on the ground of undue hardship. We now turn to the as-applied challenges to the dismissal of claims on grounds other than undue hardship.

2. Solon's Claim

The district court dismissed Solon's claim as moot because she decided to obtain the vaccine and has since been reinstated without backpay. Solon argues she remains entitled to backpay for the time she was suspended. We agree that Solon has stated a claim that is not moot.

Crediting Solon's allegations at this stage, we conclude that she was denied a religious exemption under the initial Arbitration Award process despite her longstanding objection to most medical treatments, including vaccines. Solon has pleaded that she left her prior church and "rel[ies] on her personal relationship with God as a guide." App'x at 150. After the formation of the Panel, Solon did not receive fresh review because she chose to receive the vaccine.

If Solon's initial, denied exemption application reflected her purely personal religious practices, then she has plausibly pleaded that she was improperly denied an accommodation because the old Arbitration Award Standards only allowed "exemption requests . . . for recognized and established religious organizations," and did not honor exemptions for

those whose "religious beliefs were merely personal." *Kane I*, 19 F.4th at 168 (internal quotation marks omitted). That could present a First Amendment problem. As we previously determined, the Arbitration Award Standards under which Solon was suspended were very likely unconstitutional. *See id.* at 168 ("[T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 584 U.S. 617, 638 (2018))).

The fact that Solon has now been reinstated does not necessarily erase every injury she alleges. She has plausibly pleaded that she was potentially subjected to an unconstitutional government action resulting in injury for which she has yet to receive recompense. *See* App'x at 150–51 (alleging that Solon's home went into foreclosure while she was suspended without pay). Furthermore, the pleadings and documents incorporated within the CAC do not indicate that the City ever denied Solon's accommodation request on the independent ground of undue hardship. Regardless of whether Solon ultimately prevails on the merits, she does not "lack a legally cognizable interest in the outcome" of her claims at this stage. *Tann v. Bennett*, 807 F.3d 51, 52 (2d Cir. 2015) (quoting *Blackwelder v. Safnauer*, 866 F.2d 548, 551 (2d Cir. 1989)). Therefore, the district court erred by dismissing her claim as moot when backpay remains an available remedy for her alleged wrongful suspension.

Accordingly, we vacate the district court's dismissal of Solon's as-applied claim.

3. Clark's Claim

Heather Clark has also stated a First Amendment claim at this stage. She has pleaded that the Citywide Panel dismissed some of her religious beliefs as too idiosyncratic to be religious in nature. This, of course, would be the same constitutional problem as presented in *Kane I*—and similar to why Solon stated a claim for backpay. That is, Clark pleaded the denial of a religious accommodation on the ground that a person's religious beliefs are too personal to count as properly religious. *See* 19 F.4th at 168.

The CAC provides a sufficient basis to infer that Clark was wrongfully denied a religious accommodation. The CAC pleads that the Citywide Panel rejected her appeal because it "character[ized]" Clark's receiving "guidance from the Holy Spirit as . . . allow[ing] Ms. Clark to follow individualized guidance," and thus concluded that Clark's beliefs were not "religious in nature." App'x at 135. Consistent with Clark's allegations, *see id.* at 134–35, the documents Clark submitted to the Citywide Panel describe a religious objection to the vaccine because it is a product of development using fetal cell lines and a "differing substance[]" that she may not ingest consistent with her faith. Exhibit A to Declaration of Heather Clark at 1–2, *Kane II*, 623 F. Supp. 3d 339 (S.D.N.Y. 2022), (No. 21-cv-7863), ECF No. 128-1. Nevertheless, the district court dismissed Clark's claim because "the [Citywide] panel found that her decision to not receive a vaccin[e] was not based on her religious belief, but rather, on nonreligious

sources," a conclusion the district court deemed "entirely proper . . . under Title VII." *Kane II*, 623 F. Supp. 3d at 362 n.30. While such a conclusion could indeed be proper and constitutional if the Citywide Panel had a basis for reaching it, Clark's allegations support the plausible inference that the Panel denied her request solely on the basis of its characterization of her religious objection as too idiosyncratic rather than as not sincerely held or non-religious in nature.

Given this possibility, Clark has stated a cognizable as-applied claim at this stage.

III. CONCLUSION

For the foregoing reasons, we **DISMISS** the request for injunctive relief in the form of recission as moot, and we **AFFIRM** the district court's denial of injunctive relief in the form of reinstatement and backpay. Further, we **AFFIRM** the dismissal of the facial First Amendment challenges, and **AFFIRM** in part the dismissal of the as-applied challenges. Finally, we **VACATE** and **REMAND** the case to the Southern District of New York for further proceedings consistent with this opinion as it relates to Appellants Solon and Clark, making clear that the district court may proceed as circumstances and further development of the record may require, and that we have not commented today on the merits of any stated claims.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL KANE, et al.,

Plaintiffs,

- against -

BILL DE BLASIO, et al.,

Defendants.

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MATTHEW KIEL, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

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MEMORANDUM AND ORDER

21 Civ. 7863 (NRB)
21 Civ. 8773 (NRB)

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Since the novel coronavirus emerged two and a half years ago, over a million people in the United States have died from COVID-19, including over 40,000 residents of New York City (the "City").[1] Due to the rapid spread of COVID-19, City schools were

[1] Covid Data Tracker Weekly Review, Centers for Disease Control (Aug. 19, 2022) https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html; COVID-19: Data, City of New York (Aug. 24, 2022), https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page.

abruptly compelled in the spring of 2020 to operate remotely.[2] In order to combat the further spread of the coronavirus and to allow schools to reopen as safely as possible, in August 2021, following the Food and Drug Administration's ("FDA") full approval of a COVID-19 vaccine, the New York City Commissioner of Health and Mental Hygiene issued an order requiring Department of Education ("DOE") staff, along with other City employees and contractors working in person in school settings, to provide proof of vaccination against COVID-19, which was restated with minor amendments in September 2021 (the "Vaccine Mandate" or "Mandate"). Plaintiffs are 21 teachers, administrators, and other DOE staff who challenge this Mandate on behalf of themselves and a purported class because they believe its requirement that they be vaccinated against COVID-19 violates, inter alia, their religious freedoms guaranteed by the First Amendment.[3] Presently before this Court are defendants' motion to dismiss the complaint for failure to state a claim, ECF No. 111, and plaintiffs' fourth motion for a preliminary injunction, which seeks an injunction "barring enforcement of the Mandate against [p]laintiffs and any other DOE employee who has applied for religious

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[2] New York City to Close All School Buildings and Transition to Remote Learning, Office of the Mayor (Mar. 15, 2020), https://www1.nyc.gov/office-of-the-mayor/news/151-20/new-york-city-close-all-school-buildings-transition-remote-learning.

[3] The above-captioned cases were both originally assigned to Judge Caproni and consolidated by her. After consolidation, plaintiffs filed an amended consolidated complaint, ECF No. 102 ("ACC"), alleging injuries on behalf of themselves and a purported class.

accommodation and offering each reinstatement of pay and benefits pending resolution on the merits," ECF No. 121 at 25.[4]

The present motions are the first before this Court. After Judge Caproni repeatedly denied plaintiffs' motions for preliminary injunction, plaintiffs filed a motion asking Judge Caproni to recuse herself, arguing that Judge Caproni had held Pfizer stock, which could theoretically be impacted by the outcome of this litigation. While Judge Caproni doubted the resolution of the merits of the case would have any meaningful impact on Pfizer stock, she decided to recuse herself "out of an abundance of caution and to avoid even the possible appearance of any bias or prejudice[.]" ECF No. 175 at 2-3. For the following reasons, this Court joins the long list of other courts who have upheld COVID-19 vaccine mandates,[5] and holds that the defendants' motion to

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[4] Plaintiffs in both cases filed motions for a preliminary injunction and a temporary restraining order at the outset of their case. Judge Caproni denied the motions, and the plaintiffs appealed. The Second Circuit considered the appeals together and granted a preliminary injunction, as discussed infra. After consolidation, the plaintiffs filed an additional motion for a preliminary injunction, which was denied. Thus, this present motion is the fourth motion for a preliminary injunction filed in this case.

[5] See, e.g., We the Patriots, USA, Inc. v. Hochul, 17 F.4d 266 (2d Cir. 2021) (denying preliminary injunction of vaccine mandate for healthcare workers), op. clarified, 17 F.4d 368 (2d Cir. 2021), cert. denied sub nom. Dr. A. v. Hochul, 142 S. Ct. 2569 (2022); Maniscalco v. New York City Dep't of Educ., 563 F. Supp. 3d 33 (E.D.N.Y. 2021) (denying preliminary injunction of vaccine requirement for teachers and other DOE employees), aff'd, No. 21-2343, 2021 WL 4814767 (2d Cir. Oct. 15, 2021), cert. denied, 142 S. Ct. 1668, 212 L. Ed. 2d 578 (2022); Broecker v. New York

dismiss is GRANTED and plaintiffs' motion for a preliminary injunction is DENIED.[6]

Dept. of Educ., No. 21 Civ. 6387 (KAM) (LRM), 2022 WL 426113 (E.D.N.Y. Feb. 11, 2022) (denying preliminary injunction of vaccine mandate for other DOE employees); Marciano v. de Blasio, No. 21 Civ. 10752 (JSR), 2022 WL 678779, (S.D.N.Y. Mar. 8, 2022) (dismissing challenge to vaccine requirement for City employees); O'Reilly v. Bd. of Educ., Index No. 161040/2021, 2022 NY Slip Op 30173[U] (N.Y. Sup. Ct., N.Y. Cnty. Jan. 20, 2022) (denying preliminary injunction of vaccine mandate for other DOE employees); New York City Mun. Lab. Comm. v. City of New York, 73 Misc. 3d 621, 628, 156 N.Y.S.3d 681, 687 (N.Y. Sup. Ct., N.Y. Cnty. 2021) (denying preliminary injunction of vaccine mandate and dismissing case); Ferrelli v. Unified Ct. Sys., No. 22 Civ. 68 (LEK) (CFH), 2022 WL 673863, (N.D.N.Y. Mar. 7, 2022) (denying injunction of vaccine mandate in the New York State Court system); Brock v. City of New York, No. 21 Civ 11094 (AT) (SDA), 2022 WL 479256, at *1 (S.D.N.Y. Jan. 28, 2022) (denying preliminary injunction and temporary restraining order blocking vaccine mandate for City employees); Garland v. New York City Fire Dep't, 574 F. Supp. 3d 120 (E.D.N.Y. 2021) (E.D.N.Y. 2021) (denying preliminary injunction of vaccine mandate for City employees); Andre-Rodney v. Hochul, No. 21 Civ. 1053 (BKS) (CFH), 2022 WL 3027094, (N.D.N.Y. Aug. 1, 2022) (dismissing challenge to vaccine mandate for hospital employees).

[6] Plaintiffs requested oral argument on the motion to dismiss. ECF No. 119. The Court has concluded that oral argument is unnecessary in light of the extensive briefing submitted by the parties, the numerous prior decisions in this case, and because the issues before the Court are purely legal.

I. Background[7]

A. The Vaccine Mandate and the Arbitration Award

On August 23, 2021, the FDA approved the Pfizer-BioNTech COVID-19 vaccine for individuals 16 years and older.[8] On August 24, 2021, the Commissioner of the Department of Health and Mental Hygiene (the "Commissioner") promulgated an order (the "Original Vaccination Mandate" or "Original Mandate") requiring all DOE staff, along with all City employees and staff of contractors of the DOE and City who work in person at a DOE school setting or DOE building, to provide proof that they were fully vaccinated or on track to become fully vaccinated by September 27, 2021 or prior to beginning employment. See ACC ¶ 63; Declaration of Lora Minicucci, ECF No. 113-2 ("Ex B") at 2-3. The Original Mandate defined "fully vaccinated" to mean "at least two weeks have passed

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[7] The following facts are primarily drawn from the operative complaint, ECF No. 102. Where noted, certain facts of which the Court takes judicial notice or which are incorporated by reference in the ACC are drawn from exhibits attached to the Declaration of Lora Minicucci, ECF No. 113, and the Declaration of Sujata S. Gibson, ECF No. 122. For the purposes of the Court's ruling on the instant motion, the Court draws all reasonable inferences in plaintiffs' favor. See Koch v. Christie's Int'l PLC, 699 F.3d 141, 145 (2d Cir. 2012).

[8] FDA Approves First COVID-19 Vaccine, FDA.gov, (Aug. 23, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine. The Court takes judicial notice of the FDA's press release announcing the full approval of the Pfizer-BioNTech vaccine. See Apotex Inc. v. Acorda Therapeutics, Inc., 823 F.3d 51, 60 (2d Cir. 2016) (finding that Court may properly take judicial notice of publicly available FDA guidance).

after an individual received a single dose of a one-dose series, or the second dose of a two-dose series, of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization." Ex. B at 2.

The Original Mandate explained that the U.S. Centers for Disease Control ("CDC") "has recommended that school teachers and staff be 'vaccinated as soon as possible' because vaccination is 'the most critical strategy to help schools safely resume] full operations . . . [and] is the leading public health prevention strategy to end the COVID-19 pandemic;'" Id. at 2 (alterations and quotation marks in original). It further stated that "a system of vaccination for individuals working in school settings or other DOE buildings will potentially save lives, protect public health, and promote public safety," and noted that the DOE "serves approximately 1 million students across the City, including students in the communities that have been disproportionately affected by the COVID-19 pandemic and students who are too young to be eligible to be vaccinated." Id. The Original Mandate contained no medical or religious exemptions. Id.

On September 1, 2021, the United Federation of Teachers, Local 2, AFT, AFL-CIO ("UFT") filed a Declaration of Impasse, and shortly thereafter entered into arbitration with the City and the Board of Education of the City School District for the City of New York (the "BOE"). ACC ¶¶ 66; 70(a). On September 10, 2021, following arbitration, the City, the BOE, and the UFT reached an agreement (the "UFT Award") that provided for, "as an alternative to any statutory reasonable accommodation process," a

procedure and criteria for religious exemptions. Id. ¶¶ 67; 70(a). With respect to religious exemptions, the UFT Award stated that:

> Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy). Requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an on line source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists).

Id. ¶ 70(c). Employees who wished to submit applications for this exemption were required to submit their requests via an online system, SOLAS, by September 20, 2021 at 5 p.m. Id. ¶ 70(b). Staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee Relations were to issue decisions in writing by September 23, 2021, and, if the request was denied, set forth a reason for a denial. Id. ¶ 70(d). Thereafter, those employees whose requests were denied had one school day from the issuance of the decision to appeal, with an additional 48 hours after the filing of the appeal to submit any additional documentation. Id. ¶ 70(e). The UFT Award noted that if the reason for the denial was a lack of documentation, an arbitrator could permit additional time to submit the documentation. Id. Appeals were to be conducted by a panel of arbitrators

identified by Scheinman Arbitration and Mediation Services. Id. ¶ 70(f). The UFT Award provided that if an employee was granted a religious exemption, they were permitted to remain on the payroll, but were "in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect." Id. ¶ 70(i).

The UFT Award also provided that if an unvaccinated employee chose not to request an exemption or was denied an exemption, the employee could be placed on leave without pay effective September 28, 2021 or upon denial of their appeal, whichever was later, through November 30, 2021. Id. ¶ 70(k). The UFT Award also created two options for employees to leave the DOE rather than be vaccinated. First, during the period of September 28, 2021 through October 29, 2021, any employee who was on leave without pay due to their vaccination status and wished to separate from the DOE was permitted to do so on the understanding that they would be deemed to have resigned involuntarily and would waive the right to challenge their resignation. Id. ¶ 70(m). In exchange, they would receive a reimbursement for their unused CAR days,[9] and would be eligible for health insurance through September 5, 2022, unless they were eligible for health insurance from a different source. Id.

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[9] Plaintiffs do not define the term "CAR days", but it appears to refer to "Cumulative Absence Reserve" days, which are the equivalent of sick days. See Cumulative Absence Reserve (CAR), United Federation of Teachers, https://www.uft.org/your-rights/know-your-rights/cumulative-absence-reserve-car.

Second, the UFT Award provided that during the period from November 1, 2021 through November 30, 2021, any employee could alternately opt to extend their leave without pay until September 5, 2022, provided they waived the right to challenge their voluntary resignation. Id. ¶ 70(n). Any employee who decided to get vaccinated had the right to return to their same school within two weeks. Id. The UFT Award also stated that, beginning December 1, 2021, the DOE would seek to unilaterally separate employees who had not opted into one of these two options. Id. ¶ 70(o).

On September 15, 2021, an arbitrator announced an arbitral award between the DOE and the Council of Supervisors and Administrators ("CSA"), which mirrored the UFT Award in all relevant respects (the "CSA Award"). Id. ¶ 71. On September 12 and September 15, 2021, the Commissioner issued slightly revised versions of the vaccine mandate. ECF No. 113-3 ("Ex. C" or "Vaccine Mandate") at 2. The September 15, 2021 order is currently in effect. Id. It provides the same justifications as the Original Mandate, id. at 1-2, and required that:

> No later than September 27, 2021, or prior to beginning employment, the following individuals must provide proof of vaccination as described below:
>
> a. DOE staff must provide proof of vaccination to the DOE.
>
> b. City employees who work in-person in a DOE school setting, DOE building, or charter school setting must provide proof of vaccination to their employer.

c. Staff of contractors of DOE or the City, as defined below, must provide proof of vaccination to their employer, or if self-employed, to the DOE.

d. Staff of any charter school serving students up to grade 12, and staff of contractors hired by charter schools co-located in a DOE school setting to work in person in a DOE school setting or DOE building, must provide proof of vaccination to their employer, or if self-employed, to the contracting charter school.

Id. at 2. The order further defined "proof of vaccination" as proof that an individual:

a. Has been fully vaccinated;

b. Has received a single dose vaccine, or the second dose of a two-dose vaccine, even if two weeks have not passed since they received the dose; or

c. Has received the first dose of a two-dose vaccine, in which case they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

Id. It also defined "fully vaccinated" to mean "at least two weeks have passed after an individual received a single dose of a COVID-19 vaccine that only requires one dose, or the second dose of a two-dose series of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization." Id.

C. Plaintiffs Refuse to Be Vaccinated and Commence This Suit

Plaintiffs are DOE employees who refuse to be vaccinated due to their religious beliefs. The majority of plaintiffs in both cases timely applied for religious exemptions before the September 20, 2021 deadline, pursuant to the process set out in the UFT Award.[10] See, e.g., ACC ¶¶ 226, 263, 292, 314, 362, 382, 408, 452, 553, 582, 613. Their applications were subsequently denied.[11] See, e.g., id. ¶¶ 234, 264, 292, 315, 328, 363, 382, 408, 453, 483, 554, 583, 614. Plaintiffs Kane, Castro, Chu, Clark, Di Capua, Gladding, Nwaifejokwu, Romero, Ruiz-Toro, and

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[10] Plaintiffs Grimando, Giammarino, LoParrino, Weber, and Smith did not timely apply for a religious exemption. Plaintiffs Giammarino, LoParrino, and Smith did not do so because they believed they did not meet the criteria under the UFT Award. Id. ¶¶ 422-23, 733, 758. Plaintiff Weber applied for a religious exemption on October 1, 2021 (days after the September 20, 2021 deadline). Id. ¶ 642. His application was nonetheless reviewed and denied, and after his denial, he decided not to appeal. Id. ¶ 652. Plaintiff Grimando initially and repeatedly applied for medical exemptions, and after securing a medical exemption for 45 days, then applied for a religious exemption, although she was "intimidated by the requirements." Id. ¶¶ 660, 663-666. At the time that the ACC was filed, plaintiff Bryan's application was pending before the Citywide panel. Id. ¶¶ 727-28. Based on her declaration filed in support of the motion for a preliminary injunction, ECF No. 123, it appears that her application has been denied. Id. ¶ 13.

[11] Plaintiff Ruiz-Toro appealed her denial and was subsequently approved for a religious exemption to the Mandate through June 2022. Id. ¶ 488. As a condition of this exemption, Ruiz-Toro is prohibited from entering any school building or classroom. Id. ¶¶ 489-90. She challenges this condition, and maintains a claim that the Mandate violates her constitutional and statutory rights. Id.; see also id. at ¶¶ 920-21.

Smith (collectively, the "Kane plaintiffs") filed a lawsuit on September 21, 2021 – the day after the deadline for applying for a religious exemption under the UFT Award - seeking a preliminary injunction. ECF No. 1. They subsequently moved for a temporary restraining order on October 4, 2021. ECF No. 12. The Kane plaintiffs' motion for a temporary restraining order was denied on October 5, 2021, ECF No. 33, and their motion for a preliminary injunction was denied on October 12, 2021, ECF No. 60. Plaintiffs Keil, De Luca, Delgado, Strk, and Buzaglo (collectively, "the Keil plaintiffs") filed a lawsuit on October 27, 2021. Complaint, Keil et al. v. City of New York, 21 Civ. 8773 (S.D.N.Y. Oct. 27, 2021), ECF No. 10. The Keil plaintiffs' motion for a temporary restraining order and a preliminary injunction were denied on October 28, 2021. Plaintiffs appealed these denials on October 25 and 28, 2021, respectively. ECF No. 67; Notice of Interlocutory Appeal, Keil et al. v. City of New York, 21 Civ. 8773 (S.D.N.Y. Oct. 28, 2021), ECF No. 33.

The Second Circuit considered plaintiffs' appeals in tandem and issued a 48-page opinion addressing the substantive issues in this case. It found that "[t]he Vaccine Mandate, in all its iterations, is neutral and generally applicable." Kane v. De Blasio, 19 F.4th 152, 164 (2d Cir. 2021) (hereinafter "Kane"). It also found that the Mandate's exemptions do not treat secular conduct more favorably than comparable religious conduct. Id. at 166. Accordingly, the Second Circuit found that the plaintiffs were not likely to succeed on their argument that the Mandate was facially unconstitutional. Id.

However, in accordance the City's concession that the procedure used in examining the religious

exemption requests may have been "constitutionally suspect" as applied to plaintiffs, the Second Circuit made the "exceedingly narrow" determination that the plaintiffs were likely to succeed on their as applied challenges. Id. at 167. Specifically, the Second Circuit found that plaintiffs provided evidence that the arbitrators had evaluated their requests in accordance with the UFT Award's standards for a religious exemption, which stated that "requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature." Id. at 168. Therefore, the Court reasoned that:

> Denying an individual a religious accommodation based on someone else's publicly expressed religious views — even the leader of her faith —runs afoul of the Supreme Court's teaching that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."

Id. (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989) (emphasis in original)).

Accordingly, the Second Circuit ordered that plaintiffs' requests receive fresh consideration "by a central citywide panel, which will adhere to the standards of, inter alia, Title VII of the Civil Rights Act of 1964, rather than the challenged criteria set forth in . . . the arbitration award . . . ." (hereinafter, the "Citywide Panel.") Id. at 162 (internal citations

and quotation marks omitted). Further, the Circuit also stayed the deadline for plaintiffs to opt into the extended leave program. Id. It further provided that if a plaintiff's request for religious accommodation is granted by the Citywide Panel, the plaintiff will receive backpay from the date the plaintiff was placed on leave without pay. Id. The case was subsequently stayed pending the conclusions of the proceedings before the Citywide Panel. ECF No. 80.

D. The Citywide Panel Reviews Plaintiffs' Claims

Subsequently, each of the named plaintiffs who were then a part of this case had their claims reviewed by the Citywide Panel.[12] Plaintiffs allege that the Citywide Panel "rubber-stamped" the denials, although they acknowledge that plaintiff Castro's request for a religious accommodation was granted by the Citywide Panel and that he was reinstated with backpay. ACC ¶¶ 835, 271. Likewise, plaintiffs concede that in each denial, the Citywide Panel noted that the "it would be an undue hardship" for the DOE to allow unvaccinated teachers to enter school buildings. Id. ¶ 158. Plaintiffs filed a letter informing the Court that the Citywide Panel had concluded its review on December 11, 2021. ECF No. 85.

E. Subsequent Procedural History

During the pendency of the appeal and the stay, the Kane plaintiffs twice attempted to amend their complaint to add class allegations, ECF No. 74, and

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[12] Plaintiffs Grimando, Giammarino, LoParrino, Weber, Bryan, and Solon were added to this case in the ACC. ECF No. 102.

requested leave to file a motion for class certification, ECF No. 83. Judge Caproni denied these requests because the Second Circuit had not yet issued a mandate remanding the case to her and because the Citywide Panel had not yet concluded its decision-making process. ECF No. 80 at 2, 84 at 2. On December 11, 2021, after receiving the outcome of their appeals to the Citywide Panel, plaintiffs filed an additional motion for a preliminary injunction and a motion to certify a class.[13] ECF No. 85. Judge Caproni denied both motions, reasoning that the plaintiffs had not shown irreparable harm, likelihood of success on the merits, or pled class allegations in the operative complaints. ECF No. 90. She further ordered that the Kane and Keil cases be consolidated, as neither party objected to consolidation, and gave the plaintiffs leave to file an amended complaint. Id.

On December 15, 2021, plaintiffs appealed Judge Caproni's denial. ECF No. 91. Subsequently, on December 17, 2021, they again asked Judge Caproni to stay the enforcement of the Vaccine Mandate pending the resolution of their appeal. ECF No. 92. Judge Caproni denied the request. ECF No. 93. Thereafter, plaintiffs sought a stay from the Second Circuit, which stayed the deadline for plaintiffs in this action to opt-in to the extended leave program and ordered that no further steps be taken to terminate

[13] Plaintiffs initially received notices that they would be placed on leave without pay within three business days if they did not submit proof of vaccination. Keil v. City of New York, No. 21-3043-CV, 2022 WL 619694, at *3 (2d Cir. Mar. 3, 2022). The City thereafter explained that these notices were erroneously sent to plaintiffs, and that plaintiffs had 14 days to opt into the DOE's leave without pay package. Id.

the named plaintiffs in this action for noncompliance with the Mandate during the pendency of the appeal. ECF No. 94. Subsequently, the Second Circuit denied plaintiffs' motion for a preliminary injunction, ECF No. 108, and affirmed Judge Caproni's decision in its entirety, ECF No. 116.

Defendants moved to dismiss on February 14, 2022. ECF No. 111. Plaintiffs filed their opposition on March 30, 2022. ECF No. 119 ("Opp."). That motion was fully briefed as of April 22, 2022. See ECF No. 151. During the briefing on the motion to dismiss, on April 12, 2022, plaintiffs moved for a preliminary injunction for the fourth time. ECF No. 121. On April 29, 2022, Judge Caproni informed the parties that she would decide the motion to dismiss and the motion for preliminary injunction in tandem. ECF No. 157. The motion for a preliminary injunction was fully briefed on May 20, 2022. See ECF No. 168.

On June 9, 2022, plaintiffs moved to disqualify Judge Caproni, citing her decisions against them and her ownership of Pfizer stock. ECF No. 171, 172. Although Judge Caproni noted that she doubted there was any actual conflict, as she doubted that the resolution of the merits of the case would have any meaningful impact on Pfizer stock, she decided to recuse herself "out of an abundance of caution and to avoid even the possible appearance of any bias or prejudice." ECF No. 175 at 2-3. The case was subsequently briefly assigned to Judge Ramos before being assigned to this Court. Plaintiffs sought to disqualify this Court on June 14, 2022. ECF No. 179. This Court made clear that there is no disqualifying conflict in responses dated June 15, 2022, ECF No. 180, and June 22, 2022, ECF No. 182.

II. Legal Standard

A. Motion to Dismiss

To withstand a Rule 12(b)(6) motion, the non-movant's pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. While the Court accepts the truth of the allegations as pled, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice and we are not bound to accept as true a legal conclusion couched as a factual allegation." Brown v. Daikin Am., Inc., 756 F.3d 219, 225 (2d Cir. 2014) (citations and internal quotation marks omitted).

When ruling on a motion to dismiss pursuant to Rule 12(b)(6), a district court may consider "the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993).

B. Preliminary Injunction

"When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on

the merits, and (3) public interest weighing in favor of granting the injunction." Kane, 19 F.4th at 163 (citing Agudath Isr. of Am. v. Cuomo, 983 F.3d 620, 631 (2d Cir. 2020).

III. Discussion

Plaintiffs bring no fewer than 30 causes of action, under both federal and state law, challenging the Vaccine Mandate. We first consider their federal claims.

A. Free Exercise Challenge

Plaintiffs first allege that the Vaccine Mandate violates the Free Exercise clause. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. CONST., amend. I; see Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause against the states). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990). "The Free Exercise Clause thus protects an individual's private right to religious belief, as well as 'the performance of (or abstention from) physical acts that constitute the free exercise of religion.'" Kane, 19 F.4th at 163–64 (quoting Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene, 763 F.3d 183, 193 (2d Cir. 2014)). "In order to prevail on a Free Exercise Clause claim, a plaintiff generally must establish that 'the object of [the challenged] law is to infringe upon or restrict practices because of their religious

motivation,' or that its 'purpose . . . is the suppression of religion or religious conduct.'" Okwedy v. Molinari, 69 Fed. App'x. 482, 484 (2d Cir. 2003) (alterations in original) (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993)).

Importantly, the protection of the Free Exercise clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." Smith, 494 U.S. at 879. "Where the government seeks to enforce a law that is neutral and of general applicability . . . it need only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices." Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574 (2d Cir. 2002); see Cent. Rabbinical Cong., 763 F.3d at 193 ("[T]he Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."). However, laws and government policies that are either non-neutral or not generally applicable are subject to "strict scrutiny," meaning that they must be "narrowly tailored" to serve a "compelling" state interest. Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 67 (2020); see Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) ("A government policy can survive strict scrutiny under only if it advances interests of the highest order and is narrowly tailored to achieve those interests.") (internal quotation marks and citation omitted).

1. The Vaccine Mandate is Facially Neutral and Generally Applicable

The Second Circuit has already found that "[t]he Vaccine Mandate, in all its iterations, is neutral and generally applicable." Kane, 19 F.4th at 164. Nevertheless, plaintiffs rehash arguments the Second Circuit has already rejected, and ask us to revisit this conclusion, arguing that the Court should apply strict scrutiny (1) because of a purported animus held by City and State officials and (2) because (contrary to the Second Circuit's view), it is not generally applicable.[14] Neither argument is meritorious.

a. There Is No Evidence of "Animus"

Ignoring the fact that the pandemic has claimed the lives of more than a million people in the United States, plaintiffs take the bold position that the Mandate has the "express purpose of inflicting special disability against minority religious viewpoints," Opp. at 4, rather than its obvious and explicit goals to, inter alia, "potentially save lives, protect public health, and promote public safety." Vaccine Mandate

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[14] Although the Second Circuit's opinions regarding the plaintiffs' prior motions for preliminary injunctions span 53 pages and deliver carefully considered holdings on substantive issues in this case, including on the issue of whether the Mandate is neutral and generally applicable, plaintiffs assert that we should review their claims de novo both in light of the differing standards for a preliminary injunction and a motion to dismiss and in light of the new facts they allege in their consolidated amended complaint. See Opp. at 5. Even assuming arguendo that we should review plaintiffs' claims de novo, we would independently concur with the Second Circuit's reasoning and reach the same conclusion: namely, that plaintiffs' facial challenge to the Mandate fails.

at 2. Plaintiffs argue that this case is analogous to Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). There, the Supreme Court found that a series of laws enacted with the purpose of preventing members of a religion from ritualistically sacrificing animals in accordance with their beliefs violated the Free Exercise clause. Id. at 524. The record of animus was clear; for example, the Supreme Court noted that "almost the only conduct subject to [the challenged ordinances] is the religious exercise of Santeria church members. The texts show that they were drafted in tandem to achieve this result." Id. at 535. Here, there is no such record. Instead, the Mandate lays out its reasoning, noting that the CDC has found that "vaccination is an effective tool to prevent the spread of COVID-19 and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated," and is "the most critical strategy to help schools safely resume full operations [and] is the leading public health prevention strategy to end the COVID-19 pandemic." Vaccine Mandate at 1 (alteration in original). This Court, like the other Courts which have considered this Mandate, find that the clear object of the Mandate is to reduce the spread of COVID-19 in New York's schools and permit them to open. See, e.g., Kane, 19 F.4th at 172 (holding "[t]he Vaccine Mandate . . . is designed to further the compelling objective of permitting schools fully to reopen[.]"); Maniscalco v. New York City Dep't of Educ., 563 F. Supp. 3d 33, 39 (E.D.N.Y. 2021) ("[E]ven if plaintiffs disagree with it, the [Mandate] at issue represents a rational policy decision surrounding how

best to protect children during a global pandemic."), aff'd, No. 21-2343, 2021 WL 4814767 (2d Cir. Oct. 15, 2021), cert. denied, 142 S. Ct. 1668 (2022); Broecker v. New York City Dep't of Educ., 573 F. Supp. 3d 878, 891 (E.D.N.Y. 2021) (holding Vaccine Mandate served a "obvious, significant governmental interest in preventing transmission of the COVID-19 virus and protecting students"); New York City Mun. Lab. Comm. v. City of New York, 73 Misc. 3d 621, 628 (N.Y. Sup. Ct., N.Y. Cty. 2021) (noting Mandate represents "the reasoned views and directives of public health officials seeking to best protect the health and welfare of children").

Plaintiffs assert that statements made by City and State officials and the existence of the prior arbitration scheme are evidence of animus. The Second Circuit has already rejected the argument that Mayor De Blasio's and Governor Hochul's statements reflect animus. Kane, 19 F.4th at 165 ("[T]hese statements reflect nothing more than the Mayor's personal belief that religious accommodations will be rare, as well as general support for religious principles that [he] believes guide community members to care for one another by receiving the COVID-19 vaccine.") (internal quotation marks and citation omitted); We The Patriots, 17 F.4th at 283 ("Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers; otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions nonneutral . . . ."). Similarly,

Mayor Adams's statements committing to keeping schools open reflect a policy decision, not animus towards any religious group. Moreover, statements made by DOE officials in applying the overturned UFT Award standards have no bearing on the current standards, which are applied by a different panel using different criteria.

b. The Mandate Is Generally Applicable

Plaintiffs' arguments that the Vaccine Mandate is not generally applicable again rely on arguments that the Second Circuit already rejected. Plaintiffs ask us to reconsider the Second Circuit's conclusion in light of the number of vaccination mandates the City has imposed and the fact that the Mayor has carved out certain exceptions to the private employer vaccination mandate (a mandate not at issue in this case) through Emergency Executive Order 62 ("EEO 62"). Opp. at 7-8. The number of vaccination mandates is plainly irrelevant. At most, the numerous mandates demonstrate the deep concern of the City to stem the coronavirus pandemic. As to the second point, plaintiffs' counsel seem to have forgotten that, as they conceded at oral argument before the Second Circuit on the initial preliminary injunction motions, "a law can be generally applicable when, as here, it applies to an entire class of people." Kane, 19 F.4th at 166. The Vaccine Mandate applies to the class of people who work in the New York City public schools. The fact that it does not apply to professional athletes is of no significance here. Indeed, if a distinction were even needed, it is obvious that New Yorkers may choose whether to attend a sporting event with unvaccinated athletes and accept whatever risk those

athletes pose. In contrast, school attendance is not a similar choice, and the risk posed by unvaccinated teachers is obvious.[15] Further, plaintiffs' argument that these policies demonstrate that strict scrutiny is required here because the polices "single out secular but not religious activities for favored treatment," Opp. at 9, is confusing and false. Working in a public school is not a religious activity. See U.S. CONST., amend. I.

Finally, plaintiffs argue that because the DOE provides a process for applying for religious exemptions, strict scrutiny must apply because the Citywide Panel considers each request for a religious exemption individually. In support of this position, plaintiffs rely on the Supreme Court's holding in Fulton v. City of Philadelphia that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . . because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude[.]" 141 S. Ct. 1868 at 1879 (quotation marks, citation, and alterations omitted); Opp. at 8. This position does not withstand cursory analysis. In rejecting a similar argument that the Supreme Court's decision in Fulton required strict scrutiny for every religious

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[15] The Second Circuit has already rejected plaintiffs' former argument about an exempt group (emergency responders), finding that "[v]iewed through the lens of the City's asserted interest in stemming the spread of COVID-19, these groups are not comparable to the categories of people that the Mandate embraces. While the exempt groups do not come into prolonged daily contact with large groups of students (most of whom are unvaccinated), the covered groups (for example, teachers) inevitably do." Kane, 19 F.4th at 166.

exception, a recent decision noted that "such an interpretation would create a perverse incentive for government entities to provide no religious exemption process in order to avoid strict scrutiny." Ferrelli v. Unified Ct. Sys., No. 22 Civ. 0068 (LEK) (CFH), 2022 WL 673863, at *7 (N.D.N.Y. Mar. 7, 2022). Here, the City's exemptions were provided in accordance with Title VII, which requires employers to offer reasonable religious accommodations in certain circumstances, as the Second Circuit provided in its order requiring the City to establish the Citywide Panel.[16] Kane, 19 F.4th at 175. Indeed, as discussed infra, the record shows that the City only inquired as to whether each plaintiff's belief was sincere, and where it determined it was, then proceeded to determine if a reasonable accommodation could be provided. Further, we remind plaintiffs that the government faces different burdens when it, as here,

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[16] Plaintiffs also cite to Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n, 571 F. Supp. 3d 571, 613 (N.D. Tex. 2021), which is currently on appeal, for the proposition that "[b]ecause Title VII is not a generally applicable due to the existence of individualized exemptions, the Court finds that strict scrutiny applies." Id.; Opp. at 11. Bear Creek is an outlier case. Title VII, which was passed in 1964, has been routinely analyzed and applied by courts for over half a century. Moreover, the Second Circuit and Supreme Court do not apply strict scrutiny in considering Title VII claims. See e.g., Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) ("We find no basis in either [Title VII] or its legislative history for requiring an employer to choose any particular reasonable accommodation."); Cosme v. Henderson, 287 F.3d 152, 158 (2d Cir. 2002) ("Nevertheless, to avoid Title VII liability, the employer need not offer the accommodation the employee prefers. Instead, when any reasonable accommodation is provided, the statutory inquiry ends.").

acts as an employer as opposed to a lawmaker. Engquist v. Oregon Dep't of Agr., 553 U.S. 591, 598 (2008) ("We have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage [its] internal operation.") (internal quotation marks and citation omitted).[17]

Similarly, we also reject plaintiffs' argument that because they have articulated a "hybrid rights" claim, strict scrutiny applies. The Second Circuit has repeatedly refused to apply strict scrutiny merely because plaintiffs claim a hybrid rights violation, reasoning that "[t]he allegation that a state action that regulates public conduct infringes more than one of a public employee's constitutional rights does not warrant more heightened scrutiny than each claim would warrant when viewed separately." Knight v. Connecticut Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001); see also Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003) ("[A]t least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard to evaluate hybrid

[17] Plaintiffs claim in a footnote that Engquist is not applicable because the Mandate is a regulatory action, "extending beyond government employees and imposing requirements on patrons and private sector employees." Opp. at 21 n. 8. Plaintiffs, however, are employees of the DOE and do not have standing to challenge the aspects of the Vaccine Mandate that apply to contractors or visitors to public schools.

claims.") (internal quotation marks and citation omitted). This precedent binds this Court.

Thus, we find that rational basis review applies.[18] In this context, plaintiffs claim that the City and DOE have no rational basis for the Mandate because vaccines cannot completely prevent the spread of COVID-19, and because other groups, like performers, are not required to be vaccinated. This argument is not persuasive. The DOE clearly explained that "a system of vaccination for individuals working in school settings, including DOE buildings and charter school buildings, will potentially save lives, protect public health, and promote public safety." Vaccine Mandate at 2. This is an articulated rational, and indeed, compelling basis. See Kane, 19 F.4th at 172 ("[t]he Vaccine Mandate . . . is designed to further the compelling objective of permitting schools fully to reopen[.]"); Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 67 ("Stemming the spread of COVID–19 is unquestionably a compelling interest . . . .").[19]

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[18] Plaintiffs argue that the court cannot deviate from strict scrutiny simply because the case involves public health. Opp. at 18-19. We agree. But plaintiffs are not correct that strict scrutiny must apply to an immunization mandate. As the Second Circuit recently stated, "no court appears ever to have held that Jacobson requires that strict scrutiny be applied to immunization mandates. To be sure, courts have consistently rejected substantive due process challenges to vaccination requirements without applying strict scrutiny." Goe v. Zucker, No. 21-0537-CV, 2022 WL 3007919, at *8 (2d Cir. July 29, 2022) (citations omitted).

[19] Plaintiffs object that the vaccines are ineffective and that their "natural immunity" from having contracted the coronavirus would protect them equally as well as receiving a federally

Because the City had a rational basis for mandating vaccinations, namely, in order to allow schools to continue in person safely, plaintiffs' Free Exercise Claim fails.

B. Establishment Clause

Plaintiffs claim that the Vaccine Mandate also violates the Establishment Clause because it creates a denominational preference, in that certain "unorthodox religious denominations" are more burdened than mainstream denominations.[20] Opp. at 15. This is nothing more than a repackaging of plaintiffs' free exercise claims. Plaintiffs point to no case law requiring that government action impact all religions equally. Indeed, the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a

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approved and tested vaccine. We consider the facts set forth in the Mandate as an explanation of the decision-making of the City and DOE. See Goe, 2022 WL 3007919, at *5 ("[T]o the extent that the district court relied on facts from the extrinsic materials that were in dispute, it did not rule on the factual accuracy of those materials; instead, it cited those materials to explain the decision-making of state authorities."). Even if plaintiffs' claims regarding "natural immunity" were true, they would not be significant as many of the plaintiffs do not allege that they have ever contracted the coronavirus or have any "natural immunity."

[20] Plaintiffs also mischaracterize the statements of City and State officials to claim that "the government openly stated that their purpose was to target certain religious denominations for discriminatory treatment in implementing the Mandate against religious objectors." Opp. at 15 (emphasis in original). For the reasons stated above, see supra at pp. 20-22, this argument fails.

century of our free exercise jurisprudence contradicts that proposition." Smith, 494 U.S. at 878–79.[21]

Moreover, the Supreme Court's recent decision Kennedy v. Bremerton Sch. Dist. instructs courts "that the Establishment Clause must be interpreted by reference to historical practices and understandings." 142 S. Ct. 2407, 2428 (2022) (internal quotation marks and citation omitted). We note that there is a long history of vaccination requirements in this country and in this Circuit. See, e.g., Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 38 (1905) (upholding smallpox vaccination mandate); see also Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("[A

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[21] Plaintiffs' citations to the amended consolidated complaint for the proposition that the DOE is still applying the standards set forth in the UFT Award are unavailing. See Opp. at 15 (citing ACC 102 ¶ 808, ¶¶ 134-145). Paragraph 808 states a legal conclusion unrelated to the Establishment Clause claim: "The DOE violates the Free Exercise Clause every time it applies the terms of the Exemption Standards to deny an individual request for religious exemption."). "Even under the liberal pleading standard of Federal Rule of Civil Procedure 8, courts need not credit conclusory allegations, or legal conclusions without factual allegations." Glob. View Ltd. Venture Cap. v. Great Cent. Basin Expl., L.L.C., 288 F. Supp. 2d 482, 484 (S.D.N.Y. 2003). Plaintiffs' allegations in paragraphs 134-45 similarly either recite legal conclusions or conclusory allegations (e.g., ¶¶ 140, 144), do not support the proposition plaintiffs cite them for (e.g., ¶ 139), or do not refer to process applied to plaintiffs' requests, but to the process applied to the requests of other individuals (e.g., ¶ 137-38). Plaintiffs lack standing to challenge procedures that do not apply to them. See Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (holding the "irreducible constitutional minimum of standing" requires that a plaintiff must have suffered an "injury in fact.").

parent] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease . . . ."); Phillips v. City of New York, 775 F.3d 538, 543 (2d Cir. 2015) (per curiam) (holding that "New York could constitutionally require that all children be vaccinated in order to attend public school" and that "New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs").

C. Equal Protection

Similarly, plaintiffs claim that the Vaccine Mandate violates the equal protection clause because the mandate is "facially discriminatory" and impacts unorthodox religious minorities disproportionately. Opp. at 19-21. As we have already stated, the Mandate is facially neutral and generally applicable. Moreover, the fact that certain individuals have religious objections to the Mandate does not, contrary to plaintiffs' opposition brief, provide plaintiffs with a "per se victory", id. at 19-20. "[I]t is axiomatic that [to establish an equal protection violation] a plaintiff must allege that similarly situated persons have been treated differently." Gagliardi v. Village of Pawling, 18 F.3d 188, 193 (2d Cir. 1994). Plaintiffs point to no similarly situated persons who have been treated differently - indeed, they do not point to any DOE employee who has been granted a religious exemption to the Vaccine Mandate and been permitted to work in person. Since there is no claim of differential treatment, plaintiffs' equal protection claim fails.

D. Due Process

Plaintiffs also claim that their substantive and procedural due process rights were violated by the Vaccine Mandate. Both arguments fail.

1. Substantive Due Process

"Substantive due process rights safeguard persons against the government's exercise of power without any reasonable justification in the service of a legitimate governmental objective." Southerland v. City of New York, 680 F.3d 127, 151 (2d Cir. 2012) (internal quotation marks and citation omitted). To analyze a claim under substantive due process, courts perform a two-step analysis. Hurd v. Fredenburgh, 984 F.3d 1075, 1087-89 (2d Cir. 2021).

"The first step in substantive due process analysis is to identify the constitutional right at stake." Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995). Here, plaintiffs cite to the "basic, and sacred, natural right to control one's own body, and care for it as one best sees fit, in accordance with one's creed and religious beliefs, as well as one's best judgment in independent consultation with one's doctor." Opp. at 17.[22] But "[b]oth [the Second Circuit] and the Supreme Court have consistently recognized that the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." We The Patriots USA, 17 F.4th at 293; id. at n. 35

[22] The Supreme Court's recent decision in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) makes clear that to the extent this right exists, it is not absolute.

("This Court cannot find an overriding privacy right when doing so would conflict with Jacobson [which] for over 100 years [] has stood firmly for the proposition that the urgent public health needs of the community can outweigh the rights of an individual to refuse vaccination."). Moreover, the Second Circuit has also held that the "[p]laintiffs are not required [by the Vaccine Mandate] to perform or abstain from any action that violates their religious beliefs." Kane, 19 F.4th at 172; id. at 171 ("The City is not threatening to vaccinate Plaintiffs against their will and despite their religious beliefs[.]"). Indeed, all but one plaintiff remain unvaccinated.[23]

Moreover, plaintiffs have no constitutional right to work in person with children in the New York City public schools. See Maniscalco, 563 F. Supp. 3d at 39 (holding no fundamental constitutional right is infringed by the Vaccine Mandate because, inter alia, "plaintiffs may pursue teaching or paraprofessional jobs at private schools in New York City, public and private schools outside of New York City, daycares or early childhood education centers, tutoring centers, adult or continuing education centers, virtual institutions, or within home settings").

Even if a fundamental right were at issue, plaintiffs' arguments fail at the second step of the analysis. At the second step, plaintiffs "must demonstrate that the state action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" such that the Due Process Clause "would not countenance it even were it

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[23] Plaintiff Solon appears to have chosen to be vaccinated. See ECF No. 166 ¶ 9.

accompanied by full procedural protection." Hurd, 984 F.3d at 1087 (internal quotation marks and citation omitted). As discussed, supra, there is a long history of mandatory vaccination laws in this country. As the Maniscalo court found, "Requiring that DOE employees take a dose of ivermectin as a condition of employment might qualify as 'a plain, palpable invasion' of such rights, not having any real relation to the public health crisis. However, mandating a vaccine approved by the FDA does not." Maniscalco, 563 F. Supp. 3d at 39.[24]

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[24] Plaintiffs assert that the COVID-19 vaccines available in New York City are "experimental," and that this disputed issue of fact precludes a motion to dismiss. Opp. at 25-27. While at one time, the COVID-19 vaccines were only authorized for emergency use, that is no longer the case, and as explained above, the Vaccine Mandate was only promulgated after the FDA had fully approved a COVID-19 vaccine. The Court takes judicial notice of the fact that both the Pfizer-BioNTech (COMIRNATY) COVID-19 vaccine and the Moderna (Spikevax) COVID-19 vaccine have been fully approved by the FDA for use in people 16 years and older and found by the FDA to meet high standards for safety, effectiveness, and manufacturing quality. See Developing COVID-19 Vaccines, Centers for Disease Control,(July 20, 2022), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/distributing/steps-ensure-safety.html?s_cid=11700:covid%20vaccine%20fda%20approval:sem.ga:p:RG:GM:gen:PTN:FY22 (stating the "FDA has granted full approval for Pfizer-BioNTech (COMIRNATY) COVID-19 Vaccine for people ages 16 years and older and for Moderna (Spikevax) COVID-19 Vaccine for people ages 18 years and older . . . . These vaccines were found to meet the high standards for safety, effectiveness, and manufacturing quality FDA requires of an approved product."). Further, the Court takes judicial notice of the fact that these vaccines are widely available in New York City. See COVID-19 Vaccine Locations, Vaccines.gov, https://www.vaccines.gov/results/?zipcode=10007&medicationGuids=6e9b0945-9b98-4df4-8d10-

Accordingly, plaintiffs have not stated a claim for substantive due process.

2. Procedural Due Process

Plaintiffs have also failed to state a claim for violations of procedural due process. "In order to succeed on a claim of deprivation of procedural due process, a plaintiff must establish that state action deprived him of a protected property or liberty interest." White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1061–62 (2d Cir. 1993). For the reasons already set out, there is no protected liberty interest. Further, plaintiffs do not dispute that teachers who do not have a tenure do not have a property interest in their employment. See Biehner v. City of New York, No. 19 Civ. 9646 (JGK), 2021 WL 878476, at *4 (S.D.N.Y. Mar. 9, 2021). As such, only plaintiffs Kane, Smith, Keil, Delgado, and Strk even have a property interest at stake. Am. Compl. ¶¶ 227, 445, 495, 540, 574.

Moreover, the Second Circuit has "held on several occasions that there is no due process violation where, as here, pre-deprivation notice is provided and the

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c42f526eed14,cd62a2bb-1e1e-4252-b441-68cf1fe734e9,784db609-dc1f-45a5-bad6-8db02e79d44f&medicationKeys=pfizer_comirnaty_covid_19_vaccine,moderna_spikevax_covid_19_vaccine,j%26j_janssen_covid_19_vaccine&appointments=true (displaying numerous locations where fully approved vaccines are available) (last visited Aug. 25, 2022). As such, the Court rejects the plaintiffs' arguments premised on the assertion that the vaccines fully approved by the FDA are not available in New York. See Opp. at 25-27 (arguing that the Mandate is unconstitutional because the COVID-19 vaccines available in New York are only approved under an Emergency Use Authorization).

deprivation at issue can be fully remedied through the grievance procedures provided for in a collective bargaining agreement." See Adams v. Suozzi, 517 F.3d 124, 128 (2d Cir. 2008). "Pre-deprivation processes need not be elaborate, and the Constitution mandates only that such process include, at a minimum, notice and the opportunity to respond." Garland v. New York City Fire Dep't, No. 21 Civ. 6586 (KAM) (CLP), 2021 WL 5771687, at *7 (E.D.N.Y. Dec. 6, 2021). Here, that notice and opportunity were plainly given. The amended consolidated complaint describes in detail how plaintiffs received notice of the Citywide Panel and the standards it would apply, that they had an opportunity to submit materials in support of their accommodation requests to the Citywide Panel, and the Citywide Panel issued written explanations for each of the named plaintiffs, clearly spelling out how it reached its conclusions.[25] See, e.g., ACC ¶¶ 235-36, 263-65, 271, 292, 293, 297-98, 314-20, 328, 335, 338, 362, 367-68, 382-83, 408-09, 426-28, 483-88, 498, 500-12, 522-36, 553-69, 582-92, 613-26, 669, 680, 693-95, 726-28, 750, 769-73, 778-79; see also ECF No. 122-2 (setting forth the Citywide Panel's reasoning in reaching its decision regarding each plaintiff). Moreover, plaintiffs have the ability to challenge any decision terminating their employment through their collective bargaining agreement, or

[25] This Court, having found that strict scrutiny does not apply in this case, finds plaintiffs' assertion that the Citywide Panel had to provide plaintiffs with a response that could survive strict scrutiny in order to avoid violating plaintiffs' constitutional rights, Opp. at 23-24, without foundation.

through an Article 78 proceeding.[26] Sindone v. Kelly, 439 F. Supp. 2d 268, 278 (S.D.N.Y. 2006) ("[T]he Second Circuit has gone to considerable lengths to recognize the adequacy of Article 78 procedures as affording adequate safeguards to satisfy federal procedural due process standards.").

E. Plaintiffs Have Not Pled As-Applied Claims

Further, the Mandate is not unconstitutional as applied to the plaintiffs. As a threshold matter, two of plaintiffs (Ruiz-Toro and Castro) have had their requests for religious accommodation granted.[27] ACC ¶¶ 271, 488. While these plaintiffs may have preferred a different accommodation, "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986); see also We The Patriots USA, 17 F.4th at 292 ("Title VII does not require covered entities to provide the accommodation that Plaintiffs prefer—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated.").

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[26] Indeed, plaintiff Giammarino appears to have filed an Article 78 proceeding. See Giammarino v. Board of Education et al., Index No. 160829/2021 (N.Y. Sup. Ct., N.Y. Cty. Jan. 18, 2021).

[27] Specifically, these plaintiffs were given permission to work remotely, but cannot enter DOE school buildings. ACC ¶¶ 281, 488-89.

Likewise, plaintiffs Grimando, Giammarino, LoParrino, Weber, and Smith did not avail themselves of the process for seeking a religious exemption set out by the DOE, and so have not stated a due process claim.[28] "Plaintiffs are not entitled to circumvent established due process protections and then claim they were never afforded such protections." Capul v. City of N.Y., No. 19 Civ. 4313 (KPF), 2020 WL 2748274, at *13 (S.D.N.Y. May 27, 2020), aff'd 832 F. App'x. 766 (2d Cir. 2021); see also Garland, 574 F. Supp. 3d at 130 (finding no due process violation where plaintiffs chose not to participate in the process of requesting vaccination waivers by the deadline). As such, these plaintiffs have failed to state a claim.[29]

The remainder of the plaintiffs had their claims reviewed by the Citywide Panel. While plaintiffs have pled that the Citywide Panel just "rubber-stamped" the plaintiffs' previous denials in "bad faith," ACC ¶¶ 140, 835, these assertions are insufficient to state a claim. Amron v. Morgan Stanley Inv. Advisors Inc., 464 F.3d 338, 344 (2d Cir. 2006) (holding that in opposing a motion to dismiss, "bald assertions and conclusions of law will not suffice"). Moreover, these conclusory allegations are contradicted by the fact

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[28] Specifically, plaintiff Grimando did not submit a timely religious exemption, although she did submit a timely medical exemption. ACC ¶¶ 668-69. Plaintiffs Giammarino and LoParrino opted not to submit a request for an exemption through the SOLAS portal, as required, but instead sent separate letters to DOE. Id. ¶¶ 733-34, 769. Plaintiff Weber chose not to appeal his denial of a religious exemption. Id. ¶ 652.

[29] Plaintiff Solon has apparently decided to be vaccinated, and as such, her claims are moot. See ECF No. 166 ¶ 9.

that the Citywide Panel reversed the arbitrators' denial of plaintiff Castro's religious accommodation. ACC ¶¶ 269, 271.

Further, while plaintiffs criticize the process by which the Citywide Panel evaluated their applications as improperly disregarding their religious beliefs, only one of the Citywide Panel's decisions turned on whether the plaintiffs had a sincere religious belief.[30] In all other circumstances in which it denied a plaintiff's request for a religious accommodation, the Citywide Panel found that the plaintiff's request presented an "undue hardship" because the plaintiff "is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population."[31] See, e.g., ACC ¶¶ 158, 512 (denying Keil's appeal), 536 (denying De Luca's appeal), 569 (denying Delgado's appeal), 592 (denying Strk's appeal), 626 (denying Buzaglo's appeal), see also ECF No. 122-2 (setting forth

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[30] Plaintiff Clark's appeal was denied because the panel found that her decision to not receive a vaccination was not based on her religious belief, but rather, on non-religious sources. ECF No. 122-2 at 2. This is entirely proper - under Title VII, an employer may inquire into whether an employee has "a genuine religious practice that conflicts with a requirement of employment." Bind v. City of New York, No. 08 Civ. 11105 (RJH), 2011 WL 4542897, at *10 (S.D.N.Y. Sept. 30, 2011) (holding "[a]n employer asked to grant a religious accommodation is permitted to examine whether the employee's beliefs regarding the accommodation are sincerely held" and collecting cases).

[31] Plaintiffs' argument that they can work remotely as they did when the City's schools were remote fails, because the City and DOE have decided to return to in-person learning.

Citywide Panel's reasoning regarding each plaintiff's appeal). These findings satisfied the requirements of Title VII. Under Title VII "when an employee has a genuine religious practice that conflicts with a requirement of employment, his or her employer, once notified, must offer the aggrieved employee a reasonable accommodation, unless doing so would cause the employer to suffer an undue hardship." Cosme v. Henderson, 287 F.3d 152, 158 (2d Cir. 2002). "An accommodation is said to cause an undue hardship whenever it results in 'more than a de minimis cost' to the employer." Baker v. The Home Depot, 445 F.3d 541, 548 (2d Cir. 2006) (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)). Plaintiffs' inability to teach their students safely in person presents more than a de minimis cost.

Further, we note that the Second Circuit and other courts in have repeatedly found that vaccination against COVID-19 is a proper condition of employment. See, e.g., We the Patriots, 17 F.4d at 294 (holding vaccination was a condition of employment for healthcare workers); Garland, 574 F. Supp. 3d at 129 (concluding that vaccination was a condition of employment under a Health Commissioner Order applicable to City employees); Broecker v. New York Dept. of Educ., No. 21 Civ. 6387 (KAM) (LRM), 2022 WL 426113, at *8 (E.D.N.Y. Feb. 11, 2022) (holding vaccination was a condition of employment for NYC DOE employees); O'Reilly v. The Bd. of Educ. of the City School Dist. of the City of New York, No. 161040/2021, 2022 WL 180957, at *3 (N.Y. Sup. Ct., N.Y. Cty. Jan. 20, 2022) (same). Thus, "[t]he termination of NYC DOE employees who failed to comply with the COVID-19 vaccination condition of

employment is not disciplinary. Rather, [p]laintiffs' separation is [be]cause of their failure to avail themselves of existing processes or comply with a lawful job condition." Broecker, 2022 WL 426113, at *11. As the DOE has provided notice and processes that comport with Constitutional due process before and after termination, see supra pp. 35-36, no additional process is required. Broecker, 2022 WL 426113, at *11.

F. The State Law Claims Are Dismissed for Lack of Supplemental Jurisdiction

As there are no remaining federal claims, this Court declines to exercise supplemental jurisdiction over the state law claims.[32] Pursuant to 28 U.S.C. § 1367(c)(3), a district court "may decline to exercise supplemental jurisdiction over a claim" where "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); see also Carnegie–Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (1988) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine — judicial economy, convenience, fairness, and comity — will point toward declining to exercise jurisdiction over the remaining

[32] While plaintiffs have also pled a claim for a violation of Section 1983, "Section 1983 does not create any independent substantive right, but rather is a vehicle to 'redress . . . the deprivation of [federal] rights established elsewhere.'" Laface v. Eastern Suffolk BOCES, 349 F. Supp. 3d 126, 153 (E.D.N.Y. 2018) (quoting Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999)). As such, this claim is dismissed.

state-law claims."). We therefore do not address the arguments regarding state law claims.

G. The Preliminary Injunction is Denied

Plaintiffs have also moved again for a preliminary injunction. "When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." Kane, 19 F.4th at 163. As Judge Caproni and the Second Circuit have held, having found no violation of a Constitutional right, "the only alleged harm is economic, and it can be remedied by money damages, were the [p]laintiffs to prevail on the merits of the litigation." Kane v. de Blasio, 575 F. Supp. 3d 435, 441 (S.D.N.Y. 2021), aff'd sub nom. Keil v. City of New York, No. 21-3043-CV, 2022 WL 619694 (2d Cir. Mar. 3, 2022). Moreover, for the foregoing reasons, plaintiffs have not stated a claim and therefore have not demonstrated a likelihood of success on the merits. Finally, plaintiffs have not demonstrated that the public interest weighs in their favor. There is a strong public interest in vaccination to support the City's schools safe reopening and to allow the children who attend daily to learn with as little risk as possible to them and their families. As such, the preliminary injunction is denied.[33]

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[33] Plaintiffs' request to supplement the preliminary injunction record with the May 24, 2022 deposition transcript of Eric Eichenholtz, ECF No. 167, is denied because the request is procedurally improper and because consideration of the

IV. Conclusion

For the foregoing reasons, this Court denies the motion for a preliminary injunction and dismisses plaintiffs' complaint in its entirety with prejudice. The Clerk of Court is respectfully directed to terminate the open motions and close this case.

SO ORDERED.

Dated: New York, New York
August 26, 2022

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

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transcript would not alter our decision. First, we note that plaintiffs have already filed the transcript, despite the fact that they are purporting to request leave to do so. This filing violates the Individual Practices of Judge Caproni, who was presiding at the time the transcript was filed, which explicitly state "[t]he Court will not search through the record in support of facts relevant to a party's claim or defense." Individual Practices in Civil Cases of Judge Caproni, 4.H.ii.e. Second, as noted supra at pp. 24-25, we find plaintiffs' argument that the individual consideration that plaintiffs asked for and were granted by the Citywide Panel triggered strict scrutiny under Fulton unpersuasive. But even if we accepted plaintiffs' argument, it would not alter the result, as we would still deny the preliminary injunction because plaintiffs have failed to meet each and every prong of the preliminary injunction analysis.

22-2678-cv; 21-2711-cv
Kane v. de Blasio; Keil v. City of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021

(Argued: November 22, 2021
Decided: November 28, 2021)

No. 21-2678

MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO,

Plaintiffs-Appellants,

-v.-

BILL DE BLASIO, in his official capacity as Mayor of the City of New York, DAVID CHOKSHI, in his official capacity of Health Commissioner of the City of New York, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees.

NO. 21-2711

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO,

Plaintiffs-Appellants,

-v.-

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, in his official capacity of Health Commissioner of the City of New York, MEISHA PORTER, in her official capacity as Chancellor of the New York City Department of Education,

Defendants-Appellees.

Before: LIVINGSTON, *Chief Judge*, KEARSE, and LEE, *Circuit Judges*.

In these two cases on appeal, fifteen teachers and school administrators challenge the denial of motions to preliminarily enjoin the enforcement of an order issued by the New York City Commissioner of Health and Mental Hygiene mandating that individuals who work in New York City schools be vaccinated against the COVID-19 virus ("Vaccine Mandate"). Plaintiffs-Appellants challenge the Vaccine Mandate on religious-freedom grounds and principally contend (1) that it is facially infirm under the First Amendment; and (2) that the procedures by which their religious accommodation claims were considered are unconstitutional as applied to them. We reject the Plaintiffs-Appellants' facial challenge but agree that they have established an entitlement to preliminary relief on their as-applied claim. Accordingly, the judgment of the district court is **VACATED** and the case **REMANDED** for further proceedings. Interim relief ordered by the motions panel pending appeal is continued, with the consent of Defendant-Appellee the City of New York.

FOR PLAINTIFFS-APPELLANTS:	In No. 21-2678: SUJATA SIDHU GIBSON, The Gibson Law Firm, Ithaca, NY; In No. 21-2711: BARRY BLACK, Sarah Elizabeth Child, and Jonathan R. Nelson, Nelson Madden Black LLP, New York, NY.
FOR DEFENDANTS-APPELLEES:	SUSAN PAULSON Assistant Corporation Counsel, Richard Paul Dearing, Assistant Corporation Counsel, and Devin Slack, New York City Law Department, New York, NY.

PER CURIAM

These two cases on appeal, which we heard in tandem, concern the denial of preliminary injunctive relief in connection with an order issued by the New York City Commissioner of Health and Mental Hygiene (the "Commissioner"), mandating that individuals who work in New York City schools be vaccinated against the COVID-19 virus (the "Vaccine Mandate" or "Mandate"). Plaintiffs-Appellants ("Plaintiffs") are fifteen teachers and school administrators who object to receiving the COVID-19 vaccine on religious grounds. Plaintiffs sought, but were denied, religious accommodations. They have sued the City of New York (the "City"), certain officials, and the New York City Department of Education (collectively, the "Defendants"), challenging both the Vaccine Mandate on its face and the process by which their requests for religious accommodations were denied. The United States

District Court for the Southern District of New York (Caproni, *J.*) denied motions for preliminary injunctions in both cases, but a motions panel of this Court, with the consent of the City, thereafter granted Plaintiffs substantial provisional relief pending appeal.

For the reasons set forth herein, we conclude that the Vaccine Mandate does not violate the First Amendment on its face, and we thus agree with the district court to this extent. We nevertheless vacate the district court's orders of October 12 and 28, 2021, denying preliminary relief, and we concur with and continue the interim relief granted by the motions panel as to these fifteen individuals. For the present, Plaintiffs have established their entitlement to preliminary relief on the narrow ground that the procedures employed to assess their religious accommodation claims were likely constitutionally infirm as applied to them. We remand for further proceedings consistent with this opinion.

BACKGROUND

I. Factual Background

On August 24, 2021, the Commissioner issued an order requiring generally that Department of Education ("DOE") and/or City employees or contractors who work in DOE schools or DOE buildings be vaccinated against the COVID-19 virus. The Vaccine Mandate provides, in pertinent part, as follows:

> 1. No later than September 27, 2021 or prior to beginning employment, all DOE staff must provide proof to the DOE that:

a. they have been fully vaccinated; or

b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or

c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.[1]

…

5. For the purposes of this Order:

a. "DOE staff" means (i) full or part-time employees of the DOE, and (ii) DOE interns (including student teachers) and volunteers.

b. "Fully vaccinated" means at least two weeks have passed after a person received a single dose of a one-dose series, or the second dose of a two-dose series, of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization.

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[1] The Vaccine Mandate applies the same requirements to "City employees who work in-person in a DOE school setting or DOE building," "[a]ll staff of contractors of DOE and the City who work in-person in a DOE school setting or DOE building, including individuals who provide services to DOE students," and "[a]ll employees of any school serving students up to grade 12 and any [Universal Pre-Kindergarten-3 or -4] program that is located in a DOE building who work in-person, and all contractors hired by such schools or programs to work in-person in a DOE building."

c. "DOE school setting" includes any indoor location, including but not limited to DOE buildings, where instruction is provided to DOE students in public school kindergarten through grade 12, including residences of pupils receiving home instruction and places where care for children is provided through DOE's [Living for the Young Family Through Education] program.

d. "Staff of contractors of DOE and the City" means a full or part-time employee, intern or volunteer of a contractor of DOE or another City agency who works in-person in a DOE school setting or other DOE building, and includes individuals working as independent contractors.

e. "Works in-person" means an individual spends any portion of their work time physically present in a DOE school setting or other DOE building. It does not include individuals who enter a DOE school setting or other DOE location only to deliver or pickup items, unless the individual is otherwise subject to this Order. It also does not include individuals present in DOE school settings or DOE buildings to make repairs at times when students are not present in the building, unless the individual is otherwise subject to this Order.

Joint App'x 177–79.[2] DOE serves approximately one million students across the City, and the order was consistent with guidance from the U.S. Centers for Disease Control ("CDC") that school teachers and staff should be vaccinated as soon as possible so as to permit schools to resume normal operations safely.

On September 1, 2021, the United Federation of Teachers ("UFT") filed a formal objection to the Vaccine Mandate on the ground that it fails to provide any medical or religious accommodations. After failing to resolve their dispute through mediation, the UFT and the City moved to arbitration. On September 10, an independent arbitrator (the "Arbitrator") issued an award (the "Arbitration Award") setting forth a process and standards ("Accommodation Standards") for determining, as relevant to this appeal, religious accommodations to the Vaccine Mandate.[3]

The Accommodation Standards allowed employees to request a religious accommodation by submitting a request that is "documented in writing by a religious official (e.g., clergy)." Joint App'x 197. Requests "shall be denied where the leader of the religious organization has spoken publicly in favor of

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[2] The "Joint App'x" is the joint appendix filed by the parties in No. 21-2711.

[3] The Arbitration Award also provides standards for determining medical accommodations to the Vaccine Mandate. Although Plaintiffs challenged these standards below as well, they did not appeal on these issues.

On September 15, the Arbitrator issued a materially identical award resolving a dispute between the City and the Council of Supervisors and Administrators, a labor union for school administrative personnel. Joint App'x 209.

the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature." *Id.*[4] The Accommodation Standards further provide that requests "shall be considered for recognized and established religious organizations (e.g., Christian Scientists)." *Id.*

The Arbitration Award establishes a two-step process for resolving a request for a religious accommodation. First, the DOE renders an "initial determination of eligibility for an exemption or accommodation."[5] Joint App'x 197; Defendants Br. 7.

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[4] The meaning of the second clause—"where the documentation is readily available (e.g., from an online source)"—is obscure. The parties do not address its meaning in their briefs. The district court and the *Keil* Defendants seem to have interpreted it as a restriction on an employee's ability to meet the Arbitration Award's requirement that a request be "documented in writing by a religious official (e.g., clergy)." *See* Joint App'x 60–61. Under this interpretation, it would be inadequate for an employee to produce "readily available" documentation from a religious official corroborating that employee's religious objections to vaccination. The employee would instead be required to produce documentation such as, for example, a letter from a religious official the employee knows personally. While the text of this provision is ambiguous in our view, we adopt the district court's interpretation for purposes of this opinion. The parties are free to argue for a different interpretation before the district court on remand.

[5] At times, the parties appear to use the terms "exemption" and "accommodation" interchangeably. As we use those terms, however, exemptions are different from accommodations. The Vaccine Mandate includes *exemptions* for certain objectively defined categories of people, like delivery workers. Those who are exempted from the Mandate are not subject to its terms. By contrast, employees who *are* subject to the Mandate can request accommodations under Title VII and analogous state and city

Then, if the employee's request is denied, the employee can appeal the DOE's determination to a panel of arbitrators selected by the Arbitrator. The Arbitration Award states that its procedures are to operate "[a]s an alternative to any statutory reasonable accommodation process."[6] Joint App'x 194–95. Employees who are granted an accommodation

> shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/or accommodation is in place.

Id. at 200.

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law. *See infra* at 43–44 (discussing Title VII's requirement to provide reasonable accommodations); *see also We The Patriots USA, Inc. v. Hochul*, 2021 WL 5276624, at *1 (2d Cir. Nov. 12, 2021).

[6] Elsewhere, it asserts:

> The process set forth, herein, shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school.

Joint App'x 201.

In addition to setting forth a process for granting religious accommodations, the Arbitration Award scheduled a series of deadlines for employees to comply with the Vaccine Mandate. First, it provided that as to any unvaccinated employee denied an accommodation, the DOE could place the employee on "leave without pay effective September 28, 2021, or upon denial of appeal, whichever [was] later, through November 30, 2021." Joint App'x 201. "During such leave without pay," employees "shall continue to be eligible for health insurance" but "are prohibited from engaging in gainful employment." *Id.* at 202.

From September 28 through October 29, any employee who was on leave without pay "due to vaccination status" could opt to separate from the DOE. *Id.* at 204. Employees who elected to separate were eligible for certain benefits but were required to file "a waiver of [their] rights to challenge [their] involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process." *Id.* Then, from November 1 through November 30, any employee on leave without pay due to vaccination status could "alternately opt to extend the leave through September 5, 2022," during which time they would remain eligible for health insurance. *Id.* at 205. To extend their leave, however, the employees were required to execute "a waiver of [their] rights to challenge [their] voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process." *Id.* "Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned." *Id.* "Beginning December 1, 2021, the DOE shall seek

to unilaterally separate employees who have not opted into separation . . . ." *Id.*

On September 15, the Vaccine Mandate was amended to provide: "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law."[7] Joint App'x 184. The amended Vaccine Mandate also requires "all visitors to a DOE school building" to show proof that they have received at least the first dose of a two-dose vaccine prior to entering any DOE building. *Id.* at 183. The amended Mandate excludes certain groups from the definition of a "visitor," including students, parents (in certain circumstances), deliverymen, repairmen, emergency responders, "[i]ndividuals entering for the purpose of COVID-19 vaccination," "[i]ndividuals who are not eligible to receive a COVID-19 vaccine because of their age," voters, and certain election-related personnel. *Id.* at 184.

II. Procedural History

On September 21 and October 27, 2021, Plaintiffs, fifteen DOE teachers or school administrators who sought and were denied religious accommodations pursuant to the process outlined herein, filed these two lawsuits, *Kane*, 21-cv-7863, and *Keil*, 21-cv-8773.

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[7] We observe that this additional language is superfluous as a legal matter, at least as to religious accommodation under Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e, *et seq.* The Commissioner, a City official, could not override Title VII, a federal law requiring employers to offer reasonable accommodations that do not result in undue hardship on the employer. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause). Thus, even under the original Vaccine Mandate, DOE employees were legally entitled to request accommodations.

Plaintiffs allege, *inter alia*, the violation of their First Amendment rights. On October 12, the district court denied the *Kane* Plaintiffs' request for a preliminary injunction, ruling principally that Plaintiffs were unlikely to prevail on their claim that the Vaccine Mandate was unconstitutional on its face.[8] On October 28, the district court denied a similar request for a preliminary injunction by the Plaintiffs in *Keil* "[f]or the same reasons discussed in" *Kane* on the ground that the two cases "raise[] many of the same claims . . . ." Joint App'x 8.

On October 25 and 28, 2021, Plaintiffs appealed the district court's denial of their requests for a preliminary injunction and requested an emergency injunction pending appeal. A motions panel heard oral argument on November 10, during which the City conceded that the Accommodation Standards are "constitutionally suspect." The panel then solicited supplemental letter briefing. Each party attached to its letter brief a proposed order for relief pending appeal. ECF No. 53 in No. 21-2678, at 5–6; ECF No. 65 in No. 21-2711, at 10–13.

On November 15, 2021, the motions panel issued an order ("Motions Panel Order") largely tracking the City's proposed order and referring the matter to this

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[8] A district court in this Circuit denied a preliminary injunction in a different case in which different plaintiffs challenged the same Vaccine Mandate on substantive due process and equal protection grounds. *See Maniscalco v. New York City Dep't of Educ.*, 2021 WL 4344267 (E.D.N.Y. Sept. 23, 2021). A different panel of this Court denied an injunction pending appeal, 2021 WL 4437700 (2d Cir. Sept. 27, 2021), and subsequently affirmed the district court's decision, 2021 WL 4814767 (2d Cir. Oct. 15, 2021) (summary order).

merits panel.[9] The Motions Panel Order provides: "Pending further order by the merits panel . . . Plaintiffs shall receive fresh consideration of their requests for a religious accommodation." Motions Panel Order ¶ 1. The Order sets forth a process pursuant to which Plaintiffs' requests will be promptly adjudicated "by a central citywide panel," which will adhere to the standards of, *inter alia*, Title VII of the Civil Rights Act of 1964, rather than "the challenged criteria set forth in . . . the arbitration award . . . ." *Id.* ¶ 2. The Motions Panel Order also stays the deadline for Plaintiffs to opt into the extended leave program with any required waiver. *Id.* ¶ 4. It also provides that if a plaintiff's request for religious accommodation is granted by the citywide panel, the plaintiff will receive backpay running from the date the plaintiff was placed on leave without pay. *Id.* ¶ 5.

We heard oral argument on November 22, 2021 and now vacate the district court's decision denying Plaintiffs preliminary injunctive relief. We leave in place all interim relief ordered by the Motions Panel, thus enjoining the City from terminating Plaintiffs or requiring them to opt into the extended leave program while they are afforded the opportunity to have their religious accommodation requests reconsidered. We remand the case for further proceedings consistent with this opinion.

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[9] The Motions Panel Order is set forth in an Appendix to this Opinion.

DISCUSSION

"When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020); *see also We The Patriots USA, Inc. v. Hochul*, No. 21-2179, 2021 WL 5121983, at *20 (2d Cir. Nov. 4, 2021) ("When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge."), *opinion clarified*, 2021 WL 5276624 (2d Cir. Nov. 12, 2021), *application for injunctive relief filed*, No. 21A125 (U.S. Nov. 2, 2021).[10] "We review a district court's denial of a preliminary injunction for abuse of discretion, but must assess de novo whether the court proceeded on the basis of an erroneous view of the applicable law." *Agudath*, 983 F.3d at 631.[11]

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[10] Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

[11] The parties dispute the applicable legal standard. Defendants argue that Plaintiffs seek "to modify the status quo by virtue of a *mandatory* preliminary injunction (as opposed to seeking a *prohibitory* preliminary injunction to maintain the status quo)." *A.H. v. French*, 985 F.3d 165, 176 (2d Cir. 2021). "In this circumstance, the movant must also make a strong showing of irreparable harm and demonstrate a clear or substantial likelihood of success on the merits." *Id.* We need not resolve this dispute because our conclusions would be the same under either standard.

The "purpose" of a preliminary injunction "is not to award the movant the ultimate relief sought in the suit but is only to preserve the status quo by preventing during the pendency of the suit the occurrence of that irreparable sort of harm which the movant fears will occur." *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 754 (2d Cir. 1977); *see also* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 2947 (3d ed. Apr. 2021 update) ("[A] preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits."). "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

I. Likelihood of Success on the Merits

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause against the states). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). The Free Exercise Clause thus protects an individual's private right to religious belief, as well as "the performance of (or abstention from) physical acts that constitute the free exercise of

religion." *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) (quoting *Smith*, 494 U.S. at 877).

This protection, however, "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Smith*, 494 U.S. at 879. Neutral and generally applicable laws are subject only to rational-basis review. *Cent. Rabbinical Cong.*, 763 F.3d at 193. Laws and government policies that are either non-neutral or not generally applicable, however, are subject to "strict scrutiny," meaning that they must be "narrowly tailored" to serve a "compelling" state interest. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *see Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) ("A government policy can survive strict scrutiny under the First Amendment's Free Exercise Clause only if it advances interests of the highest order and is narrowly tailored to achieve those interests.").

Here, Plaintiffs make two principal claims: (1) that the Vaccine Mandate is facially unconstitutional; and (2) that even assuming that the Vaccine Mandate is *not* facially unconstitutional, their First Amendment rights were violated by virtue of the procedures set forth in the Arbitration Award, which were used in the evaluation of their accommodation requests. We conclude that Plaintiffs have not shown a likelihood of success on their facial challenge to the Vaccine Mandate. At this juncture, however, they have demonstrated a likelihood of success on their as-applied challenge to the proceedings used in assessing their accommodation requests.

A. Vaccine Mandate

1. Neutrality

The Vaccine Mandate, in all its iterations, is neutral and generally applicable. To determine neutrality, we begin by examining the Mandate's text, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Facial neutrality alone, however, is not enough. A law that is facially neutral will still run afoul of the neutrality principle if it "targets religious conduct for distinctive treatment." *Id.* at 534, 546. We thus also consider whether there are "subtle departures" from religious neutrality, as well as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* at 534, 540.

The Vaccine Mandate is neutral on its face. It applies to "all DOE staff," as well as City employees and contractors of DOE and the City who work in DOE school settings. Thus, the Mandate does not single out employees who decline vaccination on religious grounds. Its restrictions apply equally to those who choose to remain unvaccinated for any reason.[12]

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[12] The Vaccine Mandate permits both medical and religious accommodations. In that respect, this case is factually different from recent challenges to other vaccine mandates. *See*, *e.g.*, *We The Patriots*, 2021 WL 5121983, at *1; *Does 1-6 v. Mills*, 16 F.4th

Nor do New York City Mayor Bill de Blasio's statements to the media render the Vaccine Mandate non-neutral. Plaintiffs seize on statements the Mayor made at a press conference suggesting that religious adherents should be vaccinated because the Pope supports vaccination and that accommodations to the Mandate will only be afforded to religions with long-standing objections to vaccination. But these statements reflect nothing more than the Mayor's personal belief that religious accommodations will be rare, as well as "general support for religious principles that [he] believes guide community members to care for one another by receiving the COVID-19 vaccine." *We The Patriots*, 2021 WL 5121983, at *10; *see also id.* ("Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers; otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions non-neutral . . . .").[13] And even assuming, *arguendo*, that the Mayor's statements reflect religious animus, the Mayor did not have a meaningful role in establishing or implementing the

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20, 30 (1st Cir. 2021), *application for injunctive relief denied sub nom. Does 1-3 v. Mills*, 2021 WL 5027177 (U.S. Oct. 29, 2021).

[13] While Mayor de Blasio said that only Christian Scientists and Jehovah's Witnesses could receive religious accommodations, the City has granted accommodations to members of many other faiths. *See* Defendants Br. 12 (noting that "over 100 religious exemptions [have] been granted to employees of more than 20 different faiths[] . . . and individuals whose specific religion is not identifiable" (citing Joint App'x in No. 21-2678, at 758–59)).

Mandate's accommodations process, which was implemented by DOE staff, and later, the Arbitrator. *See id.* ("Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers; otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions non-neutral . . . ."); *cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2417–23 (2018) (rejecting Establishment Clause challenge to facially neutral policy based on statements by the president that arguably reflected religious animus).

2. General Applicability

The Vaccine Mandate is also generally applicable. A law may not be generally applicable under *Smith* for either of two reasons: first, "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"; or, second, "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Plaintiffs argue that the Vaccine Mandate is not generally applicable on its face because it does not apply to the general public. We disagree.

"[A]n exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons." *We The Patriots*, 2021 WL 5121983, at *14 (quoting *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021)). Rather, there must be some showing that the exemption

procedures allow secularly motivated conduct to be favored over religiously motivated conduct. *Id.* Plaintiffs have made no such showing. Instead, as in *We The Patriots*, the Vaccine Mandate provides for objectively defined categories of exemptions — such as those for individuals entering DOE buildings to receive a COVID-19 vaccination or to respond to an emergency — that do not "'invite[]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 141 S. Ct. at 1879 (quoting *Smith*, 494 U.S. at 884); *see also We The Patriots*, 2021 WL 5121983, at *14.

Nor do these exemptions treat secular conduct more favorably than comparable religious conduct. "[G]overnment regulations are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). "[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* Plaintiffs argue that the Vaccine Mandate violates these principles because it exempts certain groups of people (for example, emergency responders). But that argument is unavailing. Viewed through the lens of the City's asserted interest in stemming the spread of COVID-19, these groups are not comparable to the categories of people that the Mandate embraces. While the exempt groups do not come into prolonged daily contact with large groups of students (most of whom are unvaccinated), the covered groups (for example, teachers) inevitably do.

Plaintiffs finally argue that the Vaccine Mandate is not generally applicable because it applies only to DOE employees and contractors. But neither the Supreme Court, our court, nor any other court of which we are aware has ever hinted that a law must apply to all people, everywhere, at all times, to be "generally applicable." As counsel conceded at oral argument, a law can be generally applicable when, as here, it applies to an entire *class* of people. Plaintiffs have not explained why DOE employees and other comparable employees are not such a class, so we reject their arguments that the law is not generally applicable.

3. Rational Basis Review

Because Plaintiffs have not established, at this stage, that they are likely to succeed in showing that the Vaccine Mandate is not neutral or generally applicable on its face, rational basis review applies. *Cent. Rabbinical Cong.*, 763 F.3d at 193; *see also Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–82). Rational basis review requires the City to have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal. *See Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Dep't's, App. Div. of the Sup. Ct. of N.Y.*, 852 F.3d 178, 191 (2d Cir. 2017).

The Vaccine Mandate plainly satisfies this standard. Attempting to safely reopen schools amid a pandemic that has hit New York City particularly hard, the City decided, in accordance with CDC guidance, to require vaccination for all DOE staff as an emergency measure. This was a reasonable exercise of the State's power to act to protect the

public health. *See We The Patriots*, 2021 WL 5121983, at *15; *see also Phillips v. City of New York*, *775* F.3d 538, 542–43 (2d Cir. 2015) (holding that New York could constitutionally require all children to be vaccinated in order to attend school); *Does 1-6*, 16 F.4th at 32 (holding that the vaccine mandate challenged in that case "easily satisfies rational basis review").[14]

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[14] Plaintiffs raise a potpourri of other constitutional challenges against the Vaccine Mandate. None is persuasive. The *Kane* Plaintiffs argue that the Mandate violates the Fourteenth Amendment's Equal Protection Clause. "When a free exercise challenge fails, any equal protection claims brought on the same grounds are subject only to rational-basis review." *Does 1-6*, 16 F.4th at 35 (citing, *inter alia*, *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004)). Plaintiffs' Equal Protection Clause challenge to the Mandate fares no better than their First Amendment challenge.

The *Kane* Plaintiffs also contend that the Mandate violates the Supremacy Clause because it prohibits reasonable accommodations under Title VII. They are unlikely to succeed on this claim. *See We The Patriots*, 2021 WL 5121983, at *17 (noting that the law at issue there did not violate Title VII because it did "not *bar* an employer from providing an employee with a reasonable accommodation" (emphasis added)); *Does 1-6*, 16 F.4th at 35 (similar).

For their part, the *Keil* Plaintiffs argue that the Mandate violates their procedural due process rights because it does not offer meaningful standards against which their requests for religious accommodations will be measured. But Plaintiffs' requests will be governed by Title VII and analogous state and city law, and the standards for those claims are well established. *See*, *e.g.*, *Cosme v. Henderson*, 287 F.3d 152, 157-58 (2d Cir. 2002); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985); *White v. Andy Frain Servs., Inc.*, 629 F. App'x 131, 134 (2d Cir. 2015); *infra* at 43–44. Plaintiffs have therefore failed

B. Arbitration Award and Accommodation Standards

Plaintiffs also contend that the Vaccine Mandate is unconstitutional as applied to them through the Arbitration Award. The City concedes that the Arbitration Award, as applied to Plaintiffs, "may" have been "constitutionally suspect," Defendants Br. 37–38, and its defense of that process is half-hearted at best. Indeed, it offers no real defense of the Accommodation Standards at all. The City has also consented to the relief ordered by the Motions Panel, under which the Arbitration Award and its results will be set aside and Plaintiffs will receive *de novo* consideration of their accommodation requests.

We confirm the City's "susp[icion]" that the Arbitration Award procedures likely violated the First Amendment as applied to these Plaintiffs. We emphasize, however, that this determination is exceedingly narrow – simply that Plaintiffs, at this juncture, have sufficiently established a likelihood of success so as to meet this prong of the preliminary injunction standard. Given the City's concessions, and in the interest of providing timely guidance to the parties, we need not and do not address any other constitutional objection to the Arbitration Award that Plaintiffs raise.[15]

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to demonstrate a likelihood of success on the merits of this claim, too.

[15] Nor do we address certain arguments made by Defendants. In a single sentence in their brief, Defendants suggest that Plaintiffs do not "have standing to launch a direct attack on the terms of awards arising out of arbitrations initiated by their own unions without first alleging a breach of

1. Neutrality

We conclude, first, that the procedures specified in the Arbitration Award and applied to Plaintiffs are not neutral. The Supreme Court has explained that "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece*

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the duty of fair representation." Defendants Br. 35 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009)). But Defendants have not identified any provision in the relevant collective bargaining agreements that "clearly and unmistakably" requires union members, including Plaintiffs, to arbitrate their constitutional claims. *Pyett*, 556 U.S. at 274; *see Fernandez v. Windmill Distrib. Co.*, 159 F. Supp. 3d 351, 360 (S.D.N.Y. 2016); *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79–80 (1998). In another single-sentence argument, Defendants suggest that Plaintiffs' unions may be "necessary parties" under Federal Rule of Civil Procedure 19(a)(1)(B)(i). Defendants Br. 35. Defendants, however, failed to raise this argument below and fail to explain *why* the unions would be necessary parties in their brief in this Court.

Given both the City's consent to the interim relief afforded here and the failure to develop these arguments before this Court, we decline to affirm on either ground. *See United States v. Morton*, 993 F.3d 198, 204 n.10 (3d Cir. 2021) ("[J]udges are not like pigs, hunting for truffles buried in the record."). Defendants are free to raise these arguments before the district court on remand, however, given that the procedural context in which this case arises may prove relevant on the merits at a later stage in the proceeding.

Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1731 (2018).

We have grave doubts about whether the Accommodation Standards are consistent with this bedrock First Amendment principle. They provide that "[e]xemption requests shall be considered for recognized and established religious organizations" and that "requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature." Joint App'x 197.[16] Moreover, Plaintiffs have offered evidence that arbitrators applied the Accommodation Standards to their applications by, for example, telling Plaintiff Keil that his religious beliefs "were merely personal, [because] there are other Orthodox Christians who choose to get vaccinated."[17] *Id.* at 376.

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[16] As noted above, we find the second clause ambiguous but have adopted the district court's interpretation for purposes of this opinion. *See supra* note 4.

[17] Plaintiffs offered substantial evidence that arbitrators referenced the Accommodation Standards in their hearings. For example, during another hearing, an arbitrator declared that, because a DOE employee's congregation was not opposed to the vaccine, the employee's objection was "personal and not religion-based." Joint App'x 338. The City notes that hearings were not recorded and that given the need to render determinations expeditiously, such determinations were issued without full written opinions to explain them. It cautions that "the record casts serious doubt on plaintiffs' contentions that the challenged criteria in the arbitration awards were controlling in the administrative appeals." Defendants Br. 11. To be clear, it may be that after further factual development, some or even all of

Denying an individual a religious accommodation based on someone else's publicly expressed religious views — even the leader of her faith —runs afoul of the Supreme Court's teaching that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, *or the validity of particular litigants' interpretations of those creeds*." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (emphasis added); *see also Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989) (noting that "disagreement among sect members" over whether work was prohibited on the Sabbath had not prevented the Court from finding a free exercise violation based on the claimant's "unquestionably . . . sincere belief that his religion prevented" him from working (citing *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)). Accordingly, we conclude that based on the record developed to date, the Accommodation Standards as applied here were not neutral, triggering the application of strict scrutiny.

2. General Applicability

Nor does it appear that such procedures were generally applicable to all those seeking religious accommodation. In *Smith*, the Supreme Court held that an unemployment compensation system with discretionary, individualized exemptions "lent itself to individualized government assessment of the

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Plaintiffs' Free Exercise Clause claims fail on the merits. But at this stage, based on the terms of the Arbitration Award and the numerous affidavits submitted by these fifteen individuals in support of their claims, we conclude that Plaintiffs have established a sufficient likelihood of success on the merits.

reasons for the relevant conduct" and was thus not generally applicable. 494 U.S. at 884. So too here.

Plaintiffs have offered evidence that the arbitrators reviewing their requests for religious accommodations had substantial discretion over whether to grant those requests. Sometimes, arbitrators strictly adhered to the Accommodation Standards. Other times, arbitrators apparently ignored them, such as by granting an exemption to an applicant who identified as a Roman Catholic, even though the Pope has expressed support for vaccination. *Cf. We The Patriots*, 2021 WL 5121983, at *14 (denying a motion for a preliminary injunction where medical exemptions were granted exclusively in accordance with a uniform certification process). In our view, and based on the record to date, Plaintiffs have thus shown that they are likely to succeed on their claim that the Arbitration Award procedures as applied to them were not generally applicable.

3. Strict Scrutiny

Because the accommodation procedures here were neither neutral nor generally applicable, as applied, we apply strict scrutiny at this stage of the proceeding. Under such scrutiny, these procedures are constitutional as applied only if "'narrowly tailored' to serve a 'compelling' state interest." *Roman Cath. Diocese*, 141 S. Ct. at 67 (quoting *Lukumi*, 508 U.S. at 546); *see also Tandon*, 141 S. Ct. at 1296 ("[T]he government has the burden to establish that the challenged law satisfies strict scrutiny."). The Supreme Court has recognized that "[s]temming the spread of COVID-19" qualifies as "a compelling interest." *Roman Cath. Diocese*, 141 S. Ct. at 67.

The question is thus whether the Arbitration Award's procedures, as implemented and applied to Plaintiffs, were narrowly tailored to serve the government's interest. Narrow tailoring requires the government to demonstrate that a policy is the "least restrictive means" of achieving its objective. *Thomas*, 450 U.S. at 718.

These procedures cannot survive strict scrutiny because denying religious accommodations based on the criteria outlined in the Accommodation Standards, such as whether an applicant can produce a letter from a religious official, is not narrowly tailored to serve the government's interest in preventing the spread of COVID-19. The City offers no meaningful argument otherwise.

II. Irreparable Harm

A. Motions Panel Order

Plaintiffs have also shown that they would suffer irreparable harm absent the relief ordered by the Motions Panel. They have demonstrated that they were denied religious accommodations — pursuant to what the City has conceded was a "constitutionally suspect" process — and were consequently threatened with imminent termination if they did not waive their right to sue. This is sufficient to show irreparable harm. *See Am. Postal Workers Union v. United States Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985) (noting that "the threat of permanent discharge" can cause irreparable harm in the First Amendment context).[18]

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[18] We do not cast doubt on the well-established principle that "loss of employment 'does not *usually* constitute irreparable injury.'" *Does 1-6*, 16 F.4th at 36 (emphasis added) (quoting

B. Plaintiffs' Request for Broader Relief

Plaintiffs contend that this interim relief does not go far enough. They argue that they are entitled to an injunction immediately reinstating them and granting them backpay pending *de novo* consideration of their requests for religious accommodations. Because Plaintiffs have not shown that they would

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Sampson v. Murray, 415 U.S. 61, 90 (1974)); *see We The Patriots*, 2021 WL 5121983, at *19; *see also*, *e.g.*, *Plata v. Newsom*, 2021 WL 5410608, at *3 (N.D. Cal. Nov. 17, 2021) (collecting cases in which district courts have concluded that the "choice" between "maintaining . . . employment or taking a vaccine that [employees] do not want . . . does not [cause employees to suffer] irreparable harm that warrants enjoining a vaccine mandate"). *But see BST Holdings, L.L.C. v. OSHA*, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021) (finding irreparable harm where "reluctant individual recipients [were] put to a choice between their job(s) and their jab(s)").

This is an unusual case for two reasons. First, Plaintiffs have demonstrated a likely violation of their First Amendment rights resulting from the manner in which their religious accommodation claims were considered. *Cf. Does 1-3*, 2021 WL 5027177, at *1, *4 (Gorsuch, *J.*, dissenting from the denial of application for injunctive relief) (finding irreparable harm where healthcare workers raised a First Amendment claim and faced termination if they did not comply with vaccine mandate). Second, these very procedures require Plaintiffs to forgo suit to avoid harm and the City has consented to the entry of an injunction which, among other things, will provide for these claims to be promptly reconsidered pursuant to procedures that are not constitutionally infirm. *Cf. Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 512 n.6 (2d Cir. 2005) (noting "particularly stringent standard for irreparable harm" in government personnel cases and observing that preliminary relief is inappropriate where harm could not be vitiated by an interim injunction). Given these facts and the City's concessions, we need not intimate a view as to whether Plaintiffs could show irreparable harm in different circumstances.

suffer irreparable harm absent this broader relief, we are not persuaded.

At the outset, we clarify what is at stake at this point in the litigation. The City has committed to providing "fresh consideration" and prompt resolution of Plaintiffs' requests for religious accommodation. Motions Panel Order ¶ 1. Under the Motions Panel Order, the City must adjudicate these requests within two weeks of Plaintiffs' submission of any documents they are permitted (but not required) to submit in support of their accommodation requests. *Id.* ¶ 3. The City may not terminate Plaintiffs or require them to opt-in to the extended leave program (and thereby waive their right to sue) while their requests are pending. *Id.* ¶ 4. The City has also affirmed that Plaintiffs who receive accommodations will be reinstated and receive all back pay and other benefits to which they are entitled. The question before us is thus whether *additional* preliminary relief is required until the City can decide Plaintiffs' renewed requests for a religious accommodation over the next few weeks.

We conclude that no such relief is required. Plaintiffs contend that they will be irreparably harmed if we do not reinstate them during this period. We disagree. Though Plaintiffs will continue to be on leave without pay while the City reconsiders their requests for religious accommodations, they have not shown that this amounts to an *irreparable* harm in the circumstances here. "In government personnel cases," like this one, "we 'apply a particularly stringent standard for irreparable injury' and pay special attention to whether the interim relief will remedy any irreparable harm that is found." *Mullins*

v. City of N.Y., 307 F. App'x 585, 587–88 (2d Cir. 2009) (quoting *Moore*, 409 F.3d at 512 n.6, in turn quoting *Am. Postal*, 766 F.2d at 721). Thus, we have held that when irreparable harm arises "not from [an] interim discharge but from the threat of permanent discharge" a preliminary injunction is inappropriate because harm would not be "vitiated by an interim injunction." *Moore*, 409 F.3d at 512 n.6 (quoting *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)).

Applying these principles here, Plaintiffs are not entitled to reinstatement while the City reconsiders their requests for religious accommodations. In *Savage*, we held that even an "interim discharge" is insufficient to show irreparable harm in the government employment context. 850 F.2d at 68. It follows that the City's decision to require Plaintiffs to remain on leave without pay for a few additional weeks is inadequate to justify an injunction reinstating them pending redetermination of their requests for religious accommodations.[19] And under the Motions Panel Order, Plaintiffs will receive backpay if their requests for religious accommodations are granted. Motions Panel Order ¶ 5; *see Sampson*, 415 U.S. at 91 (holding that possibility of backpay obviates risk of irreparable harm).

In support of their argument that they are entitled to broader relief, Plaintiffs contend that "[t]he loss of First Amendment freedoms, for even

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[19] This case does not require us to address whether an employer's decision to place its employees on leave without pay for an extended period — *i.e.*, longer than the few weeks required by the Motions Panel Order — could inflict irreparable harm.

minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). *But cf. Does 1-6*, 16 F.4th at 37 ("Even if, arguendo, these claims [including a First Amendment claim] presumptively cause irreparable harm, we think the state has overcome any such presumption."); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003) ("[W]e have not consistently presumed irreparable harm in cases involving allegations of the abridgement of First Amendment rights.").

We do not gainsay the principle that those who are unable to exercise their First Amendment rights are irreparably injured *per se*. But this principle is not applicable to the present case. The City is not threatening to vaccinate Plaintiffs against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Plaintiffs instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations. "It is well settled, however, that adverse employment consequences," like the loss of income accompanying a suspension without pay, "are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages." *We The Patriots*, 2021 WL 5121983, at *19 (citing *Sampson*, 415 U.S. at 91–92; *Savage*, 850 F.2d at 68). Because those harms "could be remedied with money damages, and reinstatement is a possible remedy as well," *id.*, they do not justify an injunction reinstating Plaintiffs. *See Savage*, 850 F.2d at 68 ("Since reinstatement and money damages could make appellees whole for any

loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief."); *cf. A.H.*, 985 F.3d at 176 ("In cases alleging constitutional injury, a strong showing of a constitutional deprivation *that results in noncompensable damages* ordinarily warrants a finding of irreparable harm." (emphasis added)).

For that reason, this case is different from other pandemic-era cases that have found irreparable harm based on First Amendment violations. *See*, *e.g.*, *Roman Cath. Diocese*, 141 S. Ct. at 67–68; *Agudath*, 983 F.3d at 636–37. Those cases involved restrictions on worshippers' rights to attend religious services and so directly prohibited them from freely exercising their religion. *See Agudath*, 983 F.3d at 636 ("The Free Exercise Clause protects both an individual's private right to religious belief and the performance of (or abstention from) physical acts that constitute the free exercise of religion, including assembling with others for a worship service.").

Not so here. Plaintiffs are not required to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable. *See Sampson*, 415 U.S. at 91, 92 n.68 ("[L]oss of income[,] . . . an insufficiency of savings or difficulties in immediately obtaining other employment . . . will not [ordinarily]

support a finding of irreparable injury, however severely they may affect a particular individual.").[20]

III. Public Interest

We briefly address the remaining preliminary injunction factor, the public interest. The public interest weighs in favor of the relief granted by the Motions Panel. To the extent Plaintiffs were denied religious accommodations pursuant to a concededly "constitutionally suspect" process, the public interest favors affording them an opportunity for reconsideration. *See Agudath*, 983 F.3d at 637 ("No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal."). Indeed, the City has not objected to providing that relief, fortifying our conclusion that it serves the public interest. In sum, the relief afforded by the Motions Panel appropriately balances the equities by ensuring that Plaintiffs are not terminated or forced to waive their right to sue as the City reconsiders their requests for religious accommodation while, at the same time, the Vaccine Mandate, which is designed to further the compelling objective of permitting schools fully to reopen, continues in effect.

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[20] Plaintiffs' request for backpay fails for an additional reason. Preliminary injunctions are appropriate only to prevent *prospective* harm until the trial court can decide the case on the merits. Plaintiffs' request for backpay is (as the term *backpay* suggests) entirely retrospective. We would thus deny Plaintiffs' request for backpay at this stage even if Plaintiffs had shown that their economic harms were irreparable.

IV. Plaintiffs' Remaining Arguments

A. "Similarly Situated" Individuals

Plaintiffs also argue that we should order sweeping injunctive relief that extends to thousands of supposedly "similarly situated" nonparties to this litigation. We disagree. To start, the City has represented that it "is making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious [accommodations] pursuant to the arbitration award's appeal process." Defendants Br. 27. "Those employees will be granted the same opportunity" as Plaintiffs "to have their religious accommodation requests considered by the central citywide panel." *Id.* at 27–28. The City also represents that "[w]hile their appeals are pending, these employees will remain on leave-without-pay status and will have seven days after their new appeals are resolved to apply for an extension of this status." *Id.* at 18–19. The City will therefore afford substantially the same relief to these nonparties as has already been ordered by the Motions Panel as regards Plaintiffs.

In any event, we would not grant Plaintiffs' request for sweeping injunctive relief even if this were not the case because as a "general rule, . . . injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *accord New York Legal Assistance Grp. v. BIA*, 987 F.3d 207, 225 (2d Cir. 2021); *see also United States v. Nat'l Treasury Emps.*

Union, 513 U.S. 454, 478 (1995) (teaching that courts should not "provide relief to nonparties when a narrower remedy will fully protect the litigants"); *United States v. Raines*, 362 U.S. 17, 21 (1960) (noting that the judicial power is limited to "adjudg[ing] the legal rights of litigants in actual controversies"); *Hawaii*, 138 S. Ct. at 2427 (Thomas, *J.*, concurring) ("[A]s a general rule, American courts of equity did not provide relief beyond the parties to the case. . . . American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power.").[21]

Plaintiffs repeatedly emphasize that they have raised "facial" challenges as if that permits them to obtain class wide relief without obtaining class certification. But we have rejected Plaintiffs' facial challenge to the Vaccine Mandate. We also reject Plaintiffs' attempt to transform their garden-variety "as applied" claims into what are effectively claims on behalf of a class simply by styling them as "facial" challenges. Indeed, Plaintiffs' challenge is an end run

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[21] *Cf. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, *J.*, concurring in the grant of stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies."); *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("[S]tanding is not dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

around the rules governing class certification. Why, after all, would plaintiffs go to the trouble of demonstrating "numerosity, commonality, typicality, and adequa[cy]" if they can obtain classwide relief as Plaintiffs now propose? *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011).

Relatedly, we do not reject Plaintiffs' theory because they failed to use the words "class action" in the title of their complaint. Rather, Plaintiffs *never moved for class certification*, so no class has been certified. And the rule that injunctive relief should be narrowly tailored to prevent harm to the parties before the court "applies with special force where," as here, "there is no class certification." *California v. Azar*, 911 F.3d 558, 582–83 (9th Cir. 2018); *see id.* ("Injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification."); *see also Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit*, such broad relief is rarely justified because injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." (citing *Yamasaki*, 442 U.S. at 702)); *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 171 (3d Cir. 2011) (collecting cases in which courts have "found injunctions to be overbroad where their relief amounted to class-wide relief and no class was certified").

Moreover, "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). The Supreme Court has "strong[ly] admon[ished] that a court should

adjudicate the merits of an as-applied challenge before reaching a facial challenge to the same statute." *Commodity Trend Serv. v. CFTC*, 149 F.3d 679, 683 (7th Cir. 1998) (citing *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 484–86 (1989)); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (refusing to facially invalidate statute because "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it"); *see*, *e.g.*, *United States v. Grace*, 461 U.S. 171, 175 (1983) (limiting review to the question of whether a statute was unconstitutional "as applied" in certain contexts, even though plaintiffs raised a facial challenge under the First Amendment). Thus, "it is a proper exercise of judicial restraint for courts to adjudicate as-applied challenges before facial ones in an effort to decide constitutional attacks on the narrowest possible grounds and to avoid reaching unnecessary constitutional issues." *Commodity Trend Serv.*, 149 F.3d at 690 n.5; *see Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, *J.*, concurring) (articulating these foundational principles of judicial restraint). Consistent with these well-established principles, we decline to expand the relief ordered by the Motions Panel to cover nonparties to this litigation.[22]

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[22] The *Kane* Plaintiffs have filed an amended class action complaint in the district court, and the *Keil* Plaintiffs have requested permission to file such a complaint. Without expressing a view as to these amended complaints, we note that remand will permit the district court to consider these complaints in the first instance.

B. Conflict of Interest and Title VII

Plaintiffs finally contend that the interim relief afforded by the Motions Panel is inadequate for two additional reasons. Neither is persuasive.

First, Plaintiffs contend that including lawyers from the Office of the Corporation Counsel on the citywide panel is improper because the Corporation Counsel has a conflict of interest due to its participation in this litigation. We reject this argument. The attorneys are advocates, not parties-in-interest. *See*, *e.g.*, *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619 (2d Cir. 2004) (rejecting the argument that an agency's "role as [the petitioners'] adversary in litigation prevented it from being an impartial administrative adjudicator in the petitioners' administrative action" (citing *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 (D.C. Cir. 1988)).

Second, the *Keil* Plaintiffs object to the Motions Panel Order's statement that consideration by the citywide panel must comport with Title VII and other applicable state and City law. They argue that the citywide panel must follow the First Amendment. It is, of course, true that the citywide panel must abide by the First Amendment. By ordering the citywide panel's proceedings to abide by other applicable law, the Motions Panel Order does not (and could not) suggest that the First Amendment is somehow inapplicable to those proceedings.

We conclude by noting that while the *Keil* Plaintiffs do not invoke Title VII in their lawsuit, that statute will be highly relevant to their renewed requests for religious accommodations. Under the Supreme Court's decision in *Smith*, the First

Amendment likely does not require any religious accommodations whatsoever to neutral and generally applicable laws. *See Shrum v. City of Coweta*, 449 F.3d 1132, 1143 (10th Cir. 2006) (McConnell, *J.*) ("[T]he mere failure of a government employer to accommodate the religious needs of an employee, where the need for accommodation arises from a conflict with a neutral and generally applicable employment requirement, does not violate the Free Exercise Clause, as that Clause was interpreted in *Smith*.").

In contrast, Title VII requires employers to offer reasonable religious accommodations in certain circumstances. *See We The Patriots*, 2021 WL 5121983, at *17. *See generally* U.S. Equal Employment Opportunity Comm'n, *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws § L Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates* (last updated Oct. 28, 2021). Title VII does not, however,

> require covered entities to provide the accommodation that [an employee] prefer[s]—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated. To avoid Title VII liability for religious discrimination, . . . an employer must offer a reasonable accommodation that does not cause the employer an undue hardship. Once any reasonable accommodation is provided, the statutory inquiry ends.

We The Patriots, 2021 WL 5121983, at *17. In providing religious accommodations, a government employer must abide by the First Amendment.

As we have explained, and based only on the record developed to date, Plaintiffs have demonstrated a likelihood of success on their claim that as applied to them, the City's process for implementing the Vaccine Mandate via the Arbitration Award offended the First Amendment. But we do not suggest that Plaintiffs are in fact entitled to their preferred religious accommodations — or *any* religious accommodation, for that matter — under Title VII (or the First Amendment). Our decision is narrow. We conclude only that the interim relief put in place by the Motions Panel should continue so that Plaintiffs, with the consent of the City, are afforded an opportunity to have their accommodation requests promptly reconsidered.

To the extent Plaintiffs raise other objections to the process by which their requests for accommodations will be adjudicated by the citywide panel, those objections are best addressed by the district court on remand. Plaintiffs are free to renew their First Amendment (and other) objections before the district court.

CONCLUSION

For the foregoing reasons, we VACATE the district court's order denying preliminary injunctive relief. Further, we ENJOIN Defendants consistent with the terms of the Motions Panel Order. This injunction will remain in place during reconsideration of Plaintiffs' renewed requests for religious accommodations. Within two weeks of the conclusion

of Plaintiffs' proceedings before the citywide panel, the parties shall inform the district court (rather than this merits panel) of the result of those proceedings and advise of any further relief being sought. Finally, we REMAND the case to the district court for further proceedings consistent with this opinion, making clear that the district court may alter the terms of the preliminary relief we have ordered or set them aside, as circumstances and further development of the record may require.

APPENDIX

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of November, two thousand twenty-one.

Before: Pierre N. Leval,
José A. Cabranes,
Denny Chin,
Circuit Judges.

Michael Kane, William Castro, Margaret Chu, Heather Clark, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Trinidad Smith, Amaryllis Ruiz-Toro,

Plaintiffs-Appellants,

v.

Bill de Blasio, in his official capacity as Mayor of the City of New York, David Chokshi, in his official capacity of Health Commissioner of the City of New York, New York City Department of Education,

Defendants-Appellees.

ORDER

21-2678-CV

Matthew Keil, John De Luca, Sasha Delgado, Dennis Strk, Sarah Buzaglo,

Plaintiffs-Appellants,

v.

21-2711-cv

The City of New York, Board of Education of the City School District of New York, David Chokshi, in his Official Capacity of Health Commissioner of the City of New York, Meisha Porter, in her Official Capacity as Chancellor of the New York City Department of Education,

Defendants-Appellees.

The motions of Plaintiffs-Appellants ("Plaintiffs") for an injunction pending appeal having been heard at oral argument on November 10, 2021, and Defendants-Appellees ("Defendants") having represented to this Court that "the City is working toward making an opportunity for reconsideration available more broadly to DOE employee[s] who unsuccessfully sought religious exemptions pursuant to the arbitration award's appeal process," it is hereby

ORDERED that this appeal is expedited and will be heard by a merits panel sitting on November 22, 2021 (the "merits panel"). Pending further order by the merits panel,

1. Plaintiffs shall receive fresh consideration of their requests for a religious accommodation by

a central citywide panel consisting of representatives of the Department of Citywide Administrative Services, the City Commission on Human Rights, and the Office of the Corporation Counsel.

2. Such consideration shall adhere to the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law. Such consideration shall not be governed by the challenged criteria set forth in Section IC of the arbitration award for United Federation of Teachers members. Accommodations will be considered for all sincerely held religious observances, practices, and beliefs.

3. Plaintiffs shall submit to the citywide panel any materials or information they wish to be considered within two weeks of entry of this order. The citywide panel shall issue a determination on each request no later than two weeks after a plaintiff has submitted such information and materials. Within two business days of the entry of this order, Defendants shall inform plaintiffs' counsel how such information and materials should be transmitted to the citywide panel.

4. The deadline to opt-in to the extended leave program and execute any accompanying waiver shall be stayed for Plaintiffs, and no steps will be taken to terminate the plaintiff's employment for noncompliance with the vaccination requirement.

5. If a plaintiff's request is granted by the citywide panel, the plaintiff will receive backpay running from the date they were placed on leave without pay.

6. This order is intended only to provide for temporary interim relief until the matter is considered by the merits panel of this court, which panel may entirely supersede these provisions for interim relief, and the parties are at liberty to advocate to the merits panel for alteration of these provisions. Unless the merits panel has previously entered a superseding order, within two weeks of the conclusion of Plaintiffs' proceedings before the citywide panel, the parties shall inform the merits panel of the result of those proceedings and advise of any further relief being sought.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, NATASHA SOLON, AMARYLLIS RUIZ-TORO, individually, and for all others similarly situated,

Plaintiffs,

vs.

BILL DE BLASIO, personally and in his official capacity as Mayor of the City of New York, **DAVID CHOKSHI**, in his official capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION**,

Defendants.

Case No. 1:21-cv-7863 (VEC)

CONSOLIDATED AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES

JURY TRIAL DEMANDED

MATTHEW KIEL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, EDWARD (ELI) WEBER, CAROLYN GRIMANDO, AMOURA BRYAN, JOAN GIAMMARINO, and BENEDICT LOPARRINO, individually, and for all others similarly situated,

Plaintiffs,

- against -

THE CITY OF NEW YORK; BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, in his official capacity of Health Commissioner of the City of New York, and **DAVID C. BANKS**, in his official capacity as chancellor of the New York City Department of Education,

Defendants.

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"The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."

— James Madison, A Memorial And Remonstrance, On The Religious Rights Of Man: Written In 1784-85

Plaintiffs, proceeding as individuals and as a proposed class, herein complain of the Defendants as follows:

NATURE OF ACTION

1. Named Plaintiffs and Class members are New York City teachers and other employees of the New York City Department of Education ("DOE").

2. Plaintiffs allege violations of their fundamental religious and constitutional rights. On behalf of themselves and all others similarly situated, they seek declaratory and injunctive relief, as well as reinstatement, nominal, compensatory, actual and punitive damages, attorneys' fees and other remedies, for harms arising from the Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors, and

Others, dated August 24, 2021, as modified or replaced by subsequent amendments thereto (collectively, the "Mandate"), and discriminatory policies adopted by the DOE in the implementation of the Mandate.

3. The Mandate violates fundamental constitutional rights, both facially and as applied, arbitrarily and capriciously discriminates against employees with sincere religious objections to vaccination— even though the employees pose no direct threat to others because of their religious or medical needs— and places unconstitutional conditions on employment.

4. In implementing the Mandate, state actors working on behalf of the City of New York adopted facially unconstitutional standards and policies subjecting Plaintiffs and thousands of other employees to per se unconstitutional heresy inquisitions and other religious harassment.

5. Mayor de Blasio sanctioned and encouraged this discrimination. In press briefings, he made statements clarifying that the City adopted a preference for the Pope's viewpoint about what "scripture" requires on the topic of vaccines, expressed hostility towards religious opposition to vaccination as largely "invalid" and stated that the City would be openly preferencing Christian Scientists, Jehovah's Witnesses, and to get an exemption, employees would have to be a "standing member of a faith that has a very, very specific long-standing objection" to vaccination according to the Mayor's religious viewpoint. Mayor de Blasio further stated that the City

would discriminate against anyone with beliefs that fall under the definition of heresy—that is, lesser recognized, unorthodox or personally held religious beliefs.

6. Under the ex-Mayor's openly discriminatory standard, people with personally held religious beliefs or unorthodox religious beliefs were expressly supposed to be (and were) singled out for discriminatory treatment by the DOE even though their beliefs are sincere.

7. In addition to being discriminatory, the Mandate is irrational.

8. COVID-19 vaccine mandates cannot stop the spread of SARS-CoV-2 in schools. The vaccines may blunt the severity of the disease, but the evidence does not support an assumption that they stop infection with and transmission of SARS-CoV-2 to others.

9. Moreover, there are far less invasive measures available to ensure public safety than forcing employees to violate their deeply held religious beliefs or lose their jobs.

10. The Mandate is an outlier. No other school district in the state requires vaccination as a condition of employment.

11. It is also overbroad. There is no option to get tested in lieu of vaccination. Nor is natural immunity recognized, even though the data overwhelmingly shows that natural immunity is more robust and durable than vaccine immunity. Moreover, remote employees are not allowed an exemption or accommodation, even those who can

easily work outside of the classroom due to the nature of their work.

12. By the same token, the Mandate is underinclusive. Unvaccinated bus drivers are allowed to bus children to school each day in enclosed vehicles, for hours at a time. Exceptions are also made for delivery people, unvaccinated adults coming to receive a COVID-19 vaccine, and many other categories. And, the DOE has deemed it safe for one million unvaccinated children to come to school each day without issue. If all of these categories of persons can safely be in the schools each day, there is no reason why the small percentage of non-exempt staff with a religious objection to vaccination cannot also be safely accommodated.

13. Excluding unvaccinated staff has not proven to have any impact on mitigating the spread of COVID-19.

14. Before the unvaccinated staff were excluded on October 4, 2021, the average number of infections for all staff across the New York City school district was about 40 active infections at a time for the first month of school. This, despite an outsize delta variant outbreak.

15. After exclusion of all unvaccinated teachers, average percent of staff infected remained largely the same, and followed the same curve as the outbreaks in the largely unvaccinated student population.

16. Currently, there are over five thousand staff members infected among the fully vaccinated

staff. This is in large part due to the Omicron variant. Vaccination has proven ineffective at stopping infection with the now dominant Omicron variant.

17. Perhaps most shocking, because such a large percentage of the fully vaccinated staff is currently infected with COVID-19, and the schools were already in a staffing crisis caused by the mass suspension of thousands of other qualified unvaccinated teachers and staff as a result of the Mandate, the DOE adopted the recommendation that ACTIVELY INFECTED teachers should return to school without testing to ensure they are no longer contagious after only five days. *See*, *e.g.*, https://www.businessinsider.com/teachers-can-return-to-classroom-after positive-covid-test-mild-symptoms-2022-1.

18. Schools are in a crisis and desperately need teachers, especially experienced teachers like the Plaintiffs and Class members in this lawsuit.

19. Plaintiffs have dedicated their careers to serving the children of New York. They just want to return to their jobs so that they can make sure that the students they care so much about do not fall through the cracks during this crisis.

THE PARTIES

The* Kane *Plaintiffs

20. Before the DOE suspended him without pay for failure to violate his sincerely held religious beliefs, Plaintiff MICHAEL KANE ("Mr. Kane") was a special education teacher in the New York City public school system for over fourteen years.

21. Plaintiff WILLIAM CASTRO ("Mr. Castro") is an administrator in the Bronx Borough Office who has been educating children in the New York City Public School system for over twelve years. He was recently reinstated to his position after it was determined that he was wrongly denied an exemption, but he remains segregated and adversely impacted.

22. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff MARGARET CHU ("Ms. Chu") was teaching ENL at a public school in East Harlem. She has been educating children in the New York City public school system for over twelve years.

23. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff HEATHER CLARK ("Ms. Clark") was a DOE Central Offices Employee working as an "Assessment Systems Training Manager" for the New York City public school system in Brooklyn in a DOE administrative building.

24. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff STEPHANIE DI CAPUA ("Ms. DiCapua") was a physical education teacher working in the New York City public school system on Staten Island. She has been employed by the DOE for four years, and teaching for eight years.

25. Before the DOE suspended him without pay for failure to violate his sincerely held religious beliefs, Plaintiff ROBERT GLADDING ("Mr.

Gladding") taught at a New York City public school on the Upper East Side, where he has taught for the last seventeen years.

26. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff NWAKAEGO NWAIFEJOKWU ("Mrs. Nwaifejokwu") taught first grade in the Bronx. She has been a teacher with the DOE for twelve years, and before that was a Head Start teacher.

27. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff INGRID ROMERO ("Mrs. Romero") was an elementary schoolteacher in the New York City public school system in Queens at the same school she attended as a child. She has been teaching in New York City public schools for over eighteen years.

28. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff NATASHA SOLON ("Ms. Solon") was an Assistant Principal working in the Bronx.

29. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff TRINIDAD SMITH ("Mrs. Smith") taught at a public school for special needs children in Brooklyn. She has been teaching with the DOE for almost twenty years.

30. Plaintiff AMARYLLIS RUIZ-TORO ("Mrs. Toro") is an Assistant Principal of Administration at a New York City Public School in Queens. She has been educating children in the New York City

public school system for twenty years. Though her religious exemption was "accepted" she has been segregated and adversely impacted by the Mandate.

The* Keil *Plaintiffs

31. Before the DOE suspended him without pay for failure to violate his sincerely held religious beliefs, Plaintiff MATTHEW KEIL ("Keil") worked for the DOE as a teacher for over 20 years.

32. Before the DOE suspended him without pay for failure to violate his sincerely held religious beliefs, Plaintiff JOHN DE LUCA ("De Luca") was employed by the DOE as a teacher for the past 10 years.

33. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff SASHA DELGADO ("Delgado") was employed by the DOE for the past 15 years.

34. Before the DOE suspended him without pay for failure to violate his sincerely held religious beliefs, Plaintiff DENNIS STRK ("Strk") worked for the DOE for the past 13 years as a high school social studies teacher.

35. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff SARAH BUZAGLO ("Buzaglo") worked for the DOE since 2017 as a teacher.

36. Before the DOE suspended him without pay for failure to violate his sincerely held religious beliefs, Plaintiff EDWARD a/k/a ELI WEBER

("Weber") was employed by the DOE as a teacher since September 2001.

37. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff CAROLYN GRIMANDO ("Grimando") was employed by the DOE as a teacher for the past 18 years.

38. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff AMOURA BRYAN ("Bryan") was employed by the DOE for the past 13 years. She began working as a special education teacher with DOE Home Instruction Schools in August 2021. In that position, she worked from a remote location in an isolated, non-school-building workplace, and did not interact in-person with DOE students or staff.

39. Before the DOE suspended her without pay for failure to violate her sincerely held religious beliefs, Plaintiff JOAN GIAMARRINO ("Giamarrino") was employed by the DOE as a teacher for the past 14 years.

40. Before the DOE suspended him without pay for failure to violate his sincerely held religious beliefs, Plaintiff BENEDICT LOPARRINO ("LoParrino") was employed by the DOE as an elementary school teacher for the past 17 years.

Defendants

41. Defendant City of New York (the "City") is a municipal corporation constituting the local municipal government of the population residing in New York, Bronx, Queens, Kings and

Richmond Counties in New York State. The First Amendment of the United States Constitution applies to this defendant by virtue of the Fourteenth Amendment.

42. Defendant Mayor Bill de Blasio ("Mayor de Blasio"), sued personally and in his official capacity, was the chief executive officer of the City until January 1, 2022. Mayor de Blasio was the architect and proponent of the challenged Mandate. Mayor de Blasio acted at all times under color of law in the acts attributed to him herein.

43. Defendant David Chokshi ("Commissioner Chokshi") is the Commissioner of Health and Mental Hygiene of the City of New York ("DOHMH"). Sued in his official capacity, Commissioner Chokshi promulgated the Mandate and subsequent amendments in coordination with Mayor de Blasio's directives. Commissioner Chokshi acted at all times under color of law in the acts attributed to him herein.

44. Defendant Board of Education of the City School District of the City of New York d/b/a New York City Department of Education ("DOE") is the department of city government responsible for the management of the New York City School District and the administration of the City's public schools. Through the issuance of Chancellor's Regulations, the DOE sets policies in the City's public schools. The Department is responsible for implementing the Mandate. For all purposes, the DOE serves as the government or public employer

of the Plaintiffs and all other persons who work for it.

45. Defendant David Chokshi ("Commissioner Chokshi") is the Commissioner of Health and Mental Hygiene of the City of New York and head of NYC's Department of Health and Mental Hygiene ("DOHMH"). Sued in his official capacity, Commissioner Chokshi acted at all times under color of law in the acts attributed to him herein.

46. Defendant David C. Banks ("Chancellor Banks") is the Chancellor of the DOE. Sued in his official capacity, and acting at all times covered herein under color of law, Chancellor Banks sets policies and oversees the employment of teachers, administrators and other employees for the DOE and is responsible for the enforcement of such policies with respect to such employees.

JURISDICTION AND VENUE

47. This court has jurisdiction to adjudicate all federal claims raised in this matter under 28 U.S.C. § 1331, which confers original jurisdiction on federal district courts to hear suits arising under the laws and Constitution of the United States; the Supremacy Clause of the Constitution of the United States, which allows federal district courts to hear suits alleging preemption of state and local laws by the Constitution and federal laws made in pursuance thereof, and 42 U.S.C. § 1983 and 28 U.S.C. § 1343 in relation to Defendants' deprivation and infringement under color of law of the Plaintiffs' rights, privileges, and

immunities secured by the United States Constitution and laws, as detailed further herein.

48. This Court has the authority to award the requested declaratory relief under 28 U.S.C. § 2201; the requested injunctive relief under 28 U.S.C. § 1343(a); and attorney's fees and costs under 42 U.S.C. § 1988.

49. Venue is proper in the United States District Court for the Southern District of New York for this action pursuant to 28 U.S.C. § 1391(b)(1) and (2) because it is the district in which Defendants unlawfully deprived many of the Plaintiffs and Class members of their rights under the laws and Constitution of the United States, as further alleged herein. It is also the district in which a substantial part of the events giving rise to Plaintiffs' claims occurred and continue to occur.

CLASS ACTION ALLEGATIONS

50. The *Kane* Plaintiffs bring this class action pursuant to Rule 23 in their representative capacity on behalf of themselves and the Class of all others similarly situated as defined in this complaint. Plaintiffs propose a Class consisting of all persons employed directly or indirectly by the DOE who assert religious objections to the Mandate (the "Class").

51. This action meets the following prerequisites of Rule 23(a):

    a. Numerosity: The Class includes thousands of members. Due to the high number of class members, joinder of all members is

impracticable and, indeed, virtually impossible.

b. Ascertainability: The proposed Class is ascertainable. Every Plaintiff is employed directly or indirectly by the DOE. Anyone who asserts that they have religious objections to the DOE Mandate is eligible to join the class.

c. Commonality: A substantial pool of common questions of law and fact exists among the Class, including but not limited to:

   i. Whether the DOE adopted facially discriminatory policies and practices for determining religious exemptions and suspended or otherwise adversely impacted the employment conditions of thousands of employees pursuant to these policies;

   ii. Whether the Mandate is subject to strict scrutiny on its face;

   iii. Whether the Mandate is subject to strict scrutiny as applied through facially unconstitutional and discriminatory Exemption Standards;

   iv. Whether the Mandate as implemented can survive strict scrutiny, including whether there are less restrictive means of mitigating the spread of COVID-19;

   v. Whether the First Amendment applies to determinations about the validity of religious beliefs made by state actors considering religious exemption and

accommodation, and what standard of review is required to assess those determinations;

vi. The irrationality and arbitrariness of particular provisions of the Mandate;

vii. Appropriate remedies to address the discrimination that occurred.

d. Typicality: Named Plaintiffs' claims are typical of the claims of the Class. Plaintiffs are all directly or indirectly employed by the DOE. The harm suffered by Plaintiffs and the cause of such harm is representative of the respective Class.

i. The claims or defenses of the Named Plaintiffs and the Class arise from the same events and actions by Defendants and are based on the same legal theory.

ii. The Named Plaintiffs include most subgroups of the proposed Class—including *inter alia* those who declined to apply under the facially discriminatory Exemption Standards policy because it appeared futile or offensive, those who applied initially, were denied and then appealed, those who were denied and declined to appeal under the facially discriminatory Exemption Standards policy, those who were granted appeal hearings, those who were not given a chance for a hearing on appeal, those who were accepted in their zoom appeal, those who were denied on appeal, those who were

accepted after second review by the "Citywide Panel" and those who were denied after second review by the "Citywide Panel."

iii. Since preliminary injunctive relief was already afforded to the diverse Plaintiffs collectively by the Second Circuit without distinction among the subcategories, it follows that they and those similarly situated have enough commonality to meet the standards under Rule 23.

e. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class.

f. Plaintiffs do not have any interests that conflict with the interests of the members of the Class. Plaintiffs have engaged competent counsel who are experienced in complex litigation, including class actions.

g. Superiority: A class action is superior to alternatives, if any, for the timely, fair, and efficient adjudication of the issues alleged herein. A class action will permit numerous similarly situated individuals to prosecute their common claims in a single forum simultaneously without duplication of evidence, expense, and resources. This action will result in uniformity of decisions and avoid risk of inconsistency and incompatible standards of conduct in the judicial system. It will also more efficiently allow adjudication of the pattern and practice claims.

h. Maintainability: This action is properly maintainable as a class action for the above-mentioned reasons and under Rule 23(b):

i. The individual amount of restitution involved is often so insubstantial that the individual remedies are impracticable and individual litigation too costly;

ii. Individual actions would create a risk of inconsistent results and duplicative litigation;

iii. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby rendering final injunctive relief or declaratory relief appropriate for the Class as a whole; and

iv. Individual actions would unnecessarily burden the courts and waste judicial resources.

i. Predominance: The questions of law or fact common to Class Members predominate over any questions that may affect only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

FACTS COMMON TO ALL CLAIMS

52. In March 2020, ex-Governor Cuomo declared a state of emergency due to the emergence of the COVID-19 pandemic.

53. In response to the pandemic, DOE closed all schools in its system, pivoting to a program of system-wide remote instruction in Spring 2020.

All school personnel and students participated in school activities through remote means.

54. During the 2020-2021 school year, DOE conducted classes using a hybrid model, in which some teachers and students participated remotely, and some were physically present on school grounds.

55. On June 23, 2021, ex-Governor Cuomo issued a declaration that the state of emergency due to COVID-19 was officially over in New York.

56. By the end of July 2021, the scientific consensus among world public health leaders coalesced around three facts: (1) vaccinated people could still catch and spread SARS-CoV-2 and were equally as infectious as unvaccinated people when they did; (2) herd immunity could not be achieved with presently available vaccines; (3) vaccine protection wanes significantly after a short period of time. Entire governments began to acknowledge that we will need to learn to live with COVID-19 as an endemic part of human life, and everyone (vaccinated and unvaccinated alike) will at some point catch and spread COVID-19.

57. Nonetheless, on August 3, 2021, Mayor de Blasio declared war on the unvaccinated, announcing a "Key to New York City" pass which intentionally excludes unvaccinated people from accessing basic aspects of life in New York in a blatant effort to coerce them to get vaccinated with one of the still-experimental COVID-19 vaccines. At a press conference, he described the goals of the program as follows:

> The key to New York City — when you hear those words, I want you to imagine the notion that because someone's vaccinated, they can do all the amazing things that are available in this city. This is a miraculous place literally full of wonders. And, if you're vaccinated, all that's going to open up to you. You'll have the key. You can open the door. **But, if you're un-vaccinated, unfortunately, you will not be able to participate in many things. That's the point we're trying to get across. It's time for people to see vaccination as literally necessary to living a good and full and healthy life.** The Key to NYC Pass will be a first-in-the-nation approach. It will require vaccination for workers and customers in indoor dining, in indoor fitness facilities, indoor entertainment facilities. This is going to be a requirement. The only way to patronize these establishments indoors will be if you're vaccinated, at least one dose. The same for folks in terms of work, they'll need at least one dose. This is crucial because we know that this will encourage a lot more vaccination.[1]

58. No religious or medical exemptions are offered under the "Key to New York City" mandate, making it one of the most draconian vaccine policies to have ever been enacted. The religious exemption was purposefully left out due to the ex-

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[1] https://wwwl.nyc.gov/office-of-the-mayor/news/539-21/transcript-mayor-de-blasio-holds-media-availability

Mayor's hostility towards religious objections to vaccination.

59. Two days after the "Key to NYC" was announced, on August 5, 2021, Wolf Blitzer interviewed CDC Director Rochelle Walensky ("Dr. Walensky") on CNN. Dr. Walensky clarified that the data on vaccine effectiveness against the then-dominant delta variant are conclusive: though the vaccines appeared to prevent severe illness, they cannot stop infection or transmission. "But what they can't do anymore is prevent transmission." When asked if asymptomatic vaccinated people could pass on the virus, Dr. Walensky said, "that's exactly right."[2]

60. Instead of pausing his mandates, Mayor de Blasio began what appears to be a crusade in earnest against the unvaccinated, expanding his ever-expanding mandates into the workplace.

61. First, in mid-August 2021, Mayor de Blasio issued a mandate for all New York City government employees, including employees of the DOE, requiring them to get vaccinated or be subjected to weekly testing requirements. As he issued this mandate, Mayor de Blasio remarked that he hoped that the testing requirements would be so burdensome that people would need to get vaccinated to avoid them — demonstrating his animus toward persons who refused to get vaccinated for religious or other reasons.

62. Then, on August 23, 2021, once again with no justification from the data or case numbers,

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[2] http://www.cnn.com/TRANSCRIPTS/2108/05/sitroom.02.html

Mayor de Blasio and Commissioner Chokshi announced that DOE employees would no longer have an option to undergo weekly testing but would now be terminated if they did not receive at least their initial COVID-19 vaccination by September 27, 2021. As announced, the new policy did not allow exemptions for any reason.

63. On August 24, 2021, Commissioner Chokshi promulgated a written vaccine mandate ("Original Mandate"), incorporating the policy announced on August 23rd. The Original Mandate included no exemptions for employees of DOE, no matter whether they were employed in DOE school buildings or remotely (with various exceptions for certain categories of employees or reasons other than religious accommodation provided).

64. Lawsuits and labor disputes ensued. Mass protests erupted and continue to be held.

65. The City openly refused to agree to consider any religious exemptions or accommodations to the policy as the parties tried to negotiate.

Arbitration and Initial Lawsuits Forced the City to Agree to Accommodate Religious Beliefs

66. On September 1, 2021, the United Federation of Teachers, Local 2, AFT, AFL-CIO ("UFT") filed a Declaration of Impasse. The challenge moved to arbitration.

67. On September 10, 2021, an arbitrator, Martin F. Scheinman, issued an order in the UFT Arbitration ("UFT Award") that required DOE to permit religious exemptions to its vaccine

requirements, but imposed unconstitutional restrictions on the criteria and manner in which requests for such exemptions were to be determined and draconian consequences for unvaccinated DOE employees, even those who did receive an exemption (collectively "Exemption Standards.")

68. Arbitrator Scheinman has held public fundraisers for Mayor de Blasio and is a major donor. His neutrality is in question.

69. On information and belief, the discriminatory religious exemption criteria provisions of the UFT Award were composed almost entirely of language and procedures proposed by the City.

Unconstitutional Exemption Standards Formally Adapted by DOE

70. *Inter alia*, the UFT Award contained the following provisions:

    a. As an alternative to any statutory reasonable accommodation process, the City, the Board of Education of the City School District for the City of New York (the "DOE"), and the United Federation of Teachers, Local 2, AFT, AFL-CIO (the "UFT), (collectively the "Parties") shall be subject to the following Expedited Review Process to be implemented immediately for full-time staff, H Bank and nonpedagogical employees who work a regular schedule of twenty (20) hours per week or more inclusive of lunch, including but not limited to Occupational Therapists and Physical Therapists, and Adult Education

teachers who work a regular schedule of twenty (20) or more hours per week. This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy ... *Id*. At 6-7, Section I.

b. Any requests to be considered as part of this process must be submitted via the SOLAS system no later than Monday, September 20, 2021, by 5:00 p.m. *Id.*

c. Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy). Requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an on line source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists). *Id.* at 9, Section I.C.

d. The initial determination of eligibility for an exemption or accommodation shall be made by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee Relations. These determinations shall be made in writing no later than Thursday, September 23, 2021, and, if denied, shall include a reason for the denial. *Id.* at 9-10, Section I.E.

e. If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE within one (1) school day of the DOE's issuance of the initial eligibility determination. The request for appeal shall include the reason for the appeal and any additional documentation. Following the filing of the appeal, any supplemental documentation may be submitted by the employee to the Scheinman Arbitration and Mediation Services ("SAMS") within forty eight (48) hours after the filing of the appeal. If the stated reason for denial of a medical exemption or accommodation request is insufficient documentation, the employee may request from the arbitrator and, upon good cause shown, the arbitrator may grant an extension beyond forty eight (48) hours and permit the use of CAR days after September 27, 2021, for the employee to gather the appropriate medical documentation before the appeal is deemed submitted for determination. *Id.* at 10, Section I.F.

f. A panel of arbitrators identified by SAMS shall hear these appeals, and may request the employee or the DOE submit additional documentation. The assigned arbitrator may also request information from City and/or DOE Doctors as part of the review of the appeal documentation. The assigned arbitrator, at his or her discretion, shall either issue a decision on the appeal based on the documents submitted or hold an expedited

(virtual) factual hearing. If the arbitrator requests a factual hearing, the employee may elect to have a union representative present but neither party shall be required to be represented by an attorney at the hearing. The expedited hearing shall be held via Zoom telecommunication and shall consist of brief opening statements, questions from the arbitrator, and brief closing statements. Cross examination shall not be permitted. Any documentation submitted at the arbitrator's request shall be provided to the DOE at least one (1) business day before the hearing or the issuance of the written decision without hearing. *Id.* at 10-11, Section I.G.

g. Appeal decisions shall be issued to the employee and the DOE no later than Saturday September 25, 2021. Appeal decisions shall be expedited without full Opinion, and final and binding. *Id.* at 11, Section I.H.

h. While an appeal is pending, the exemption shall be assumed granted and the individual shall remain on payroll consistent with Section K below. However, if a larger number of employees than anticipated have a pending appeal as of September 27, 2021, as determined by SAMS, SAMS may award different interim relief consistent with the parties' intent. Those employees who are vaccinated and have applied for an accommodation shall have the ability to use CAR days while their application and appeal are pending. Should the appeal be granted,

these employees shall be reimbursed any CAR days used retroactive to the date of their initial application. *Id.* at 11-12, Section I.I.

i. An employee who is granted a [ ] religious exemption [ ] under this process and within the specific criteria identified above shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/ or accommodation is in place. [ ] Employees so assigned shall be required to submit to COVID testing twice per week for the duration of the assignment. *Id.* at 12-13, Section I.K.

j. The process set forth, herein, shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision. Should either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to SAMS for expedited resolution. *Id.* at 13, Section I. L.

k. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021. Such leave may be unilaterally imposed by the DOE and may be extended at the request of the employee consistent with Section III(B), below. Placement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose. *Id.* at 13, Section II.A.

l. During such leave without pay, employees shall continue to be eligible for health insurance. As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period. *Id.* at 14, Section II.C.

m. During the period of September[ ] 28, 2021, through October 29, 2021, any employee who is on leave without pay due to vaccination status may opt to separate from the DOE. In order to separate under this Section and receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. If an employee opts to separate consistent with this Section, the employee shall be eligible to be reimbursed for

unused CAR days on a one (1) for one (1) basis at the rate of 1/200th of the employee's salary at departure per day, up to 100 days, to be paid following the employee's separation with documentation including the general waiver and release. Employees who elect this option shall be deemed to have resigned involuntarily effective on the date contained in the general waiver as determined by the DOE, for non-disciplinary reasons. An employee who separates under this Section shall continue to be eligible for health insurance through September 5, 2022, unless they are eligible for health insurance from another source (e.g., a spouse's coverage or another job). *Id.* at 16, Section III.A.

n. During the period of November 1, 2021, through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternately opt to extend the leave through September 5, 2022. In order to extend this leave pursuant to this Section, and continue to receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. Employees who select this option shall continue to be eligible for health insurance through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the DOE before September 5, 2022,

shall have a right to return to the same school as soon as is practicable but in no case more than two (2) weeks following notice to the DOE. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned. *Id.* at 17, Section III.B.

o. Beginning December 1, 2021, the DOE shall seek to unilaterally separate employees who have not opted into separation under Sections III(A) and III(B). Except for the express provisions contained, herein, all parties retain all legal rights at all times relevant, herein. *Id.* at 17, Section III.C.

71. On September 15, 2021, Arbitrator Scheinman issued a second arbitral award in a negotiation between the DOE and the Council of Supervisors and Administrators ("CSA"), which represents DOE employees in supervisory and administrative positions. The CSA Award mirrored the UFT Award in all ways relevant to the instant litigation.

72. On information and belief, at least two additional awards were issued in union arbitrations between DC37, a union that represents persons who work for DOE (or indirectly for DOE, through DOHMH) as school aides and in other staffing positions, and DOE and DOHMH, with provisions that mirror the UFT awards in all ways relevant to the instant litigation.

73. The NYC DOE officially adopted the religious accommodation policy set forth by Arbitrator Scheinman as DOE policy.

74. Defendants acknowledge that none of the underlying collective bargaining agreements contain a waiver provision waiving individual employees' right to sue in court for discrimination or constitutional violations.

75. Instead, the contracts all have express provisions guaranteeing that individual rights are not waived. For example, on information and belief, arbitrations between the UFT and DOE are governed by an agreement dated May 1, 2014 called the Joint Intentions and Commitments ("Joint Intentions"). The Joint Intentions contain *inter alia*, the following provisions (at 177, Art. 22, Section d, paras. 2, 4) that limit the UFT's powers in arbitration:

    a. Nothing contained in this Article or elsewhere in this Agreement shall be construed to permit the Union to present or process a grievance not involving the application or interpretation of the terms of this Agreement in behalf of any employee without his/her consent.

    b. Nothing in this Article or elsewhere in this Agreement shall be construed to deny to any employee his/her rights under Section 15 of the New York Civil Rights Law or under the State Education Law or under applicable Civil Service Laws and Regulations.

c. Nothing contained herein shall be construed as a waiver of any substantive arbitrability objection or to preclude any other resort to judicial proceedings as provided by law.

76. None of the Plaintiffs consented to permit any union to process a grievance concerning the Defendants' attempt to deprive them of their constitutional rights and, on information and believe, neither did any of the Class members.

77. Meanwhile, the UFT and fifteen other labor unions representing employees of DOE filed a lawsuit ("New York State Litigation") in the New York State Supreme Court in New York County on or about September 9, 2021 mounting a facial challenge to the constitutionality of the Original Mandate.[3]

78. Justice Laurence Love issued a Temporary Restraining Order in the New York State Litigation against enforcement of the Original Mandate because it failed to provide for religious and medical exemptions.

79. The 2021-2022 school year for DOE commenced on September 13, 2021 for students.

80. On September 15, Commissioner Chokshi issued a new mandate, which rescinded the Original Mandate, as amended. The amendment extended the vaccination requirement to staff of charter schools and their contractors, but it still did not apply to schoolchildren. It added a requirement

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[3] *New York City Municipal Labor Committee, et al., v. The City of New York, et al.*, No. 158368/2021 (N.Y. Co.).

that "Public meetings and hearings held in a DOE school building must offer individuals the opportunity to participate remotely in accordance with Part E of Chapter 417 of the Laws of 2021." It created special exceptions for individuals who enter "a DOE school setting, DOE building, or charter school setting [ ] for the limited purpose to deliver or pick up items unless the individual is otherwise subject to this Order [or who are] present [at] such locations to make repairs at times when students are not present in the building unless the individual is otherwise subject to this Order. It also excepted the following classes of persons:

a. Students attending school or school-related activities in a DOE school setting;

b. Parents or guardians of students who are conducting student registration or for other purposes identified by DOE as essential to student education and unable to be completed remotely;

c. Individuals entering a DOE school building for the limited purpose to deliver or pick up items;

d. Individuals present in a DOE school building to make repairs at times when students are not present in the building;

e. Individuals responding to an emergency, including police, fire, emergency medical services personnel, and others who need to enter the building to respond to or pick up a student experiencing an emergency;

f. Individuals entering for the purpose of COVID-19 vaccination;

g. Individuals who are not eligible to receive a COVID-19 vaccine because of their age; or

h. Individuals entering for the purposes of voting or, pursuant to law, assisting or accompanying a voter or observing the election.

81. The following language was added: "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law."

The Religious Exemption Policy is Unconstitutional

82. The DOE adopted the discriminatory arbitration policy as its sole official policy for determining religious exemptions.

83. The DOE knew or should have known that these standards are blatantly unconstitutional and thus impermissible for adoption by a government employer.

84. The Exemption Standards require the state to impermissibly pass judgment on which religions are "valid" and which it will decline to acknowledge or give its blessing.

85. Specifically, people who follow personal religious paths, or who belong to religions that are not "established" and "recognized" by the random reviewing administrator will <u>not</u> be considered.

86. The policy further provides that religious objections based on personally held religious

beliefs, and not necessarily echoed by the official doctrine of a church as relayed by "clergy", will be denied.

87. Moreover, to be considered, the exemption "must be documented in writing by a religious official (e.g. clergy)." The certification requirement discriminates against those who practice religions that do not belong to a hierarchical organization or who have personal religious beliefs.

88. To the extent that people have "recognized" church leaders that write letters attesting that a person has religious beliefs against vaccination and these beliefs are the beliefs of the church, this documentation cannot be available online. If the church has placed a description of their ministry online, the person will be denied an exemption.

89. Additionally, if a person does happen to belong to an "established" and "recognized" religious organization that is hierarchical and provides letters from clergy (that are not available online), that person will still be denied if any "leader" of that person's "religious organization" has ever spoken publicly in favor of vaccination.

90. "Leader" is not defined and in practice, the DOE has interpreted this very broadly (i.e., if one is Jewish, and any Jewish faith leader has ever made a statement in favor of vaccines, the DOE zealously argued that the employee's religious exemption should be denied even if the employee's particular faith did not include following that particular "religious leader").

91. As alleged by the *Kane* Plaintiffs in their initial complaint, filed before any determinations were made, the language of the policy shows that the intention is to deny everyone or substantially everyone. In fact, the policy gives only one example of a religion that will be accepted for exemption: Christian Science.

92. This intention was made plain to the employees. Multiple supervisors and agents of the DOE advised teachers that the DOE intended to deny all religious exemptions other than Christian Science-based objections. They asserted that the DOE has instructed, without authority, that "all other religions have publicly made statements in support of vaccination" and thus that anyone belonging to any other religion than Christian Science must be denied.

93. The City was represented by Corporation Counsel in all of the zoom appeals. In each appeal, the DOE representatives repeatedly and zealously argued for unconstitutional reasons for denial, repeatedly arguing that employees' applications should be rejected because they conflict with the Pope's decision to get vaccinated, or sometimes another popular faith leader (often one that had little or nothing to do with the religious beliefs of the applicant being assessed). Corporation Counsel also frequently cited a letter from Defendant Commissioner Chokshi, which questioned the validity of religious objections to the use of fetal cells in the development of COVID-19 vaccines.

94. In no uncertain terms, the DOE participated in heresy inquisitions, and openly advocated for discrimination against their employees because they held minority religious views or religious views which Defendants believe are "wrong".

95. This widespread, acknowledged policy reflected ex-Mayor de Blasio's guidance and admission of how the City would handle the applications for religious accommodation. In a press briefing held on September 23, 2021, ex-Mayor de Blasio was asked how the City intended to implement the religious exemption policies and what criteria would be used. He responded:

> **Mayor**: Yeah, it's a great question. Thank you. Yes. **And very powerfully Pope Francis has been abundantly clear that there's nothing in scripture that suggests people shouldn't get vaccinated.** Obviously, so many people of all faiths have been getting vaccinated for years and decades. **There are, I believe it's two well-established religions, Christian Science and Jehovah's Witnesses that have a history on this, of a religious opposition. But overwhelmingly the faiths all around the world have been supportive of vaccination. So, we are saying very clearly, it's not something someone can make up individually. It has to be, you're a standing member of a faith that has a very, very specific long-standing objection.**

96. It is long-settled that discrimination against personally held religious beliefs is unconstitutional and the Defendants were on notice that such criteria violates their employees' rights.

97. In the 1980s, the New York State Legislature similarly limited religious exemptions, only allowing exemption from vaccination to families who were "bona fide members of a recognized religious organization" with teachings that were contrary to immunization.

98. After parents with personally-held religious beliefs challenged the language codified into the Public Health Law in federal court, it was determined that the statute violated the Establishment Clause of the United States Constitution in a number of ways, one of which was to exclude those with personally held religious beliefs from protection.

99. As a result of that holding, New York State had to change its statutory language to provide religious exemptions to anyone who holds a religious objection, whether personally held or echoed by an established religious organization. No certification from clergy or attestation of membership could be required.

100. To this day, the amended Section 2165 of the New York State Public Health Law, which governs immunization requirements for adults, subsequently states: "this section shall not apply to a person who holds genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such person being

admitted or received into or attending an institution."

101. Such broad and equal protection is the Constitutional floor. The City violated the rights of thousands of employees by adopting this facially unconstitutional policy to administer accommodations required by the First Amendment and Title VII.

Implementation of the Exemption Standards

102. The religious exemption policy was intentionally set up to make it impossible to receive a meaningful chance at a religious exemption, while attempting to sidestep the expected lawsuits about the unconstitutionality of withholding such exemptions.

103. Indeed, upon the proclamation that the City now had a mechanism for religious and medical exemption, the temporary restraining order in the State litigation was dissolved.

104. However, what was not before the state court was the details of the religious exemption policy, which if examined, would have been readily revealed as facially unconstitutional.

105. In addition to discrimination claims, Plaintiffs, many of whom are tenured teachers and staff, have procedural due process rights that were grossly violated by the DOE's policy.

106. Although the UFT Award set a deadline of September 20, 2021 for employees of DOE to apply for exemption from the Vaccine Mandate, DOE waited until Saturday, September 18, 2021

to inform many of their employees of the opportunity to apply for the exemption. Most employees had only two days or less to apply for exemption under the UFT Award. CSA employees were only provided with one day.

107. Thus, covered employees seeking an exemption for religious reasons were given only a few days (or in some cases one day) to prepare and submit their applications even though these requests require, in addition to thoughtful and detailed explanations of faith written by the employees, documentation from religious leaders — specifically clergy members — and the documentation could not be available online.

108. The SOLAS system, where requests had to be uploaded, promptly jammed, leaving many employees unable to apply.

109. Some DOE employees who have religious objections to the Vaccine Mandate (such as Plaintiff Smith) purposely declined to file applications for exemption from the vaccination requirement because the Exemption Standards expressly excluded those with personally held religious beliefs from protection and were facially unconstitutional and offensive. Said employees believed an application would be futile. Many of these employees instead began raising money for a lawsuit.

110. Upon information and belief, at least five thousand DOE employees, including most of the Named Plaintiffs, did file religious-based requests for exemption from the Mandate on or before the deadline.

111 All applications were immediately denied through an autogenerated form email stating that any accommodation would be an "undue hardship" on DOE. This same email was even sent to employees who already worked remotely and those who could easily be accommodated remotely (such as IT or administrative positions).

112. Upon information and belief, some of those who were issued these insulting computer-generated denials then joined with their colleagues to try to generate support needed to file for emergency relief, realizing that the City was not going to act in good faith to provide religious accommodation. Others attempted to file an appeal, but were shut out of the system because it crashed during the short one-day period in which the appeals were supposed to be submitted.

113. DOE attorneys represented to the Court of Appeals that approximately 1,400 DOE employees were able to file appeals from decisions denying their exemption requests within the one day allotted.

114. Many of these 1400 were denied an opportunity for a zoom appeal, with no explanation whatsoever. Others were given fifteen minutes to meet with an arbitrator over Zoom, in adversarial proceedings including an attorney for DOE, and then were promptly denied, with no explanation whatsoever.

115. The DOE alleges that 165 employees eventually received a religious exemption through appeal.

116. Upon information and belief, the majority of those 165 alleged "acceptances" were granted *after* the *Kane* Plaintiffs filed a motion for emergency relief on October 4, 2021, and were issued in anticipation of litigation.

117. Pursuant to the DOE's blatantly unconstitutional religious accommodation policy, thousands of DOE employees, including most Named Plaintiffs, were denied religious accommodation and suspended without pay beginning October 4, 2021.[4]

118. Pursuant to Section II.A of the Exemption Standards, they were eligible to receive health insurance for a finite period but "prohibited from engaging in gainful employment" under Section II.C thereof.

119. Pursuant to Section III of the Exemption Standards, unvaccinated employees of DOE, including the Plaintiffs, are faced with a Hobson's Choice between two alternatives: (1) they may choose to "separate" from DOE, lose their tenure and careers, but remain eligible for health insurance through September 5, 2022, and receive compensation for unused CAR days; or (2) they may opt to extend their unpaid leave status through September 5, 2022, remain eligible for health insurance, but be prohibited from gainful employment for an entire year without income from any source. Both options require the

[4] The original date of September 27, 2021 was pushed back to October 4, 2021 because of a temporary restraining order from the Second Circuit.

"separated" employee to sign an express waiver of any right to challenge the separation. The DOE's required waiver document for election of Option (1) includes the following representation: "As it relates to the DOE, I understand that I lose all entitlements to reversion, retention, and tenure." If unvaccinated employees failed to elect option (1) by October 29, 2021 or Option (2) by November 30, 2021, then the DOE has the power unilaterally to terminate their employment starting on December 1, 2021 according to Section III of the Exemption Standards.

120. The Exemption Standards provided the exclusive procedure pursuant to which DOE employees were able to file applications for religious exemptions from the Mandate.

Kane and Keil Lawsuits and Early Proceedings

121. While all of this was happening, the teachers and educators impacted by the mandates were in a state of crisis. The labor disputes and pending lawsuits meant that the landscape was changing every day. The Mandate itself was amended three or four times in the month between its announcement and original effective date. The Mandate was also stayed more than once in various courts.

122. As it became apparent that help was not coming from many of the broader suits, those with religious objections to the Mandate and the discriminatory standards began organizing to try to bring the issues with the religious exemption process before the Court.

123. These are working class Plaintiffs, who were each in a state of crisis brought on by ex-Mayor de Blasio's shock and awe vaccine policies. They do not have the money to walk into a high-priced law firm and hire a team of attorneys. Nor do they have the ability to fight every battle while other lawsuits are pending that might provide relief. They have to conserve their resources.

124. The *Kane* Plaintiffs raised money with great difficulty and filed for emergency relief as soon as they were able - just before the effective date of October 4, 2021. They filed seeking relief for themselves and all others similarly situated.

125. At that time, many of the *Kane* Plaintiffs still did not know whether their applications were accepted or denied yet. They did know, however, that whatever the outcome, the process itself was boldly discriminatory and harmful.

126. The district court denied injunctive relief after two hearings.

127. A separate set of educators filed suit in the *Keil* matter as soon as they were able to considering the hurdles in trying to raise funds and secure a law firm to help.

128. The *Keil* Plaintiffs were denied relief with no opportunity for a hearing.

129. At no time during the lower court proceedings did any Defendant assert that there was some "alternative" process or set of standards that could have been employed.

130. Both sets of Plaintiffs sought emergency relief through appeal.

131. The November 28, 2021 merits panel decision of the Second Circuit Court of Appeals found that the Mandate, as applied through the Exemption Standards, was likely to be unconstitutional. Corporation Counsel admitted in open court that the policies they had adopted and used to determine religious accommodations were "constitutionally suspect."

132. The Second Circuit held that Plaintiffs are likely to succeed, vacated and remanded the denial of injunctive relief and ordered that each of the Named Plaintiffs receive "fresh consideration of their requests for a religious accommodation by a central citywide panel consisting of representatives of the Department of Citywide Administrative Services, the City Commission on Human Rights, and the Office of the Corporation Counsel" (the "Citywide Panel") adhering to "standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law."

133. The Citywide Panel was created by the Defendants and is entirely controlled by them, and the provision for referral of such panel set forth in the Second Circuit's order was adopted *verbatim* by the court from a proposal drafted by Defendants.

134. The DOE promised to extend the same "fresh look" by the Citywide Panel to many of the thousands of others who were suspended under

the admittedly unconstitutional Exemption Standards policy.

135. Upon information and belief, some of the proposed Class have been given the opportunity to ask for a "fresh look" by the Citywide Panel.

The Citywide Panel

136. The Citywide Panel process is just another veiled attempt to continue to discriminate against employees with sincerely held religious beliefs against COVID-19 vaccination. It does not provide adequate safeguards to meet the basic constitutional or statutory standards.

137. First, it has not been extended to everyone. Other than for Named Plaintiffs in these categories, the Citywide Appeals Panel option has not been extended to DOE workers who either declined to file an administrative application pursuant to the discriminatory Exemption Standards or who declined (or were unable) to file an appeal pursuant to the discriminatory Exemption Standards, and on information and belief, to others who object to the Mandate on religious grounds, including DOE employees whose attempts to file exemption applications or appeals were rejected or ignored by the Defendants.

138. For these employees, their status with DOE continues to be governed by the unconstitutional Exemption Standards — which means that each and every such person who is unvaccinated has either been dismissed already, or is now on leave without pay and subject to dismissal by the DOE

despite possessing a religious objection to vaccination without ever having been offered any constitutionally valid process for applying for a religious exemption.

139. Second, the Citywide Appeals Panel was supposed to apply standards for the evaluation of religious exemptions that complied with the law, including *inter alia* the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, the New York City Human Rights Law, and the New York State and United States Constitutions. They failed to do so.

140. Rather, the Citywide Appeals Panel did not apply these standards, and is simply using this "fresh look" process to try to justify their original unlawful discriminatory suspensions in bad faith.

141. Third, even though Defendants essentially admitted that they had openly discriminated against thousands of employees on the basis of religion, their review of these determinations was not undertaken by a neutral decision-maker.

142. Instead, Defendants employed their own staff, and worse, the attorneys who represent them defending against this lawsuit and who had initially overseen the denials under the unconstitutional policy, to provide the "fresh look."

143. Defendants likely owe substantial amounts of money to each person that they discriminated against. They are inherently vested in upholding the denials and cannot be allowed to self-police in

this manner mid-litigation or have a say in determining whether the suspensions were justifiable under some new theory.

144. Fourth, no Plaintiff was given any meaningful opportunity to be heard, or adequate notice of the reasons for their denial.

145. Fifth, the issuance of more autogenerated denials reveals once more that individualized determinations required by law are not taking place in good faith. This "fresh look" policy is nothing more than an attempt to whitewash the discrimination that already took place.

146. The applications submitted by fourteen of the Named Plaintiffs were reviewed within two weeks, as ordered by the Second Circuit.

147. All were summarily rejected with an autogenerated explanation "does not meet criteria" email save one.

148. The one Named Plaintiff whose application was accepted received the same explanation "does not meet criteria". He was reinstated with back pay but is still barred from entering any school building, without explanation, even though he has natural immunity.

149. All fourteen decisions stated that the decision was final and no indication was given that any additional information would be provided. The denials required that Plaintiffs get vaccinated within three days of receiving the decision.

150. Plaintiffs filed an application to renew their motion for a preliminary injunction within days

after receiving their denials. Several days later, attorneys for the DOE sent counsel for the Plaintiffs an email with purported "reasons" justifying the denials.

151. Upon information and belief, these "reasons" were an afterthought, generated in response to Plaintiffs' allegations about the summary nature of the sham "fresh look" process.

152. On information and belief, the Citywide Appeals Panel has no published rules or regulations to govern its actions, keeps no records of its decision-making process, and is not required to give any reasoned explanation of its decisions.

153. On information and belief, the few additional individual DOE employees whose religious exemption requests have been denied by the Citywide Appeals Panel have also received denials that lacked explanations, as the Named Plaintiffs originally were given.

154. On information and belief, no one except the Named Plaintiffs in this lawsuit has received, or ever will receive, any explanations at all for denials issued by the Citywide Appeals Panel.

155. Corporation Counsel's explanations, if they were accurate, show that the panel violated standards established by the United States Constitution, Title VII and the other laws that the Panel was required to apply.

156. The most common reason for denial was that Plaintiffs' religious beliefs are personally held and thus cannot be "religious in nature" since Plaintiffs allegedly have control over what beliefs

to adopt. This explanation was given to all those whose beliefs are derived from guidance from prayer, or moral conscience, for example. The DOE attorneys stated that such beliefs cannot be "religious in nature" though they acknowledged that all of the beliefs were sincerely held *religious* beliefs.

157. Other Plaintiffs were allegedly denied because the DOE asserted the Plaintiffs are wrong about their religious beliefs. These were precisely the kinds of unconstitutional reasons that were challenged successfully on interlocutory appeal, and which the Second Circuit explained are blatantly violative of the First Amendment's protections.

158. Each email also added that in addition, the DOE would deny each applicant even if their beliefs were found valid because it would be an "undue hardship" to the DOE to allow any unvaccinated teachers to enter school buildings. This was not supported or substantiated, nor did they explain why some teachers were accommodated nonetheless under the discriminatory standards.

159. Moreover, according to Corporation Counsel's letter explaining the panel's decisions, the panel received submissions from both the Plaintiffs and from the Defendants. While Defendants were thoroughly familiar with the facts set forth in Plaintiffs' applications, and were able to tailor their submissions in an attempt to rebut them, the Plaintiffs were not afforded any opportunity to review Defendants' submissions to the panel or

to rebut them. This built-in advantage in the system designed by Defendants and adopted by the Second Circuit panels violated Plaintiffs' rights to due process and deprived them of a fair hearing.

160. Ultimately, even if Defendants could demonstrate that any Class member possessed some secular objections to the vaccine in addition to their religious objections, this would not undermine their religious beliefs when such beliefs constitute their primary concern.

161. On information and belief, the First Amendment's religion clauses require the DOE to provide an accommodation to Plaintiffs that is the least restrictive alternative available to the Defendants. It is not constitutional for the Defendants, as governmental actors, to deny Plaintiffs — and thousands of other religiously motivated employees — their constitutional rights simply because the DOE finds it to be inconvenient to accommodate those rights.

162. Following the denial of their appeals by the Citywide Appeals Panel, the Plaintiffs were informed that they must present proof of vaccination to the City by December 28, 2021, or opt-in to extended leave-without-pay-and without-outside-employment status (waiving their rights to challenge the Defendants' actions in court), or be fired.

163. This threat puts Plaintiffs — and everyone who is similarly situated — under tremendous pressure to betray their religious beliefs in order to protect the livelihoods, income and insurance

protections for themselves and their families during a winter where COVID-19 and its Delta and Omicron variants are once again predicted to wreak havoc upon the health of the general population (without any apparent regard to vaccination status as Omicron easily infects the vaccinated and unvaccinated alike).

The Vaccine Mandate is not Neutral or Generally Applicable

164. The religious exemption policies are not neutral or generally applicable.

165. Though the Plaintiffs and most other DOE employees are banned from entering any school building despite having religious beliefs that do not allow them to be vaccinated, there are multiple carve-outs for persons who can enter school buildings.

166. Pursuant to the Vaccine Mandate, the one million children who attend New York City schools can enter school buildings each day.

167. Bus drivers are allowed to be unvaccinated, even though they have children in enclosed spaces for long periods of time, and they can enter school buildings unvaccinated.

168. Voters, delivery people and visiting parents can also enter school buildings unvaccinated.

169. Moreover, people whose vaccine immunity waned long ago, or who have only just begun their doses are allowed to teach in person under the terms of the mandate.

170. In addition, the Mandate has been tainted by substantial evidence of religious animus, not only from the City of New York, but by decision makers at the State level as well.

171. The Mandate was promulgated on the same day that Governor Kathy Hochul was appointed interim Governor of the State of New York.

172. Governor Hochul has strongly held religious beliefs in support of vaccination. In place of a cross, she wears a golden "Vaxed" necklace, which she describes in religious terms. Before taking office, she met with Mayor de Blasio and coordinated a vaccine strategy.

173. Two days after Mayor de Blasio's New York City Department of Health Vaccine Mandate was passed without a religious exemption, Governor Hochul removed the religious exemption from the New York State Department of Health regulation governing healthcare workers.

174. Mayor de Blasio's amended mandates reference the state mandates as a justification to enact his own.

175. Both mandates were to take effect on September 27, 2021. The day before the state mandate was supposed to take effect, Governor Hochul gave a sermon at a Brooklyn church, during which she said that God made the vaccine and that she was recruiting apostles to coerce those who did not understand God's will and what God wants (that we be vaccinated). Governor Hochul then told the press that the Pope supports vaccination and that no religious objections to

vaccination are valid, and this is why she removed the religious exemption from the state healthcare mandate.

176. Mayor de Blasio's statements have frequently echoed this New York government assertion that people's religious beliefs against vaccination are "invalid" because they are unorthodox. Representatives of the DOE repeatedly argued the same in each Zoom appeal.

177. These statements are as ignorant as they are unlawful.

178. The history of religious opposition to vaccination is well-established and religious objectors exist in nearly every faith tradition.

179. Even within the Catholic Church, there is currently a robust debate about the religious propriety of getting a COVID-19 vaccine.

180. Similar to abortion, the topic of vaccination is so intertwined with religion that it is itself a religious issue, and any vaccine mandate is inherently enmeshed with religion.

181. Refusing to allow for reasonable religious accommodation is itself indicative of a lack of neutrality.

182. The State has now doubled down on its persecution of those with religious objections to vaccination.

183. Just before this mandate was to take effect, Governor Hochul gleefully announced that she had instructed the Department of Labor to deny

unemployment compensation to anyone who is unable to work due to a vaccine requirement.

184. Several terminated DOE employees have applied and been denied unemployment compensation even though they are unable to get vaccinated due to their sincerely held religious beliefs.

185. Even as the DOE's own data showed that the vaccine mandates were not stopping the spread, Mayor de Blasio just kept issuing more random mandates. After these proceedings began, he issued additional mandates for general city employees, firefighters, police officers, daycare workers, and even employees in the private sector.

186. The government of New York City is treating vaccination as a religious sacrament, wholly divorced from the science or law. Their goal is not and has never been to stop the spread of COVID-19. It is to spread the gospel of COVID-19 vaccination even if it means trampling religious rights and ignoring the irrationality of such policies.

The Vaccine Mandate is Not Narrowly Tailored

187. The DOE's restrictions, prohibitions and "accommodations" on religious exemptions to the vaccine mandate are not narrowly tailored to promote a compelling interest.

188. There is no compelling reason to force the five percent of teachers who have religious objections to vaccination to violate their sincerely held religious beliefs.

189. DOE cannot meet their burden of proving that the protection of the children who attend City schools requires 100% of the teachers and staff to be vaccinated (rather than the 95% that currently are) or that the same end of virus protection could not be accomplished by means that would inflict less harm upon a significant number of religiously observant DOE employees.

190. New York City's DOE is the only school district in the entire State of New York that requires vaccination for all of its employees. All other districts in the state, including the adjacent school districts with overlapping populations and employees, allow unvaccinated teachers and school personnel to work in school buildings, subject to state testing requirements.

191. All of these other school districts have a governmental interest that is identical to that of the DOE, but they have not found it necessary to suspend, segregate or fire their religiously motivated workforce.

192. To date, the peer-reviewed evidence does not support the assumption that the vaccinated are substantially less infectious than unvaccinated people, particularly against the now dominant strains of SARS-CoV-2 widely circulating.

193. On the contrary, transmission was not even studied in clinical trials, and it was expressly acknowledged from the outset that these vaccines cannot provide sterilizing immunity (meaning protection against transmission). These vaccines were not designed to stop transmission and the evidence-based science conclusively shows that

they do not stop transmission of SARS-CoV-2 enough to mitigate community spread.

194. Any initial hopes that the vaccines would somehow turn out to provide sterilizing immunity have long-since been dashed, particularly with the dominance of the delta variant and now the omicron variant, upon which vaccination appears to have little to no impact in stopping infection.

195. Even before the emergence of Omicron, the science established that vaccines cannot stop transmission. In July, the CDC released the findings of a study confirming the vaccinated are as infectious as the unvaccinated. The study also showed the vaccinated are as likely to contract COVID-19, and asymptomatic vaccinated people were just as infectious as asymptomatic unvaccinated people. Multiple other studies emerged at the same time showing the same findings.

196. It is not surprising, then, that high vaccination rates do not translate into lower community spread.

197. For example, a recent Harvard study found that "there appears to be no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases." Subramanian S V and Akhil Kumar. "Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States." *European Journal of Epidemiology*, 1-4. 30 Sep. 2021, doi: 10.1007/s10654-021-00808-07.

198. Moreover, at the same time, evidence emerged that the vaccines were even waning in efficacy for symptom mitigation thus prompting many to start advocating for boosters after a few months. Studies from Israel and other highly vaccinated countries show efficacy plummeting less than eleven weeks after vaccination. Israel is already now contemplating a fourth booster, as their third has lost effectiveness.

199. Defendants' own publicly available data support these points. The NYC DOE publishes regular updates on the number of infected students and in-person staff working in New York City Schools. That data shows that excluding unvaccinated staff has not decreased the percentage of staff infected with COVID-19 at all (in fact, there are thousands currently infected among the fully vaccinated staff, whereas before exclusion of the unvaccinated, there were typically only a few dozen infected).

200. Nor was there ever a science-based reason to exclude these teachers and staff. Many of them have already been infected, and have as good or better immunity than their vaccinated co-workers. Many worked without issue throughout the pandemic on the frontlines. There was no emergency requiring their removal in October, and no reason not to allow them to return to the class room now.

201. Moreover, beyond the termination threat embodied by the Mandate, the DOE's pernicious treatment of employees seeking religious exemptions shows animus: employees are

required to choose between resigning or suffering another ten months of continued unpaid "leave" status, with a prohibition on outside employment. These loyal, longstanding employees are being told to "quit or starve," in essence. The policy is designed to be punitive and it is unconscionable, but consistent with ex-Mayor De Blasio's intent to impose requirements so burdensome that people would need to get vaccinated to avoid them.

202. Many of these employees have children and spouses to feed, elderly parents to support, and eventually, a retirement to fund. To deny teachers and other educators both a salary and any option to earn money from other sources is not, by any understanding, a narrowly tailored provision. It does not meet even Title VII standards, much less strict scrutiny.

203. Even for those few random employees who were granted an exemption, the accommodation is not sufficient. There is no reason to segregate religious employees and bar them from accessing school buildings. This segregation has employment consequences and the DOE cannot meet their burden of establishing that such drastic action is necessary.

204. Essentially, DOE is treating unvaccinated employees as if they have COVID-19, even if they are regularly testing and can establish that they do not have COVID-19. Because they are being treated as if they have a communicable disease, the appropriate standard is to assess whether they pose a direct threat to others — that is, a significant risk of substantial harm.

205. The DOE cannot meet this burden. Unvaccinated employees who are regularly tested do not pose a risk to anyone else and certainly not more of a risk than their largely untested vaccinated co-workers, who clearly can and are catching COVID-19 at staggering rates.

206. These provisions, along with the skewed application procedures that appear to be engineered to deny exemptions, accomplish two purposes: to make refusal to vaccinate so onerous that religious opponents of vaccination will be forced to act against their beliefs or waive their legal rights, and to save money through the mass "separation" of religiously motivated employees.

207. The Mayor of New York City controls the New York City school system. These policies were always ordered from the top down.

208. As the new Mayor of New York City, Mayor Adams has vowed to continue to require in-person schooling for DOE schoolchildren and vaccination for all DOE employees. As the new leader of the DOE, Chancellor Banks is required to follow Mayor Adams's instructions and, on information and belief, he is doing so, including by continuing to require that DOE require vaccination for all of its employees.

209. The children, meanwhile, are in crisis. New York City has put out desperate ads stating that anyone with a bachelor's degree (even with no teaching experience) can be hired.

210. A staffing crisis has deprived hundreds of thousands of children of basic services and

programs that are supposed to be guaranteed to them under law.

211. Violence has increased as staffing issues do not allow sufficient supervision.

212. Multiple stabbings have occurred.

213. Schools are closing, not because the children are sick, but because there aren't enough staff to keep them open.

214. Without discounting that COVID-19 should be taken seriously, it is well-understood that it is a mild disease in children with a risk of death that is so low as to be statistically insignificant.

215. With the milder variants now circulating, and vaccines and therapeutics available to those who want to use them, there is no compelling need to mandate COVID-19 vaccination in schools.

Plaintiff's Injuries and Standing to Seek Declaratory and Injunctive Relief

216. All Plaintiffs have sincere religious objections to vaccination and are entitled to opt out of these vaccines both because they are experimental medicine and because the vaccines conflict with their deeply held religious beliefs.

217. They bring this suit on behalf of themselves and all similarly situated teachers and educators in New York City with sincere religious objections to taking a COVID-19 vaccine.

FACTS RELATING TO INDIVIDUAL PLAINTIFFS

Michael Kane

218. Michael Kane ("Mr. Kane") is a resident of Nassau County and has been a special education teacher in New York City public school system for over fourteen years.

219. Mr. Kane objects to the Vaccine Mandate due to his long-standing sincerely held religious objections to vaccines.

220. These religious objections are sincerely held, and deeply personal. Mr. Kane was raised Buddhist and Catholic.

221. Through the years, and after battling addiction and depression, Mr. Kane found salvation in his deep personal relationship with God, and the spiritual forces of Christ and Buddha.

222. Mr. Kane derives his religious beliefs from personal communion with God, meditation, and prayer, as well as study of the sacred teachings of Buddha, Christ and spiritual texts.

223. He does not blindly follow the dictates of any one preacher or clergy member, and objects to having to submit any "certification" from an outside party about what his faith is or should be.

224. Mr. Kane's clear guidance from prayer and meditation is to refrain from vaccination. This is in line with the religious beliefs that he relied upon to free himself from addiction and depression by giving up pharmaceutical interventions that he'd been using to

unsuccessfully treat his condition, and instead turning to prayer.

225. Pursuant to his personal religious beliefs, Mr. Kane has not had a flu vaccine or any other vaccine for over twenty years.

226. Mr. Kane duly submitted an exemption request on Monday, September 20, 2021. By the end of the day, he received the form letter claiming he was denied on the basis of undue hardship.

227. Mr. Kane is a dedicated and experienced tenured teacher. He teaches some of the most vulnerable students in New York City, in a field that is terribly understaffed.

228. Mr. Kane's students are very attached to him.

229. When Mr. Kane was removed from the classroom, many of his students suffered serious harm and neglect.

230. Upon information and belief, they are not receiving their mandated services, they do not have adequate tenured and trained teachers, and they are daily subjected to danger and neglect.

231. Mr. Kane was subjected to discrimination and harassment by DOE employees in his Zoom arbitration.

232. For example, Corporation Counsel (who represented the DOE in the zoom appeals) stated repeatedly that though they found he was sincere in his religious beliefs, he should be denied accommodation because the Pope disagrees with Mr. Kane.

233. Mr. Kane explained that his religious views are not shaped by the Pope or the Dalai Lama, but rather, come from prayer.

234. Mr. Kane was left in pending status for several days after his Zoom appeal, but finally summarily denied any accommodation after the initial TRO appearance on October 4, 2021.

235. Mr. Kane's same materials were reviewed by the Citywide panel. In these materials, the primary reason provided for exemption was guidance from prayer.

236. Once again, the Citywide panel noted that they did not have reason to doubt the sincerity of Mr. Kane's religious views, but nonetheless denied him on the grounds that they did not consider guidance from prayer to be "religious" in nature as it is personally interpreted.

237. Without relief, Mr. Kane will be terminated imminently.

238. Upon information and belief, Mr. Kane has natural immunity from prior exposure, though he has not been tested.

239. Either way, Mr. Kane does not pose a significant risk to anyone else based on his vaccine status and has been safely teaching in the NYC schools throughout the pandemic.

240. He has a family to support, and losing his job has been very hard on him and his family.

William Castro

241. William Castro ("Mr. Castro") is a resident of Pennsylvania and works in the New York City

School District as an administrator in the Bronx Borough Office.

242. He has been working in the New York City Public School system for over twelve years.

243. Mr. Castro grew up in public housing in Queens and attended public school in New York City. Early on, he developed an appreciation for the power of education, seeing that it could elevate people's lives and provide meaningful opportunities.

244. He knew, from a young age, that he wanted to be an educator.

245. Mr. Castro began his career as a teacher teaching English in public schools on the Lower East Side for over eight years. He started as a teacher, then quickly became a lead teacher and then Dean of Students.

246. Mr. Castro's background is similar to many of his students, and his leadership and passion for teaching has been an inspiration to countless New York City children.

247. He always goes above and beyond, seeing needs and fulfilling them. At his first job, he noticed, for example, that no one had stepped up to create a basketball program for the girls. So, on top of all the other things he was handling, he started a team and served as coach for five years, inspiring the children to apply the discipline and skills learned on the team to their academic studies as well as their athletic achievements.

248. At the urging of colleagues, and because he wanted to share his skills and passion for education on a broader scale, Mr. Castro went back to school to pursue a career in administration.

249. With certifications as a School Building Leader, School District Leader, English Language Arts Teacher, and English as a Second Language Instructor, it was a natural fit for Mr. Castro to be hired three years ago as the ESL service administrator for the lowest performing district in the Bronx. This district is characterized as "high needs" and has many ESL students from diverse cultural and language backgrounds.

250. Mr. Castro was hired to the Borough office in November 2019.

251. Though he was very new to the position when the pandemic hit, Mr. Castro poured his heart and soul into the job to ensure that the ESL students received the instructional services they need and make sure the school did not let them fall through the cracks.

252. When the first shutdown occurred, area leaders were trying to figure out what to do and looking for guidance.

253. Mr. Castro did not wait, but rather "took the bull by the horns," quickly realizing that since they were going into this new arena with fully remote learning, the teachers were going to need substantial support to learn how to navigate online systems and platforms.

254. Mr. Castro immediately began professional development with teachers, and led sessions that were conducted remotely, where he had over a hundred participants at a time in multiple sessions. His efforts were applauded and the teachers in his district were particularly prepared.

255. Mr. Castro worked tirelessly over the next year and a half to maintain this excellence and make sure the students in his district were taken care of and overworked teachers were supported and listened to.

256. Some students were in person, some remote. Constant issues arose, and everyone was anxious and stretched to the limit. But Mr. Castro consistently stepped up to be there for his community and to be a leader.

257. Though there was no vaccine or even PPE available from the school in the beginning of the pandemic, he would not hesitate when asked to go into the buildings to support students and staff. His constant refrain was "anything you need me to do, I will do it for the schools and these communities."

258. In December 2020, Mr. Castro got sick. Soon after, his wife got sick as well. Diagnosed with COVID-19 by his physician, Mr. Castro lost his sense of smell and taste, and developed symptoms of long-COVID, with brain fog and fatigue lasting for several months.

259. He was allowed to take a leave of absence to rest and recover, but instead, he continued to

work for his district remotely, putting in long days to support the community and students he cares so much about even though he was not well.

260. Once he recovered, Mr. Castro was routinely asked to start going back into schools and buildings, including for school building readiness walkthroughs in preparation for the return of in-person learning.

261. As an administrator, he was never required or expected to be vaccinated, or even tested.

262. Mr. Castro has a religious objection to vaccination that is long-standing and deeply held.

263. Mr. Castro submitted his exemptions through the online system within the one day afforded to CSA employees. He meets all of the criteria set forth in the award. He belongs to a church that shares and supports his religious views on vaccines, no leader of his church has gone on record making statements supportive of vaccines, he is sincere, he submitted a letter from his pastor, and his church does not violate any of the rules set forth in the policy.

264. Nonetheless, Mr. Castro was summarily denied with the boilerplate "undue hardship" letter.

265. Mr. Castro then timely and immediately appealed. During his Zoom appeal, they affirmed he is sincere, and he pointed out that he met all of the criteria. Nonetheless, the DOE argued that he should be denied relief because he and his church hold beliefs that run contrary to Pope Francis' beliefs. Essentially, the DOE takes the position

that Mr. Castro's religion is heretical because it is different from the Pope's.

266. The DOE also argued that because Defendant Chokshi says that the COVID-19 vaccines do not use aborted fetal cells, one of the reasons for objecting (indirect participation in abortion) is invalid.

267. Defendant Chokshi is wrong. COVID-19 vaccines used fetal cell lines at some point in development or testing. But even if he was not, the DOE has no authority to deny religious accommodation because they believe that someone's beliefs are wrong.

268. Mr. Castro poses no heightened danger to his community due to his vaccine status. Mr. Castro's district needs him and has suffered as a result of his removal.

269. Mr. Castro was denied his religious exemption and removed from the payroll on October 18, 2021

270. Mr. Castro is supporting his wife and son, and his wife is pregnant.

271. After the "fresh look" review, Mr. Castro was reinstated with back pay.

272. However, the impacts of being wrongfully suspended without pay for three months were devastating on him and his family.

273. While on unpaid leave, his health deteriorated from the stress. He suffered from chest pain and heart palpitations and symptoms

related to his previous diagnosis of Bell's Palsy returned.

274. Mr. Castro had found out his wife was pregnant a week before being placed on unpaid leave. He couldn't sleep at night after the suspension because he did not know if he would be put out in the streets with his family and did not know how he would be able to make rent.

275. He had to take out a loan, because without income for four months, he was unable to pay for basic things, like rent, food, school expenses, car expenses and medical bills.

276. Because he was still wrongfully suspended when the annual health insurance benefits transfer period occurred for New York City employees, he was ineligible to choose the plan he needed to ensure coverage for his family this upcoming year.

277. Since Mr. Castro's wife is pregnant, the previous coverage was not ideal for the upcoming year, particularly since it did not cover most providers in Pennsylvania, where they live. When Mr. Castro was suspended, he attempted to login and transfer to another carrier during the election period, as would have been his right. The website informed him that only employees on active payroll had this privilege.

278. Because Mr. Castro is not vaccinated, he is not allowed to even attend visits with his wife in New York City due to Mayor de Blasio's ever-increasing crackdown on the unvaccinated. Now his wife is forced to go to visits alone.

279. Mr. Castro was at every appointment for his son, and being denied access now is very hard on both him and his wife.

280. If he had been able to transfer coverage, he would have been able to attend all visits in Pennsylvania, which has no such restrictions. Moreover, his wife is now in jeopardy, as they will need to drive all the way to New York City for her to give birth in June.

281. Mr. Castro is now reinstated to his former position, but he is not allowed to report to school buildings as he did in the past to provide side-by-side support and training to teachers in the classrooms or given them constructive feedback after observing in-person instruction.

282. This was a very important and fulfilling aspect of his role.

283. There is no reason why Mr. Castro needs to be segregated and deprived of this aspect of his job. It could have lasting consequences on his career and sense of fulfillment in his work.

Margaret Chu

284. Margaret Chu ("Ms. Chu") is a resident of Brooklyn, New York and teaches English as a Second Language in a public school in Harlem, New York.

285. Ms. Chu is Chinese-American and was born and raised in New York City.

286. She was recently certified to teach English as a New Language ("ENL" — formerly "ESL") and

now works as an ENL teacher in East Harlem. This is her calling, and her dream job.

287. Previously, she taught special education for twelve years.

288. Ms. Chu loves her students and is a dedicated and passionate teacher.

289. Ms. Chu is a practicing Roman Catholic, with sincerely held religious convictions against the COVID-19 vaccine. She believes in God and his teachings, went to twelve years of Catholic school, completed all of her Sacraments, and lives her life according to the teachings of the Bible. Her moral conscience prevents her from being able to take these vaccines.

290. Ms. Chu's Parish wrote a letter in support of her religious accommodation.

291. Ms. Chu's mother and grandparents came to the United States to escape the repressive government of China. Ms. Chu cannot believe that she now faces the same kind of tyranny and lack of respect for individual religious beliefs and other fundamental rights that her family tried to escape.

292. Ms. Chu timely filed for an exemption, was summarily denied, timely appealed and was granted a Zoom appeal.

293. At the Zoom appeal, the DOE representatives and Arbitrator Barry Peek ridiculed her concerns about abortion and her Catholic faith. The DOE representatives from Corporation Counsel stated

that Ms. Chu should be denied because her beliefs are not supported by the Pope.

294. Ms. Chu felt like she was the subject of a witch hunt. She eloquently explained that her religious beliefs as a Catholic are not dictated by the Pope's choices. She discussed the responsibility of all Catholics to follow their moral conscience.

295. The DOE and the arbitrator would not accept that Ms. Chu could have different beliefs than the Pope and though they acknowledged she was sincere, the DOE argued that Ms. Chu should be denied.

296. Ms. Chu was still pending at the TRO hearing on October 4, 2021. She was denied an exemption after the TRO hearing and removed from the payroll.

297. Ms. Chu timely submitted all requested materials to the Citywide panel for a review of her denial.

298. Though the DOE found that Ms. Chu had sincere religious objections to COVID-19 vaccination, Corporation Counsel decided that following one's moral conscience is not "religious in nature" as it is a personal decision not one dictated by an authority figure.

299. Essentially, they used the same discriminatory standards they had employed the first time.

300. Thus, without relief, Ms. Chu will be formally terminated imminently.

301. The impacts of this four-month long suspension have been extreme.

302. Ms. Chu has always been an industrious and diligent worker. She put herself through school, earning two bachelor's degrees, two master's degrees, and all the while taking care of herself and her family.

303. She has always dreamed of becoming an ESL teacher. This dream came true in August of 2021, when, after countless interviews and persistence, she got a position in Harlem.

304. Emotionally and mentally, being suspended from this job, having no money, and enduring the harassment and derision from her employers about the supposed invalidity of her religious beliefs has been very hard on Ms. Chu.

305. Ms. Chu is proud, and has never had to borrow money from anyone. Now, she is desperate. She has run out of savings, had to borrow money, and has been denied unemployment insurance, as the DOE wrote to the unemployment board, claiming she was "discharged for misconduct" as a result of her failure to violate her religious beliefs by taking a COVID-19 vaccine.

306. Upon information and belief, the DOE has reported the same status of "suspension for misconduct" in all of Ms. Chu and thousands of other employees' records.

307. Ms. Chu has realized that she may be forced to move out of New York City. Her elderly parents, who she cares for, depend on her

however, and they cannot move. The stress of this situation has kept Ms. Chu up night after night and is taking a toll on her health.

Heather Jo Clark

308. Heather Clark ("Ms. Clark") is a DOE Central Offices Employee. Her job title is "Assessment Systems Training Manager" and until she was suspended for failing to violate her sincerely held religious beliefs, she worked in Brooklyn in an administrative building.

309. Ms. Clark was raised Christian. She attended church each week, belonged to Christian youth groups throughout college, and spent summers at Christian programs.

310. Due to concerns about the role that the Church played in covering up child abuse and other serious moral failings, she became disillusioned and for a time, renounced her faith.

311. Many years ago, however, after becoming seriously ill, she visited a Christian healer, who laid hands on her, and renewed her sense of Christ and God.

312. From then on, Ms. Clark has been a devout Christian, but has opted to follow a primarily personal path to Christ.

313. Ms. Clark has sincere religious objections to vaccines. These beliefs are grounded in guidance from the Holy Spirit, as well as her objection to the use of aborted fetal cell lines in the production and testing of the vaccines.

314. On September 16, 2021, she duly submitted a religious exemption letter through the SOLAS system reflecting these concerns.

315. The next day, she received back the same form email that everyone else did stating that it would be an undue hardship to accommodate her since it would not be safe for her to enter into any school building.

316. For Ms. Clark, this reason makes no sense. Ms. Clark worked remotely for the NYC DOE since April 2020 with no indication that this has created any type of "undue hardship" for the DOE. Moreover, she is not a classroom teacher, but works in the Central Offices when not working remotely, so does not enter school in any event as a typical part of her job.

317. Ms. Clark timely filed an appeal but was denied the opportunity for a Zoom hearing even though she holds sincere religious beliefs in opposition to vaccination.

318. Ms. Clark timely submitted her materials to the Citywide panel for review.

319. The Citywide Panel acknowledged that Ms. Clark's religious beliefs are sincere, but rejected the validity of the beliefs or the characterizing of guidance from the Holy Spirit as religious in nature because it allows Ms. Clark to follow individualized guidance.

320. Ms. Clark also shared stories of other situations in which she'd followed the guidance of the Holy Spirit, even when it seemingly conflicted with her own interests. For example, years ago,

Ms. Clark was prescribed Vioxx by her doctor. As she always does, she prayed, and received clear guidance from the Holy Spirit that she should not take it. Seemingly against medical advice and her own personal interests, she declined to take it. Several weeks later, Vioxx was removed from the market for causing heart attacks. The DOE characterized these stories as showing that Ms. Clark's views were scientific rather than religious. This is clearly inaccurate.

321. Ms. Clark has now been off of the payroll for over three months and will be imminently terminated without relief.

322. The sudden and extended loss of employment forced her to relinquish her New York City apartment, which she loved and which is an irreparable loss.

323. Her belongings are in storage, and she now has to stay at the good will of her family, living, as she puts it, "on other people's terms, like a child or a ward."

324. Because she had to move out of New York City to stay with family, she is no longer in the area/network covered by her health insurance, which means that she has very high health care bills that she has had to incur.

325. Celebrating Christmas has always been a particular joy for Ms. Clark. This year, she could not afford to buy presents or any special foods. She suffers from extreme stress from being daily forced to choose between her job and her faith.

Stephanie Di Capua

326. Stephanie DiCapua ("Ms. DiCapua") is a physical education teacher working in the New York City Public School System in Staten Island.

327. Due to her deeply held religious beliefs, Ms. DiCapua is unable to be vaccinated. These beliefs are long-standing and are also reflected in the official teachings of her particular Christian church. Stephanie's pastor sent a letter supporting her religious exemption and pointing out the teachings of the Bible that support and guide their religious viewpoints.

328. On Friday, September 17, 2021, Ms. DiCapua received the same form rejection letter that all other employees received, alerting her that her religious accommodation would not be honored because it would present an undue hardship on the DOE.

329. She appealed but was summarily denied even the right to have a Zoom hearing without explanation.

330. On October 4, 2021, Ms. Di Capua was removed from the payroll and suspended without pay.

331. Ms. Di Capua's removal, like the removal of all Plaintiffs, is a great loss to the students and the community.

332. Ms. DiCapua has been employed by the DOE for over four years and has taught for over eight years.

333. She always goes above and beyond, and volunteers for new projects at school to give her students the best experience possible. She created a physical education leader club in her school, raised money for their first ever Wellness Room, created the school's first ever Wellness Committee, developed a student and staff cookbook, and created various school wide wellness initiatives for students to participate in.

334. Ms. DiCapua is dedicated to her job and to the kids she teaches. In addition to her normal duties, she coaches softball and organized a before-school fitness and sports program and was selected to be a physical education reviewer through the Office of School Wellness to develop the first ever physical education scope and sequence for students in the NYC DOE.

335. Ms. DiCapua supplied a detailed, heartfelt, six-page single-spaced letter and record from her church supporting her religious exemption for "fresh look" by the Citywide Panel.

336. Ms. DiCapua's religious objections to vaccination have been long-standing, well-documented and are grounded in her reading of her obligations under the Bible, and her understanding of what faith requires of her.

337. Ms. DiCapua also belongs to a church that shares her beliefs.

338. Bizarrely, as if they never read her letter, Corporation Counsel's reasons for denial asserted that though they do not question the sincerity of her religious beliefs, they believed her decision

was about opposition to the mandate. The DOE also said: "[t]he employee did not provide, beyond the most general response, any examples of other medications or specific vaccines she has refused due to her articulated religious belief." This is belied by the six-page letter, which does detail other vaccines and interventions that Ms. DiCapua declined due to her religious beliefs — including the flu vaccine. Ms. DiCapua's letter was solely focused on her religious beliefs. She never mentioned any particular opposition to mandates nor is this the source of her religious objection. The Citywide Panel never interviewed Ms. DiCapua and had no valid basis to infer such reasons for denial.

339. Upon information and belief, the Citywide Panel never even read her materials but simply made up a hasty reason to deny Ms. DiCapua. Nothing in her materials supports their conclusion.

340. The last three months without salary, having to choose daily between her faith and job, has been devastating for Ms. DiCapua.

341. She has suffered irreparable harm in the form of debilitating stress, fear and hopelessness that she might have to compromise her religious beliefs to keep her job. She cannot pay her student loan debt, buy food, pay rent.

342. She has become very sad and depressed.

343. She wanted to be a teacher all her life and worked very hard to achieve her dream.

344. She had no financial assistance, and has over $ 50,000 in student loan debt.

345. Until she was suspended, she was on track to get student loan forgiveness for this debt and was on income-based repayment plans.

346. How, without intervention, she will not qualify for loan forgiveness.

347. Ms. DiCapua did what she was supposed to do. She works hard. She put herself through college. She paid for her master's degree out of pocket and through loans that she diligently paid back.

348. She worked through the pandemic without any thought for herself, because that is what she was asked to do and the students needed her.

349. She got COVID-19, and now has natural immunity.

350. Now, though she poses no direct threat to anyone, she is shunned, treated as diseased, and deprived of an income.

351. Before she was suspended, Ms. DiCapua was planning a wedding, and looking forward to starting a family.

352. Now these plans are all on hold. She cannot afford a wedding. The couple cannot afford to start a family now.

353. Each day presents unbearable coercion to give in and violate her faith. Each day that she has to live with this coercion destroys Ms. DiCapua's spirit and breaks her heart.

Robert Gladding

354. Robert Gladding ("Mr. Gladding") resides in Manhattan and until October 4, 2021, he taught at a New York City public school on the Upper East Side, where he has taught for over seventeen years.

355. Mr. Gladding has been a teacher with the New York City public school system for over twenty years.

356. Mr. Gladding is a very religious man and has sincerely held religious objections to the Mandate.

357. He was raised a Christian and was encouraged from a young age to develop a personal relationship with Christ.

358. His mother, also a Christian, lived through the horrors of World War II in her home country of Germany, where she witnessed the horrific effects of religious intolerance and adherence to dogma. She survived that Godless and dangerous time by always being guided by her inner connection with Christ. She encouraged Robert to find God personally rather than through the dictates of fallible human leaders.

359. Throughout Mr. Gladding's life, his choices have been made in consultation through prayer with God, including even such fundamental decisions as where to live, when to have a child, what profession to follow and of course, what medical course of action to follow.

360. He became a teacher in response to a calling he believes to have received from God to join the

New York City Teaching Fellows in 2001 after the tragedy of 9/11 so deeply wounded his beloved City.

361. The teachings of Mr. Gladding's faith tradition and his guidance from prayer prohibit vaccination.

362. On Friday, September 17, he submitted a religious exemption detailing his personal religious path and sincerity, and his religious objections to vaccines, grounded in prayer, along with a letter from an interfaith minister who can attest to Mr. Gladding's sincerity and commitment to his religious practices.

363. Mr. Gladding was summarily denied, and denied after appeal, even though he has a long-standing religious objection to vaccination.

364. After the motion for emergency relief was filed on October 4, 2021, Mr. Gladding was oddly changed to "pending" status from denied. A few hours after the TRO hearing, his application was changed back to denied.

365. Upon information and belief, these changes were made in anticipation of litigation, as the DOE simultaneously used this pending status to claim that the matter was not ripe for consideration of injunctive relief.

366. Mr. Gladding has dedicated his career to his students and to teaching. It would be a serious blow to the New York City education system and to his school if he were to be summarily dismissed.

367. Mr. Gladding timely submitted documentation of his sincere religious objection to vaccination. He documented his long history of turning to prayer for all major decisions. He noted that the most important reason for his objection was grounded in guidance from God: "Most importantly, I have sought guidance directly from God, and He has answered me through prayer clearly and unequivocally — it is a sin to get vaccinated, and I cannot do it. I have learned to listen when God guides me this way and I must do so now."

368. Mr. Gladding was denied on the grounds that the DOE believes personally held religious beliefs derived from prayer are not religious in nature, because individuals allegedly have discretion about what to do according to what guidance they get.

369. This reason for denial violates Mr. Gladdings constitutional rights.

370. Mr. Gladding has been irreparably harmed by the discrimination he has faced.

371. He cannot afford to stay in New York City any longer without employment, and he and his wife have had to begin preparations to leave.

372. Unfortunately, he has teenaged daughters, who are not prepared to leave their schools.

373. The family is being separated, and Mr. Gladding will miss the last two years of his time with his children before they leave for college.

374. Mr. Gladding and his family are in crisis, and desperately need this Court's intervention to save their precious time together.

Nwakaego Nwaifejokwu

375. Nwakaego Nwaifejokwu (Mrs. Nwaifejokwu) has been a teacher with the New York City Public School system for twelve years. Prior to that, she worked with Head Start.

376. Until she was suspended for declining to violate her deeply held religious beliefs on October 4, 2021, she taught First Grade in the Bronx.

377. For Mrs. Nwaifejokwu, teaching is not just a job, it is a passion. She finds herself spending hours of time outside of school making preparations to support her students, staying up late into the night thinking about how to get things "just right." She loves her students, and they love and need her.

378. When the school announced suddenly in 2020 that they were going remote, no training or assistance was offered. Mrs. Nwaifejokwu spent hours working alone and with her colleagues to learn how to use various online platforms and make sure their students were supported. She went above and beyond, working in the wee hours of the morning and late into the night to reach out to families, support her students and make sure that she was able to give them the best education possible in such difficult circumstances.

379. At that time, she was teaching kindergarten. When school resumed, 70 percent of the students

were still remote, so Mrs. Nwaifejokwu had to work with the other teachers to come up with creative solutions to make sure everyone was taken care.

380. Several of the children in her class are on the autistic spectrum. Mrs. Nwaifejokwu is luckily able to draw on her many years as a special education teacher to support them while handling these uncertain times.

381. Mrs. Nwaifejokwu has sincere religious objections to vaccination.

382. Mrs. Nwaifejokwu timely filed for an exemption and was summarily denied. She appealed and then was denied again without explanation.

383. When Mrs. Nwaifejokwu submitted her religious exemption materials to the Citywide Panel, they determined that she does qualify for religious exemption after all. Nonetheless, they denied her, stating: "The record before the Panel demonstrated that the employee holds sincerely held religious beliefs sufficient to justify a reasonable accommodation if such accommodation did not present an undue hardship. However, the panel believes the DOE has successfully demonstrated that an accommodation, in appellant's case, would create an undue hardship if granted. Appellant is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population."

384. Mrs. Nwaifejokwu does not pose a direct threat to her students based on her vaccine status.

385. She taught these students without issue throughout the pandemic, and for months after the "emergency" Mandate was passed.

386. Currently, the DOE is sending actively *infected* teachers into the classroom instead of Mrs. Nwaifejokwu, who is not infected.

387. Moreover, the DOE could at the very least provide an alternative accommodation, such as allowing Mrs. Nwaifejokwu to provide remote support to students.

388. The DOE has not met its burden of showing that termination for cause is the least restrictive method of safeguarding the school population.

389. The impacts of being suspended without pay for the last three months have been immense. Mrs. Nwaifejokwu has had to take out a loan and use personal credit cards just to pay for basic day-to-day expenses. The credit is running out.

390. Mrs. Nwaifejokwu's situation is now at a crisis level. She does not know what she is going to do to safeguard herself and her family.

391. Moreover, being deprived of doing the work she is so passionate about is irreparably harming Mrs. Nwaifejokwu.

392. The stress of being daily coerced into choosing between her job and her faith is causing serious physical, mental and emotional harm.

393. Mrs. Nwaifejokwu has started suffering from severe headaches, stomach aches, and debilitating panic and depression.

394. This holiday season broke Mrs. Nwaifejokwu's heart. She was unable to buy or give holiday gifts to her family. She could not even celebrate her mother's birthday as she previously planned due to finances.

395. Without assistance, Mrs. Nwaifejokwu faces the imminent threat of the loss of her home, and other severe consequences imposed by the DOE.

Ingrid Romero

396. Ingrid Romero ("Mrs. Romero") resides in New Jersey and is an elementary school teacher in the New York City Public School system in Queens. She has been teaching for over eighteen years.

397. Mrs. Romero grew up in Queens, though she has a lot of family in Ecuador, who she and her husband help to financially support.

398. Mrs. Romero is a dedicated and beloved teacher. She teaches third grade at the same school that she attended when she was a little girl.

399. Mrs. Romero regularly leads workshops and has been recognized by principals and parents as an excellent educator. Many teachers and principals from other schools visit her classroom to observe and learn from her best teaching practices.

400. Mrs. Romero's presence at the school is vital, and she is a role model and an inspiration to her students. Her students relate to her.

401. Mrs. Romero understands what the children are going through in a way that many cannot. Her mother, who came to the United States over fifty years ago, still does not speak English. Mrs. Romero had to learn on her own initiative. She shares this with her students and tells them not to give up, and that they can achieve their dreams if they just give it their best effort.

402. When Mrs. Romero sees her students or former students in the hall, they typically exchange their favorite hello. She says, "Ok! Remember kids, always do your best, and nothing..." and they respond enthusiastically: "Nothing less!" That is her saying: "Do your best, and nothing less. That's all I am asking from you."

403. Mrs. Romero encourages her students to be excellent at English but to speak their native language too, to never forget where they come from and be proud of their culture and heritage. She is proud of who she is and where she comes from, and she helps the children feel pride in where they come from and who they are as well.

404. In March 2021, Mrs. Romero and her family were diagnosed with COVID-19 through testing. Now recovered, she has lasting natural immunity and poses no danger to any of her students or colleagues.

405. Mrs. Romero cannot take a COVID-19 vaccine because of her sincerely held religious beliefs.

406. She has always been a deeply religious person, but three years ago, after her husband got cancer, she re-committed to God on a very deep level.

407. Mrs. Romero learned to pray over every medical decision. When it comes to the COVID-19 vaccines, she cannot take them, because she learned that they were derived through the use of aborted fetal cells.

408. Mrs. Romero timely submitted her application to SOLAS in September but was denied.

409. She also timely submitted an application to the Citywide Panel, but was again denied. The Citywide Panel erroneously decided that because she'd gotten a flu shot many years ago, before she recommitted to God, and before she learned about the use of aborted fetal cells in vaccines, that disqualifies her from following her faith now.

410. This reason for denial is unconstitutional. It does not matter if people have always been perfect in their faith, or whether their religious beliefs have always been the same.

411. Mrs. Romero has demonstrated that she is a devout Catholic. She shared many stories about the central place that faith holds in her life, she has demonstrated her commitment to God not only in her materials, but in the fact that she has been willing to suffer months of deprivation and harm by the DOE to stand by her faith.

412. The financial impacts of being suspended without pay these months have been devastating,

not just on her and her immediate family, but also on her family in Ecuador, who depends on her help.

413. Mrs. Romero's cousin, for example, has lupus, and needs medications that Mrs. Romero's income has been providing. Other extended family also relies on this income for survival.

414. Mrs. Romero's heart is broken, thinking of her students in the hands of untrained teachers and staffing shortages.

415. Having to choose between her job and her faith is breaking her heart.

Trinidad Smith

416. Trinidad Smith ("Ms. Smith") was adopted from an orphanage in Bogota, Colombia, as a child.

417. She worked hard, earned a master's degree, and has been teaching in the New York City public schools for almost twenty years.

418. Until she was suspended on October 4, 2021 for failing to get vaccinated, Ms. Smith taught in District 75, an all special education district, in a school for children with autism and serious emotional disturbance.

419. Ms. Smith is one of the more senior teachers in her district and is irreplaceable.

420. Ms. Smith cannot take the vaccines because she is opposed to them on religious grounds.

421. Ms. Smith is a devout Catholic. However, after learning about the serious abuses taking

place in the Catholic Church, and the associated years of cover-ups and collaboration from leadership, she decided to leave the Church and practice her Catholicism through direct communion with spirit and God.

422. Because Ms. Smith has a personal practice, she did not qualify for exemption under the discriminatory Exemption Standards. But her religious convictions are no less sincere.

423. She objects to the facially discriminatory process and instead of filing an application under the facially discriminatory process, filed this lawsuit to demand that the City provide a constitutional process.

424. Ms. Smith's removal from the school she teaches at has been devastating for the children. They are currently facing serious neglect and are not receiving needed care and services due to the staffing crisis caused by the mandate.

425. Ms. Smith does not pose a direct threat to anyone based on her vaccine status and has been safely teaching in the school throughout the pandemic without issue.

426. In November, Ms. Smith submitted a heartfelt religious exemption letter to the Citywide Panel as directed by the Second Circuit.

427. She explained that her beliefs are derived from prayer, and provided her religious history. She was adopted by very religious people, and raised in the belief that prayer is medicine. As a child, Ms. Smith was never taken to the doctor, but healed through faith and food. As an adult,

Ms. Smith continues to turn to prayer for any medical decision, and that is what she did when faced with this decision as well. Ms. Smith received strong guidance from prayer not to take the COVID-19 vaccines (or any other vaccine she has prayed about), and thus she has abstained in consideration of God's will.

428. The Citywide Panel denied Ms. Smith's application, stating in the email that counsel forwarded, "[t]he record before the Panel demonstrated that the employee's sincerely held religious beliefs, which the panel does not question, are not preventing the employee from vaccination. Indeed, the appellant, in his ***[sic]*** documentation, refused to rule out use of such medications if ultimately it was a necessary medical intervention for him ***[sic]*** instead noting, thus far, he ***[sic]*** has had no such occasions to require medication and had not previously been vaccinated."

429. The Panel never spoke to Ms. Smith. She never "refused to rule out" anything. She simply wrote a letter, explaining her religious beliefs.

430. The reason for denial exhibits an improper encroachment by the state into deciding what religious beliefs they deem valid or invalid. It is improper for the state to make these decisions, or to interfere in Ms. Smith's relationship with God and prayer.

431. Ms. Smith has suffered heavy, irreparable harm as a result of this Mandate and the discrimination she faced.

432. She is a single parent, raising a thirteen-year-old son.

433. She has been working since she was fifteen years old.

434. Three years ago, she achieved her dream and bought a house.

435. The loss of income has left her unable to pay her mortgage for four months. Without intervention, she is at imminent risk of losing her home.

436. She was unable to buy any presents for her child this year at Christmas, and any gifts that were sent to them were spent on food and basic bills.

437. Ms. Smith's son is getting ready to start high school in the fall. He asks constantly whether they will lose the house, because he really wants to go to school with his friends in the neighborhood.

438. He is a major athlete, and plays football and basketball. They chose the neighborhood in part because of the sports teams in the district.

439. Ms. Smith has worked hard to provide her son with the opportunities that she did not have growing up in an orphanage in Colombia.

440. It breaks her heart to see her son so worried. Ms. Smith has also been suffering severe emotional and mental anguish thinking about her students.

441. Colleagues report that the students are left without adequate staff every day. The vaccinated

teachers are all catching COVID-19, and the staffing crisis caused by the expulsion of the unvaccinated teachers is now exacerbated to a crisis point.

442. Many of the children are regressing. In this context, this puts the other children in serious danger. Violent outbursts have been increasing, and the children are not receiving their mandated services.

443. Untrained staff are being placed in dangerous situations that they do not know how to handle or manage.

444. Ms. Smith desperately wants to go back to the classroom to help the children she loves and has dedicated her life to caring for.

445. She does not want to lose her tenure, but she cannot keep living without any income.

446. Moreover, unless this Court intervenes, Ms. Smith will be ineligible to teach summer school this year as well, since eligibility for teaching in the summer is tied to days taught during the year. Ms. Smith depends on the summer school income to pay her mortgage.

447. Without intervention, Ms. Smith and her students will be irreparably harmed.

Natasha Solon

448. Natasha Solon ("Ms. Solon") is an assistant principal that worked in the Bronx she was suspended without pay on October 4, 2021 for failing to violate her sincerely held religious beliefs.

449. Ms. Solon is a deeply religious person. Her grandfather presided over the Mt. Olivet Baptist Church in Brooklyn until his death, and Ms. Solon was raised in the church.

450. After the revelations about pedophilia and other unholy activities in the Church emerged, Ms. Solon decided to rely on her personal relationship with God as a guide. They attend online services and are deeply devoted to prayer.

451. Ms. Solon prays about all major medical decisions. She has declined life-saving treatments including blood transfusions and other vaccines on the basis of guidance from prayer in the past. She also consults the Bible regarding interventions that could fall afoul of scripture.

452. Ms. Solon timely submitted a religious exemption letter on September 18, 2021, detailing her sincerely held religious beliefs against vaccination.

453. She was immediately denied through an autogenerated message.

454. She timely appealed and was denied without any opportunity to be heard or explanation for why.

455. Ms. Solon was then placed involuntarily on leave without pay. She has not received any income since October 4, 2021.

456. The effects of this involuntary suspension have been severe.

457. Ms. Solon recently bought a house. Because she has received no income since October, the

house is now in foreclosure proceedings and she is at imminent risk of losing it.

458. Moreover, without income, Ms. Solon was unable to pay for her son's college expenses, and he had to take a leave of absence and miss a semester of college.

459. Ms. Solon and her children are completely out of resources. They cannot even afford to buy food or basic supplies. They are desperate.

460. Ms. Solon attempted to apply for other jobs, but even though she is extremely well qualified, was not getting any calls back.

461. Finally, a woman at one of the schools confided in her that the reason she was not getting hired was because the DOE put a "problem" code next to her records, which, upon information and belief, they have put next to every employee's name who is unvaccinated.

462. This problem code means misconduct and severely prejudices Ms. Solon in attempting to find new work.

463. Ms. Solon has never had any kind of disciplinary action or mar on her record before this and has done nothing to merit this problem code.

464. Ms. Solon is also ineligible for unemployment insurance, because DOE has asserted that failing to get vaccinated is misconduct meriting termination for cause.

Amaryllis Ruiz-Toro

465. Amaryllis Ruiz-Toro ("Mrs. Toro") is an Assistant Principal of Administration at a New York City Public School in Queens.

466. Mrs. Toro has been educating children for almost two decades. She spent years teaching ELA, and then serving as Dean at the same school in Queens. In September 2019, just before the start of the pandemic, she was promoted to the job of Assistant Principal.

467. As an administrator at a Title I school, the bulk of the work Mrs. Toro does is to service and support the students, largely from immigrant and lower socio-economic families, both academically and most recently socially and emotionally with internal support systems to address the current traumas that this pandemic has caused for students, families, and staff.

468. Mrs. Toro is deeply committed to this work. In the days leading up to the first school closures, when masks and PPE were not available, Mrs. Toro did not complain. She worked tirelessly alongside her colleagues, ensuring that her staff was protected even if it meant she had to be without.

469. She assured the students and parents that whatever happened, she would not abandon them, and that she and the school would do everything in their power to support them.

470. During the months of largely remote education that followed, Mrs. Toro, who is bilingual, maintained her demanding duties as an

Assistant Principal and also supported families as a bilingual person to ensure Latino families were receiving support and having their needs addressed and heard.

471. When students returned to school, she personally greeted them each day and made sure to find ways to make them feel safe and supported.

472. Educating students and caring for her community is everything to Mrs. Toro, and she has made a lot of sacrifices to do this work.

473. After the return, even when the option for remote work was offered, Mrs. Toro elected to be there in the school to help her community. She knew that her physical presence was necessary to support students and staff and help offer a sense of normalcy.

474. This was a big risk. Her sons and daughter all suffer from chronic asthma. Mrs. Toro reached deep and had to rely on her sincere and powerful faith in God to guide her and her family and keep them safe.

475. Mrs. Toro worked actively with her principal to ensure that their systems would support all their constituents and were running as smoothly as possible. She initiated and supervised the freshmen advisory program to support the school's youngest members, researched and created activities and strategies that would help the teachers best support the students during their remote learning, and even created a once-a-week mindfulness session for the staff members

so that they would find a place of refuge and support.

476. She made sure that no one was left behind.

477. Mrs. Toro recently had COVID-19 and is naturally immune. A large percent of the fully vaccinated teachers and staff are catching COVID-19 currently.

478. Mrs. Toro does not mind getting tested regularly. However, she cannot take the COVID-19 vaccine.

479. Mrs. Toro has prayed on this issue and has received clear guidance from prayer not to take the vaccine. On this basis, she declined vaccination when it was made available.

480. On September 17, 2021, Mrs. Toro met with her principal (at his request) to discuss the fact that she was filing a religious and medical exemption. He told her that the policy was crafted in such a way that it was simply not possible to get a religious exemption regardless of sincerity. He reiterated the DOE's policy for any employee who is refusing to comply with their mandate and asked Mrs. Toro as to whether she would resign or take a leave of absence (unpaid). She explained that she will do neither.

481. Mrs. Toro is the primary breadwinner in her home. She has a mortgage and three kids under the age of eighteen. All three of her children have serious asthma and require expensive medical plans. Two of her children are in private Christian schools.

482. Mrs. Toro has spent her career as an educator and is on the path to becoming a principal. She was in agony feeling she had to choose between her faith and her job.

483. Mrs. Toro submitted her exemption request and was initially denied with everyone else. She timely appealed.

484. Mrs. Toro's zoom appeal took place after the TRO appearance on October 4, 2021.

485. The DOE representative was more constrained in their arguments as a result, though they still insulted Mrs. Toro's beliefs and advocated for denial, not because of sincerity, but based on the allegation that her beliefs were wrong because they conflict with the Pope's.

486. The arbitrator said that many of his colleagues were denying people who belonged to minority churches but that he, as a Southerner, appreciated that there were independent and non-denominational churches.

487. The DOE attorneys (Corporation Counsel) still argued zealously for denial based on discriminatory reasons.

488. Mrs. Toro met all of the criteria in the award. She was granted an exemption that will expire in June 2022.

489. Nonetheless, she is still barred from entering any classroom.

490. She is regularly harassed and retaliated against since she submitted an exemption, and she is in danger of losing her ability to become a

principal, because the window to get her mentoring and supervisory hours accomplished is rapidly closing, as she is barred from entering any school building to accomplish the requirements.

491. Moreover, Mrs. Toro has been barred from attending any of the ELI trainings necessary for the completion of her SBL license, because they are all held in classroom buildings which means she is barred from attendance. She needs to complete all training sessions for this academic year.

492. Being barred from the trainings and classroom irreparably harms her ability to progress in her career.

493. Ms. Toro has faced discrimination and arbitrary harassment since her religious exemption was approved.

494. She is currently barred from working in her normal office due to the Mandate, even though there are no children in the building where she normally works, and now has to travel far from home to work in another office to fulfill her current work requirements.

Matthew Keil

495. Plaintiff Mathew Keil has been an employee of the DOE for more than twenty years. Over the course of those years, he has accrued seniority in the Department, received tenured status, accumulated Years In Service that have put him close to earning the right to retirement benefits, and accumulated CAR credits that under normal circumstances can be cashed in for income at the

time of retirement. He is unvaccinated and he refuses to be vaccinated for religious reasons. The Mandate threatens to deprive him not only of his career but also all of the economic and retirement benefits that he has accumulated over his long service with the Department.

496. Keil is an ordained deacon in the Russian Orthodox Church and serves as such in the Saint Sergius Chapel at the Synodal Headquarters of his denomination in New York City. He converted to the Russian Orthodox Church and was catechized and baptized in 1999. In the years that followed, he demonstrated his strong commitment to Orthodoxy. For many years, Keil spent his summers in the Russian Monastery in Jordanville, New York, and over the past twenty years he also traveled far and wide to many Orthodox places of pilgrimage — including the Greek monasteries on Mt. Sinai in Egypt, as well as to those in the Holy Land, and in Constantinople. He was blessed, in the winter of 2004, to venerate the relics of Saint Nicholas in Bari, Italy.

497. Keil was tonsured as a reader in the Russian Orthodox Church in 2008, ordained as a sub-deacon in 2011, and ordained as a deacon in 2013. He regularly goes to confession.

498. Keil provided all of the foregoing information in the application he submitted to DOE for a religious exemption. He also provided the following information in support of his application:

a. The religious beliefs to which Russian Orthodox individuals adhere to affect not only their behavior on Sundays when they go to Church, but also their choice of careers, education, diets and marital relations, and even their very bodies. "For so it is written, Know ye not that we are the temple of God, and that the Spirit of God dwelleth in you?" (1 Corinthians 3:16).

b. For example, the Orthodox generally do not embalm or cremate their dead, get tattoos, donate blood to the non-Orthodox, or obtain heart transplants or other surgeries that may defile their bodies. This is not to say that one cannot find members of the Church who do in fact do such things, but rather that such is not generally accepted as orthopraxis by traditionally minded faithful.

c. The same goes for vaccinations. There are no verses in the Bible dealing with vaccinations, and consequently many Orthodox believers have no problem inoculating either themselves or their children. However, the Church gives its members the ability to look critically at contemporary society, and it provides the eternal criteria by which they can judge the world around them and choose for themselves what would violate their conscience and obligations to God.

d. In 2007, Keil developed his religious beliefs concerning vaccinations when he spoke with monks at St. Nectarios' monastery in Roscoe, New York, and they stated that Geronda

Ephraim, the spiritual head of the monastery and many other monasteries in North America, enjoined the monks and other people from getting vaccinated. After studying the Scriptures, prayer, and engaging in other spiritual disciplines, Keil developed the following beliefs.

i. Vaccinations, unlike other medications, are injected directly into people's blood.

ii. Keil believes that the Old and New Testaments make it unmistakably clear that we must be scrupulous about the purity of our blood.

iii. The primary concern from an Orthodox point of view is the sacredness of our blood through the partaking of Holy Communion. It is only through this Blood of our Lord Jesus Christ that we can be reconciled to God the Father (see Ephesians 1:6-8).

iv. Taking vaccinations profanes the sacredness of our mortal bodies by mixing the Lord's Body and Blood, which is in us, with the cells of monkeys, chicken embryos, bovine serum, rabbit brains, dog kidneys, live viruses, formaldehyde, and even cells cultured from aborted fetuses.

v. Such pollution and unnatural mixing is specifically condemned by God in the Bible (see Hebrews 10:29).

vi. Even though the Covid vaccines do not contain fetal tissues, every single one has

utilized aborted human fetal cell lines at one time or another during their development through either their testing or manufacturing.

vii. Multiple Orthodox jurisdictions have stated that it is absolutely clear that to take any one of these vaccinations would involve one in the sin of abortion.

viii. In a larger sense, the practice of vaccination also runs contrary to the Orthodox mindset of trusting in God for our health, pursuing Him and His aid primarily. Scripture demonstrates that sickness and disease are a direct result of Satan, sin, and our fallen state, so healing must be sought above all from God.

ix. Ultimately, the Orthodox Church has always upheld the right to follow one's own properly formed moral conscience. We will be judged by God for having done or not done the things in this life that we believed to be truly right.

e. As a result of these beliefs, throughout his adult life, Keil has completely abstained from vaccinating himself (and his wife and six children).

f. Keil does not, however, judge others of his faith who decide to vaccinate either themselves or their children.

499. During the 2020-2021 school year, Keil fulfilled all of the responsibilities of his job

remotely. He was ready, willing and able to do the same during the 2021-2011 school year.

500. In September 2021, Keil submitted a request for religious exemption from the Vaccine Mandate pursuant to the Exemption Standards. Keil submitted a detailed affidavit in support of his religious exemption claims, and a letter from his bishop. In his affidavit, Keil described his religious history and beliefs in detail, as summarized above. On September 22, 2021, the DOE informed Keil that his exemption request was denied. The DOE's denial letter stated that his "application was reviewed in accordance with applicable law as well as the Arbitration Award in the matter of your union and the Board of Education regarding the vaccine mandate." Nevertheless, it stated that,

> We have reviewed your application and supporting documentation for a religious exemption from the DOE COVID-19 vaccine mandate. Your application has failed to meet the criteria for a religious based accommodation. Per the Order of the Commissioner of Health, unvaccinated employees cannot work in a Department of Education (DOE) building or other site with contact with DOE students, employees, or families without posing a direct threat to health and safety. We cannot offer another worksite as an accommodation as that would impose an undue hardship (i.e.

more than a minimal burden) on the DOE and its operations.

501. Keil immediately requested an appeal.

502. On October 1, 2021, Keil participated in an appeal hearing pursuant to the Exemption Standards. Keil orally affirmed the truth of the facts set forth in his affidavit.

503. At the hearing, the DOE representative first restated the Department's position that accommodating Keil's sincerely held religious beliefs would pose an undue hardship. However, besides saying the DOE was bound by the Health Commissioner's Vaccine Mandate, the DOE representative did not provide any evidence or explanation about how accommodating Keil would be an undue hardship, especially when numerous other school districts in the State of New York have not implemented a vaccine mandate.

504. Next, the DOE representative shifted to addressing the sincerity of Keil's beliefs. He began by claiming that medicines such as Tylenol and Advil have been manufactured and tested using aborted fetal cell lines, and questioned whether Keil was aware that many other everyday products have been tested and manufactured using aborted fetal cell lines as well.

505. While he was unaware of the connection between aborted fetal cell lines and the medicines mentioned, Keil is familiar with a number of products that were manufactured or testing using aborted fetal cells, and said so, and testified that

as a result, he does not partake of them or allow his family to partake of them, due to their sincerely held religious beliefs.

506. The DOE representative's inquiries during Keil's appellate hearing did not focus on the sincerity of his beliefs but on their validity.

507. Keil provided evidence that his religious objection is to the use of fetal cells in any aspect of the vaccine, including its testing, research, or manufacturing, and that he was aware that there are no fetal cells actually present in the vaccine, but this did not make his religious objection any less religious or sincere.

508. The representative from DOE also stated that Keil's beliefs regarding the vaccination did not seem to be religious in nature but were merely personal, asserting that there are other Orthodox Christians who choose to get vaccinated.

509. Keil explained in response that under the Church's teachings, each individual Christian has the obligation to follow his own conscience as informed by his faith and study of the Scriptures in determining whether to get vaccinated. That decision is a personal one between the individual and God.

510. On October 4, 2021, Arbitrator Riley[5] denied Keil's appeal, and provided no explanation for the denial. Keil was immediately placed on

[5] Plaintiffs do not concede that the appellate hearings conducted pursuant to the Exemption Standards were arbitrations.

administrative leave without pay from his employment with DOE.

511. Pursuant to the orders of the United States Court of Appeals for the Second Circuit on November 15 and 30, 2021, Keil submitted to a "fresh look" examination of his application for religious exemption by the Citywide Appeals Panel. On or about December 10, 2021, Keil received a notice informing him that his appeal was denied, and requiring him to vaccinate himself to remain employed by DOE, or to "opt-in" to an extended leave without pay program along with a waiver of rights by December 28, 2021, or to face termination of his employment and insurance coverage.

512. Corporation Counsel sent an email to Plaintiffs' counsel on December 13, 2021 that purported to explain Keil's denial by the Citywide Panel as follows:

> **APPEAL NO. 00004823, Matthew Keil**
>
> After carefully reviewing the documentation provided by all parties, the Citywide Appeal Panel has voted to AFFIRM the DOE's determination to deny Appellant Keil's reasonable accommodation. One panel member found that appellant articulated a sincerely held religious belief that precludes vaccination and be entitled to a reasonable accommodation if one did not present an undue hardship. The others did not reach this issue because the panel determined that a religious accommodation cannot be granted because, even assuming a valid basis for a

reasonable accommodation, the DOE has satisfied what is necessary under the law to demonstrate undue hardship. Appellant is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population. DOE has met its burden under the law that diverting the appellant from classroom duties constitutes an undue hardship.

513. Keil is now faced with the choice imposed by the Exemption Standards: because he holds religious beliefs that forbid him from accepting vaccination, he must either violate his religious beliefs and vaccinate himself; or resign from his employment with DOE after a 20-year career, with limited benefits, and waive his constitutional rights; or go on unpaid leave until September 5, 2022, with limited benefits and a prohibition on gainful employment, and waive his constitutional rights; or be fired effective December 1, 2021.

514. If Keil wishes, or needs, to earn paid income between now and next September, instead of draining his savings, the Defendants are requiring him to surrender almost all of the benefits and other seniority and economic rights that he has earned over his years of loyal service with the DOE. He is ready, willing and able to work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment — as he has done in the past.

515. Because the Defendants have refused to respect Keil's constitutional right to religious freedom, have inflicted substantial harm upon him because he has stood up for his rights, and are on the precipice of a deadline, set by themselves, that will change Keil's status even further with the DOE and inflict still more harm, Keil is forced to go to court to restrain further harm and to defend his constitutional rights.

John De Luca

516. Plaintiff John De Luca is employed by the DOE as a teacher. He is unvaccinated and he refuses to be vaccinated for religious reasons.

517. During the 2020-2021 school year, De Luca fulfilled his job responsibilities remotely.

518. De Luca is a member of the Catholic church and has a sincerely held religious belief that he should not receive any of the Covid-19 vaccines.

519. De Luca was brought up in the Christian faith and has been a lifelong follower of the teachings of God. His Christian upbringing, religious schooling, and study of the Old and New Testaments, his lifelong following of the teachings of God, and his daily prayers with God are the foundation of his personal religious beliefs. Through these experiences, De Luca believes that he knows that God will seek retribution against him for not following God's laws and for De Luca's lack of faith in God.

520. One of God's commandments is "You shall not kill." See, Exodus 20:13. De Luca understands that all the Covid vaccines have used aborted fetal

cell lines as part of their development or in the testing of the vaccines. De Luca believes that if he were to take any of these vaccines, he would be participating in the abortions which resulted in these cell lines and committing a sin against God.

521. De Luca believes that the Catechism of the Catholic Church supports his religious beliefs. According to a 1992 volume which dealt with the issue of conscience, "Man has the right to act in conscience and in freedom so as personally to make moral decisions." The Vatican II document *Dignitatis Humanae*, says, "He must not be forced to act contrary to his conscience. Nor must he be prevented from acting according to his conscience, especially in religious matters." The Code of Canon Law, Canon 748, Section 1, declares that "All are bound to seek the truth in matters which concern God and his Church; when they have found it, then by divine law they are bound, and they have the right to embrace and keep it." While the Catholic Church considers the vaccines to be morally acceptable, De Luca, like many other Catholics, objects to the vaccines for reasons of conscience.

522. In September 2021, De Luca submitted his request for a religious exemption to the DOE. It was quickly denied, and De Luca filed an appeal. He received notice of his appellate hearing in late October.

523. On October 25, 2021, De Luca submitted his appeal documentation, including a letter from Monsignor Joseph Giandurco, the (Catholic) Pastor of The Church of St. Patrick, affirming the

Catholic teaching that everyone has the right to follow their conscience and acknowledging De Luca's objection based on his Catholic faith and his conscience.

524. On October 26, 2021, De Luca participated in the arbitration hearing on his appeal.

525. At the arbitration hearing, the representative from DOE stated that it was the DOE's position that De Luca's request for a religious exemption was "properly denied because it is a somewhat political, philosophical objection, and his religious leaders -- the religious leaders of that denomination -- have clearly and publicly expressed support for the vaccination."

526. Arbitrator Peek stated during the hearing that while De Luca had produced contradictory documents from Louisiana and North Dakota, New York's Department of Health did state the Johnson and Johnson vaccine was produced using fetal cell lines, but that the research "definitely proves that neither Pfizer nor Moderna were produced with any use of fetal cells." He went on to say to De Luca, "when you find out I'm right, you'll understand."

527. De Luca was questioned by Arbitrator Peek about his vaccine history during the hearing. De Luca testified that he had received vaccines as a child but has not taken the flu vaccine, Tylenol, or aspirin in over 5 years.

528. The DOE representative went on to say that De Luca's religious leaders have "clearly and publicly" expressed support for the vaccine. She

noted that the September 24, 2021, Clergy letter De Luca submitted in his exemption application explicitly states that the vaccine is morally acceptable and that the church recommends that the vaccination be taken. The DOE's advocate went on to note that the Pope has spoken publicly in favor of the vaccine and has encouraged all to get vaccinated.

529. The DOE representative characterized De Luca's religious beliefs as personal, political, and philosophical, and were thus not a legitimate reason to have an exemption.

530. The DOE representative repeated the claim of the appellate examiner that the Commissioner of the NYC Department of Health and Mental Hygiene had stated that neither Pfizer nor Moderna use any fetal cell lines for the production and manufacturing of the vaccines.

531. The DOE representative represented to the hearing officer that De Luca had provided critical "in-person" services and that it would be a severe undue hardship for the DOE not to have a vaccinated teacher due to the shortage of teachers. She said that the DOE is required to provide students with an environment that is safe and conducive to learning.

532. Arbitrator Peek asked De Luca if he was aware of the Pope's statement that there is a moral obligation to get vaccinated. "If you found out that the Pope said that people have a moral obligation to take the vaccine, what impact does that have on you?" When De Luca said "no," Arbitrator Peek went on to ask "if the leader of

the Catholic Church, or one of the major leaders of the Catholic Church, says you have a moral obligation to be vaccinated, how do you, in your mind, say that that would be against the Word of God, and you would be condemned for that and deemed a murderer, when your religious leader says you should do it?"

533. Arbitrator Peek continued to question the legitimacy of De Luca's beliefs, stating that documents he had provided containing Church positions on personal conscience were from the 1990s and "none of them dealt with this issue of vaccination."

534. On October 26, 2021, Arbitrator Peek denied De Luca's appeal without any explanation for the denial.

535. Pursuant to the orders of the United States Court of Appeals for the Second Circuit on November 15 and 30, 2021, De Luca submitted to a "fresh look" examination of his application for religious exemption by the Citywide Appeals Panel. On or about December 10, 2021, De Luca received a notice informing him that his appeal was denied, and requiring him to vaccinate himself to remain employed by DOE, or to "opt-in" to an extended leave without pay program along with a waiver of rights by December 28, 2021, or to face termination of his employment and insurance coverage.

536. Corporation Counsel sent an email to Plaintiffs' counsel on December 13, 2021 that purported to explain De Luca's denial by the Citywide Panel as follows:

APPEAL NO. 00004832, John Deluca

After carefully reviewing the documentation provided by all parties, the Citywide Appeal Panel has voted to AFFIRM the DOE's determination to deny Appellant Deluca's reasonable accommodation. The record before the Panel demonstrated that the employee holds sincerely held religious beliefs sufficient to justify a reasonable accommodation if such accommodation did not present an undue hardship. However, the panel believes the DOE has successfully demonstrated that an accommodation, in appellant's case, would create an undue hardship if granted. Appellant is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population.

537. De Luca is now faced with the choice imposed by the Exemption Standards: because he holds religious beliefs that forbid him from accepting vaccination, he must either resign from his employment with DOE, with limited benefits, and waive his constitutional rights; or go on unpaid leave until September 5, 2022, with limited benefits and a prohibition on gainful employment, and waive his constitutional rights; or be fired effective December 1, 2021.

538. If De Luca wishes, or needs, to earn paid income between now and next September, instead of draining his savings, the Defendants are

requiring him to surrender almost all of the benefits and other seniority and economic rights that he has earned from his work with the DOE. He is ready, willing and able to work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment — as he has done in the past.

539. Because the Defendants have refused to respect De Luca's constitutional right to religious freedom, have inflicted substantial harm upon him because he has stood up for his rights, and are on the precipice of a deadline, set by themselves, that will change his status even further with the DOE and inflict still more harm, De Luca is forced to go to court to restrain further harm and to defend his constitutional rights.

Sasha Delgado

540. Plaintiff Sasha Delgado has worked for the New York City Department of Education for 15 years, and as an Individualized Education Program teacher for the past nine years. Over the course of those years, she has accrued seniority in the Department, received tenured status, accumulated Years In Service that count toward the right to retirement benefits, and accumulated CAR credits that under normal circumstances can be cashed in for income at the time of retirement. She is unvaccinated and she refuses to be vaccinated for religious reasons. The Vaccine Mandate threatens to deprive her not only of her career but also all of the economic and retirement benefits that she has accumulated over her fifteen years of service with the Department.

541. During the 2020-2021 school year, Delgado fulfilled her job responsibilities remotely.

542. Delgado was raised as a member of the Catholic church, attended mass every Sunday, completed all of her Catholic sacraments, and attended Catechism classes growing up.

543. As a teenager, she joined her church's youth group and volunteered as a catechist, teaching religious instruction to children.

544. Delgado attended a Catholic college because she felt that it was important to her to incorporate religious values into her education.

545. In early adulthood, Delgado became a born-again Christian.

546. Since then, Delgado have taken Christian-based classes at churches, attended Christian retreats, and attended Christian-led conferences and events. She participates in weekly fellowship conference calls with other believers and her pastor where they hear preaching, pray and read the Scriptures from the Bible.

547. Delgado was baptized at Christian Revival Temple 14 years ago.

548. She is currently a member of Miracle Tabernacle Ministries.

549. In Delgado's spiritual journey as a Christian, the more she read the Bible, studied, prayed, and fasted, the more she felt led by the Lord not to take any vaccinations, or to allow her son to have them.

550. Delgado believes that the Word of God states that we are created in the image of God, and this affirms the unique value of all human life. She believes as a Christian that her body is the temple of the Holy Spirit and therefore, she is forbidden to inject His temple with the COVID-19 vaccine. She cites as support for her beliefs 1 Corinthians 3:16: "Don't you know that you yourselves are God's temple and that God's Spirit dwells in your midst?" She also cites 1 Corinthians 3:17: "[i]f anyone destroys God's temple, God will destroy that person; for God's temple is sacred, and you together are that temple."

551. Delgado objects to the Pfizer and Moderna COVID-19 vaccines because, she understands, in the early development of mRNA vaccine technology, they used fetal cells for "proof of concept" (to demonstrate how a cell could take up mRNA and produce the SARS-CoV-2 spike protein), or to characterize the SARS-CoV-2 spike protein. Likewise, she understands that the nonreplicating viral vector vaccine produced by Johnson & Johnson required the use of fetal cell cultures, specifically PER.CG, in order to produce and manufacture the vaccine. Delgado believes that these vaccines would alter her God-given body and that they are the equivalent of a prohibited "unclean food," as referenced in the Bible, that would harm her conscience.

552. As a result of these religious beliefs, Delgado does not drink any alcohol or eat pork because she is forbidden to eat or drink things that are unclean and alter the state of mind. She does not use products on her skin or hair that have toxins

and chemicals in them because she wants to take care of her body as God's temple.

553. On September 19, 2021, Delgado submitted her original request for a religious exemption to the DOE. Her application informed the adjudicators about her religious journey and her religious objections to vaccination as set forth above.

554. On September 22, 2021 the DOE denied Delgado's application, stating that

> [y]our application has failed to meet the criteria for a religious based accommodation. Per the Order of the Commissioner of Health, unvaccinated employees cannot work in a Department of Education (DOE) building or other site with contact with DOE students, employees, or families without posing a direct threat to health and safety. We cannot offer another worksite as an accommodation as that would impose an undue hardship (i.e. more than a minimal burden) on the DOE and its operations.

555. The denial notice also stated that "[t]his application was reviewed in accordance with applicable law as well as the Arbitration Award in the matter of your union and the Board of Education regarding the vaccine mandate."

556. Delgado requested an appeal and submitted an additional letter from her pastor, Ron Cohen.

557. On October 1, 2021, Delgado attended the hearing on her appeal. She was represented by Christina Martinez, Esq. at the appeal.

558. At the appeal hearing, Karen Solimando, the representative from DOE, emphasized that the DOE was applying a "very narrow" religious exemption to Delgado's proceeding, and informed the hearing officer that Delgado's exemption request had been denied for three reasons.

559. It should be noted that the United States Constitution requires a "broad" reading to be given to claims for religious exemption, not a "narrow" one. Attorney Solimondo's statement at the appeal hearing constitutes an admission that the DOE's initial denial was based on an unconstitutional attitude of hostility toward religious freedom.

560. First, Attorney Solimondo said that Delgado did not have a pastor's letter supporting her request.

561. However, while this is an unconstitutional requirement, Delgado had sent a letter from her pastor to the general appeals email address. Arbitrator David Riley confirmed at the hearing that he had the pastor's letter within his file.

562. Attorney Solimando next stated that, "I believe that there's no theological objection raised by many if not all of the denominations in Christianity to the vaccine."

563. The requirement that her request be denied if the leader of her religious organization has spoken publicly in favor of the vaccine is a violation of Delgado's rights under the First Amendment of the Constitution. Even if this requirement had been legal, however, Attorney

Solimando's statement was incorrect as a matter of fact. According to Delgado, the leader of her religious organization, her pastor, has never spoken publicly in favor of the religious vaccine. With respect to Delgado's statement that the vaccination violates her religious beliefs, Pastor Cohen's letter stated, "I do stand and agree with her and ask that she be free of this mandate."

564. Attorney Solimando explained the third reason for the denial of Delgado's religious exemption request as follows:

> [T]o the extent that the objection is predicated on the use of fetal cell tissue or fetal cell lines the Department of Health and Mental Hygiene has submitted a letter to the arbitration panel which clearly states that none of the Covid vaccines contain fetal tissue or fetal cells and that the fetal cell line that was used for the vaccine production and manufacturing were used only in the early research phases and in a way that is very common in the development of drugs including very common over-the-counter medications such as Tylenol, Advil, Aspirin, etc. So I don't believe that is a basis to support this exemption request. I'll also note it's very clear in that letter that no fetal cells, tissue, or cell lines are used in the production of Pfizer or Moderna vaccines."

565. Delgado's initial application for exemption had informed the DOE that her religious objection is to the use of fetal cells in any aspect of the vaccine, including its testing, research, or

manufacturing. She understands that no fetal cells are actually present in the vaccine, but argued to the appellate examiner that this did not make her religious objection any less religious or sincere.

566. Further, Delgado understands that Attorney Solimando's statement that "no fetal cells, tissue, or cell lines used in the production of Pfizer or Moderna" is untrue; Delgado understands that while there are no fetal cells, tissues, or cell lines *present in* the Pfizer or Moderna, they were used in the *manufacturing* of Pfizer and Moderna vaccines.

567. On October 4, 2021, Arbitrator Riley denied Delgado's appeal, and provided no explanation for the denial. Delgado was immediately placed on administrative leave without pay from her employment with DOE.

568. Pursuant to the orders of the United States Court of Appeals for the Second Circuit on November 15 and 30, 2021, Delgado submitted to a "fresh look" examination of his application for religious exemption by the Citywide Appeals Panel. On or about December 10, 2021, Delgado received a notice informing her that her appeal was denied, and requiring her to vaccinate herself to remain employed by DOE, or to "opt-in" to an extended leave without pay program along with a waiver of rights by December 28, 2021, or to face termination of her employment and insurance coverage.

569. Corporation Counsel sent an email to Plaintiffs' counsel on December 13, 2021 that

purported to explain Delgado's denial by the Citywide Panel as follows:

APPEAL NO. 00004830, Sasha Delgado

After carefully reviewing the documentation provided by all parties, the Citywide Appeal Panel has voted to AFFIRM the DOE's determination to deny Appellant Delgado's reasonable accommodation. The record before the Panel demonstrated facts that cast doubt on appellant's claim that the religious belief she articulated would preclude her from vaccination. While appellant said she would abstain from other medication should she learn similar things about its development, the only medication in which appellant seems to have had sufficient concern to research whether it was tested on such cells is the COVID-19 vaccine. Indeed, appellant suggests that she may have taken similar medications in the past based on the "belief" that they were not tested on fetal cells. These responses strongly indicate appellant is taking a different approach with respect to the COVID-19 vaccine than she does in analogous circumstances.

Even assuming the appellant had established a valid basis for a reasonable accommodation, the panel believes the DOE has satisfied what is necessary under the law to demonstrate undue hardship. Appellant is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk

to the vulnerable and still primarily unvaccinated student population. DOE has met its burden under the law that diverting the appellant from classroom duties constitutes an undue hardship.

570. Respondents' panel drew an adverse inference from their finding that Appellant Delgado did research for the COVID-19 vaccine but not other medications. This is not relevant to whether her belief is religious in nature or sincerely held. Not all other medications were as controversial or as deliberated as the Covid-19 vaccine. Many reasonable and intelligent members of society did their research on it, whether or not they had a religious objection.

571. Delgado is now faced with a grim choice imposed by the Mandate and the Exemption Standards: because she holds religious beliefs that forbid her from accepting vaccination, she must either resign from her employment with DOE after a 15-year career, with limited benefits, and waive her constitutional rights; or go on unpaid leave until September 5, 2022, with limited benefits and a prohibition on gainful employment, and waive her constitutional rights; or be fired effective December 1, 2021.

572. If Delgado wishes, or needs, to earn paid income between now and next September, instead of draining her savings, the Defendants are requiring her to surrender almost all of the benefits and other seniority and economic rights that she has earned over her years of loyal service with the DOE. She is ready, willing and able to

work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment — as she has done in the past.

573. Because the Defendants have refused to respect Delgado's constitutional right to religious freedom, have inflicted substantial harm upon her because she has stood up for her rights, and are on the precipice of a deadline, set by themselves, that will change her status even further with the DOE and inflict still more harm, Delgado is forced to go to court to restrain further harm and to defend her constitutional rights.

Dennis Strk

574. Plaintiff Dennis Strk has been a Social Studies teacher at Francis Lewis High School in Queens for the past 13 years. Over the course of those years he has accrued seniority in the Department, received tenured status, accumulated Years In Service that accrue toward his right to retirement benefits, and accumulated CAR credits that under normal circumstances can be cashed in for income at the time of retirement. He is unvaccinated and he refuses to be vaccinated for religious reasons. The Vaccine Mandate threatens to deprive him not only of his career but also all of the economic and retirement benefits that he has accumulated over his years of service with the Department.

575. Dennis Strk was profoundly influenced early in life by the religious values of his grandparents and parents and by their strong faith in God. Strk learned to pray in both English and Croatian,

celebrated Christian holidays such as Easter and Christmas, and attended religious school once his parents could afford it.

576. Strk's faith deepened as a teenager, when he had the privilege of attending Saint Francis Preparatory School. There, he learned to truly live his faith in the service of others, following the model of Christ, and he grew passionate about social justice. During the spring break of Strk's senior year, he had the opportunity to act on his faith by attending a service trip to Kentucky to help the local community with a variety of projects such as repairing metal roofs, community cleanup, and attending religious services.

577. As he entered adulthood, Strk learned more about Christian approaches to health as he further explored the Holy Scriptures and began to realize that vaccination is a sin and an affront to God's plan for His people and to the teachings of the Bible.

578. Strk believes that conscious sins are addressed in Hebrews 10:26-29, which states that if we deliberately keep on sinning after we have received knowledge of the truth we are deserving of punishment. Since he believes that vaccination would be a conscious betrayal of his faith, he has not been vaccinated in 13 years.

579. Strk believes that our bodies are created in the image of God and are sacred temples that are not to be defiled. Strk understands that Covid-19 vaccines contain blood or cells from animals, and the research involved in vaccines also uses these profane ingredients as well. He believes that if

these substances are then injected into the bloodstream, this results in the defilement of our sacred temples. He believes that such vaccinations therefore violate the teachings found in the Book of Leviticus 17:1 which says that the life of a creature is in the blood.

580. Because he understands that vaccines contain substances that defile our blood and lead to a betrayal of faith, Strk is committed to living a pure and holy life by refusing vaccination, as expressed in 2 Corinthians 7:1-4. Strk believes that his body is not just a sacred temple created in the image of God; it is also a vessel of worship (Romans 12:1-3).

581. If he were to depend on vaccination as his primary source of preventative health, Strk believes that he would be betraying his trust in God's power to heal illness. Strk believes that the source of his health comes first and foremost from God, citing Jeremiah 17:5-10 for a powerful explanation of the consequences faced by those who trust more in man than in God.

582. On September 17, 2021, Strk submitted his request for a religious exemption to the DOE, explaining his religious objections to the adjudicator as set forth above.

583. On September 19, 2021, the DOE denied Strk's application, stating that he had failed to meet the criteria for a religious-based accommodation, that under the Commissioner of Health's Order, unvaccinated employees cannot work in DOE buildings without posing a direct threat to people's health and safety, and that

offering another worksite would pose an undue hardship on the DOE.

584. On September 20, 2021, Strk submitted, as additional appeal documentation, a PDF of a Federal Register publication regarding "Federal Law Protections for Religious Liberty" which can be accessed here: https://www.govinfo.gov/content/pkg/FR-2017-10-26/pdf/2017-23269.pdf.

585. On September 24, Strk took part in the hearing on his appeal.

586. At the appeal hearing, the representative from DOE stated that one of the reasons Strk's exemption was denied was that he did not have a letter from clergy. Strk responded that a clergy letter is not required under the law, but the representative from DOE stated that it was required under the arbitration award.

587. The DOE representative also questioned Strk's objection to the vaccines' connection to aborted fetal cells. She stated that there is no actual aborted fetal cell tissue as an ingredient in the vaccines.

588. Strk explained that even if there is no fetal tissue in the vaccine itself, his objection is to the use of aborted fetal cells in the research of the vaccine. Furthermore, his objection is not just to the testing or manufacturing of the vaccines using fetal tissue, but also to the use of animal blood in the development of vaccines, since he believes that the defiling of blood leads to a betrayal of faith.

589. The representative from DOE also stated that accommodating Strk's religious beliefs would be an undue hardship on the DOE's daily operations

590. Strk was informed that Arbitrator Carol Hoffman denied his appeal in an email dated October 5, 2021, although the denial itself was dated September 24, 2021.

591. Pursuant to the orders of the United States Court of Appeals for the Second Circuit on November 15 and 30, 2021, Strk submitted to a "fresh look" examination of his application for religious exemption by the Citywide Appeals Panel. On or about December 10, 2021, Strk received a notice informing him that his appeal was denied, and requiring him to vaccinate himself to remain employed by DOE, or to "opt-in" to an extended leave without pay program along with a waiver of rights by December 28, 2021, or to face termination of his employment and insurance coverage.

592. Corporation Counsel sent an email to Plaintiffs' counsel on December 13, 2021 that purported to explain Strk's denial by the Citywide Panel as follows:

> **APPEAL NO. 00004835, Dennis Strk**
>
> After carefully reviewing the documentation provided by all parties, the Citywide Appeal Panel has voted to AFFIRM the DOE's determination to deny Appellant Strk's reasonable accommodation. The record before the Panel demonstrated facts that cast doubt on appellant's claim that the religious belief

> he articulated would preclude him from vaccination. Specifically, appellant's responses are equivocal with regard to how acts on the articulated belief outside of the specific context of COVID-19 vaccination. For example, appellant does not deny using medications that are tested on fetal cell lines, only that he tends to "avoid" them and pursue alternatives if available. The submissions demonstrate the appellant is making a fact-based decision concerning vaccination and, in doing so, relying on incorrect facts regarding COVID-19 vaccines, such as that all COVID vaccines contain fetal cells.
>
> Even assuming the appellant had established a valid basis for a reasonable accommodation, the panel believes the DOE has satisfied what is necessary under the law to demonstrate undue hardship. Appellant is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population. DOE has met its burden under the law that diverting the appellant from classroom duties constitutes an undue hardship.

593. According to Corporation Counsel's depiction of the panel's reasoning, the panel erroneously based its denial of Strk's application on the ground that Appellant Strk "rel[ied] on incorrect facts regarding COVID-19 vaccines, such as that all COVID vaccines contain fetal cells." This reasoning violated Strk's rights for several

reasons. First, even if Appellant Strk believed that the Covid-19 vaccines contained aborted fetal cells—which he does not—and that inaccuracy was the basis for his sincerely held religious objection, again, the DOE could not deny him a religious exemption on the basis that his belief was untrue as a matter of fact. Indeed, in *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996), the defendant lodged a religious objection to a purified protein derivative test because he believed it was artificial within the meaning of the Rastafarian faith, while the defendant there argued that the test was natural in origin. The Court held that, regardless of which party held a correct version of the facts, "[w]e have no competence to examine whether plaintiff's belief has objective validity" and still found that plaintiff's beliefs were entitled to free exercise protection. *Id.* at 476.

594. The panel went a step further than just misapplying the law here, however. They completely misstated Appellant Strk's beliefs, which have been precisely and eloquently articulated over and over again. Appellant Strk is fully aware that the Covid-19 vaccines do not contain aborted fetal cells, and stated as much in his original religious exemption request, in his declaration before the Southern District which became part of the Second Circuit's record, and in his supplemental documentation submitted to Respondents. 21-cv-08773, ECF No. 50-3 at 4 ("I avoid medical products and food products that are researched, developed, tested, and/or produced using aborted human fetuses"); R355 ("The

individual from the DOE .... stated that there is no actual aborted fetal cell tissue as an ingredient in the vaccines. I explained that ... my objection is to the use of aborted fetal cells in the research of the vaccine").

595. Respondents' panel further abused the First Amendment in their assertion that Appellant Strk should be denied because even though he stated that he "avoid[s]" using "medical products and food products that are researched, developed, tested, and/or produced using aborted human fetuses," but he "does not deny using [them]." Respondents make a distinction without a difference. Respondents seem to suggest that the sincerity of Appellant Strk's beliefs are lessened by the fact that he "avoids" these products rather than "denies" using them. Such absurd hairsplitting is not permitted under the First Amendment. *Roman Catholic Archdiocese of N. Y. v. Sebelius*, 987 F. Supp. 2d 232, 249-250 ("where a law places substantial pressure on a plaintiff to perform affirmative acts contrary to his religion, the Supreme Court has found a substantial burden without analyzing whether those acts are *de minimis*").

596. The DOE is now forcing Strk to decide by December 28, 2021 whether to be placed on unpaid leave with benefits for a limited time period, with no right to engage in paid employment elsewhere (but only if he surrenders his legal right to challenge the DOE's actions), to resign and retain his benefits for a limited time period (but only if he surrenders his legal right to

challenge the DOE's actions), or to lose his job and his health insurance.

597. If Strk wishes, or needs, to earn paid income between now and next September, instead of draining his savings, the Defendants are requiring him to surrender almost all of the benefits and other seniority and economic rights that he has earned over his years of loyal service with the DOE. He is ready, willing and able to work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment — as he has done in the past.

598. Because the Defendants have refused to respect Strk's constitutional right to religious freedom, have inflicted substantial harm upon him because he has stood up for his rights, and are on the precipice of a deadline, set by themselves, that will change his status even further with the DOE and inflict still more harm, Strk is forced to go to court to restrain further harm and to defend his constitutional rights.

Sarah Buzaglo

599. Plaintiff Sarah Buzaglo has been employed by the DOE since 2017 as a teacher. She is unvaccinated and she refuses to be vaccinated for religious reasons. The Vaccine Mandate threatens to deprive her not only of her career but also of economic and retirement benefits that she has accrued during her employment with the Department.

600. During the 2020-2021 school year, Buzaglo fulfilled her job responsibilities remotely.

601. Buzaglo is an Orthodox Jew. From birth, she was raised to believe in God and the laws of the Torah which provide a blueprint for how she lives her life. The clothing she chooses to wear each day follow the laws of "*tzniut*," modesty. The food she eats daily is in accordance with the laws of "*kashrut*," the kosher diet. The prayers she utters each morning, the Sabbath she welcomes each weekend, and the holidays she celebrates each year all are in accordance with the laws of the Torah as she believes God commanded.

602. When she was old enough to attend pre-school, Buzaglo's parents enrolled her in a small educational program located in a nearby synagogue. At the age of three, she was already learning how to sing Sabbath songs and morning blessings, as well as songs about Jewish history.

603. After pre-school Buzaglo was enrolled in Prospect Park Yeshiva, an all-girls yeshiva where students studied two curricula: Judaic studies in the morning, and secular studies in the afternoon.

604. Buzaglo's Judaic studies included daily classes and exams in Bible study (*Tanach*), Prayer (*Beu'r Tefilla*), Psalms (*Tehillim*), Jewish Law (*Halacha*), Jewish History (*Historia*), Hebrew (*Ivrit*), Sages Commentary on the Torah (*Rashi*), The Book of Prophets (*Navi*), and the weekly Torah portion (*Parsha*). She engaged in the study of these subjects from first to eighth grade, which left a lasting impact on her formative years.

605. After graduating from Prospect Park Yeshiva, Buzaglo chose to attend an even more religious high school program at Yeshiva of Brooklyn High School for Girls.

606. At Yeshiva of Brooklyn, Buzaglo's faith strengthened. With Rabbi Mandel and Rebbetzin Spector (the Hebrew principal) encouraging and supporting her, she led the morning prayers for her class. She volunteered with the school's "*chessed*" organization to visit an elderly woman, as God commanded his people to be kind and compassionate. Buzaglo began attending prayers at synagogue frequently. She volunteered as a counselor at the weekly Sabbath program for children in her local synagogue, telling them stories about the weekly Torah portion and organizing games to keep them entertained so that their parents could rest. Eventually Buzaglo was asked to become the chapter leader and managed a team of eight to ten counselors, running the Sabbath *Bnos* Program until graduation.

607. Following her graduation from high school, Buzaglo again chose to strengthen her faith further by pursuing a gap year of study in a seminary program for women located in the holy city of Jerusalem.

608. When Buzaglo graduated from Meohr Bais Yaakov Seminary and returned to New York City, she determined that she wanted to engage in God's holy work and continue teaching. She accepted a position teaching fourth and fifth grade at the Hassidic all girl's school Bais Yaakov

D'Chassidei Gur. During this time, Buzaglo attended the Jewish program at Touro College, where she pursued a Bachelor's Degree. Touro's program accommodated her religious needs by providing kosher food in the cafeteria and scheduling no classes during Jewish holidays. Later, Buzaglo taught English classes at Bnot Chaya Academy, a program for Jewish teens at risk, many who were victims of sexual abuse, physical abuse, drug addiction, neglect, eating disorders, and mental health issues.

609. After working in Bnot Chaya Academy for five years, Buzaglo completed a Master's degree in Education and went to work for New York City public schools. She has worked since then in a school with a large immigrant population of students with diverse religious, ethnic, and socio-economic backgrounds. Buzaglo's own religious background has helped her to understand and mentor her NYC public school students. When a Muslim student was being bullied for wearing a hijab, Buzaglo encouraged her to be proud of her choice to dress modestly and addressed the bullying. When her Muslim students struggled to focus during Ramadan, she sympathized and created a lighter lesson plan and workload because she understood hunger pains from fasting on Yom Kippur and Tisha Ba'av. When some students needed help to obtain permission to miss class time for afternoon prayers, she reached out to an imam to help. When organizing class trips, Buzaglo always ensured that kosher, vegan, and halal food options were available to

accommodate all of her public school students' diverse dietary needs.

610. Buzaglo's religious opposition to vaccination developed after she reached adulthood. She was vaccinated as a child, as her pediatrician advised her parents.

611. However, after consulting with her Rabbi as an adult and doing her own study of scripture and Torah law, Buzaglo discovered a host of issues that exist with vaccination that go against her religious beliefs.

612. For several reasons based in scripture and Torah law, vaccines are problematic for Buzaglo. She adheres to a personal interpretation of what Judaism and the Torah mean to her. The Jewish faith allows for individual translation by each member of the community, and it is up to the individual worshipper to process the messages of the Torah and act accordingly. Through her studies, Buzaglo developed the following religious beliefs relating to vaccinations:

a. Sanctity of Blood: The Torah dictates that man should not mix the blood of man and that of animals. (*Rashi, Kesuvos* 60A) According to Buzaglo, it is well documented that a majority of vaccines are prepared using tissue cultures from animals. This directly contradicts the teachings of Buzaglo's faith as she understands it. Additionally, the Torah prohibits Jews from eating blood (Leviticus 19:19) and Buzaglo understands from this that injecting blood into one's bloodstream is a direct prohibition as well. To Buzaglo, this

prohibition practically applied means that a vaccine that contains blood cells taken from the kidney of a monkey, etc. and is injected into human blood vessels is considered problematic, sinful, and blasphemous to God's name.

b. Sanctity of Life/Abortion: As Buzaglo understands it, Judaism holds dear the value of human life. But in her view, vaccines violate the sanctity of human life. While conducting her research, she learned that a majority of vaccines (including Varicella, Rubella, Hepatitis A, Rabies, and Covid-19) are made by growing viruses in fetal cells. Buzaglo learned that both the Moderna and Pfizer vaccines were tested for the presence of spiked protein on human kidney cells which were removed from an aborted fetus. As she understands it, the Johnson & Johnson vaccine was actually made using fetal retinal cells.

c. Both Genesis and Deuteronomy discuss the sanctity of life including how we were created in God's image, and that to defile God's image is to defile God himself. As Buzaglo understands Torah, a fetus is considered a human life, and to end that life is murder and a direct violation of the Torah.

d. Buzaglo has adopted views on vaccination that she understands Torah to require. To her, the act of bringing life into this world brings holiness and the image of God with it, and the notion of injecting into her own

bloodstream sells from a poor fetus is blasphemous. Buzaglo believes that taking a vaccine means participating in sin and going against God's will and the sanctity of life she holds dear.

e. Foreign Materials: As Buzaglo understands it, the Torah prohibits us from welcoming any foreign materials into the body, and this is precisely what vaccines are. As a Torah observant Jew, Buzaglo keeps her body and blood unpolluted and without contamination. She considers these vaccinations to represent a defilement of the body, blood, and soul.

f. Self - Flagellation: Buzaglo understands that Torah observant Jews, like herself, are forbidden to self-flagellate. As she understands it, in Judaic law, one is not permitted to inject oneself with a vaccine that offers no significant medical curative benefit to the patient, even if it is allegedly good for others. As she understands it, Scripture prohibits inflicting oneself with Biblically unnecessary gashes, wounds or pokes: "You are children of the Lord, your God. You shall not poke yourselves ..." (Deuteronomy 14:1.) "You shall not make incisions in your flesh for any soul ... I am the Lord." (Leviticus 19:28). The same lesson is further underscored in other scriptural verses (e.g., Leviticus 21:5). To Buzaglo, this is a serious Biblical injunction. In her case, since she has natural immunity protecting her from COVID, she perceives no health need for her to receive an injection. As she sees it, to obtain an

unnecessary injection would be in direct violation of Judaic law.

g. Exposure to Unnecessary Risk: Buzaglo believes that Torah observant Jews like herself are forbidden to expose themselves to risk that is unnecessary to the individual (in her case, she believes that natural immunity to COVID-19 makes vaccination unnecessary). In her view, Scripture does not permit exposing oneself to any risk in the absence of a significant medical benefit to one's own self that outweighs the risk. She finds support in a Torah verse that states: "Guard your own soul scrupulously." (Deuteronomy 4:9). As she interprets Torah, if a Torah-adherent individual has natural immunity or, for some other reason, faces minimal or negligible risk from COVID, he is prohibited to expose himself to the risks of the vaccine.

h. Betrayal of Faith in God: As a Torah observant Jew, Buzaglo believes that God is the ultimate healer. Each year during the high holy day of Yom Kippur Buzaglo utters the prayer "He alone determines who shall live, and who shall die, who by fire, who by drowning, who by illness, who by pestilence, etc." Every morning as she opens her eyes, Buzaglo utters the Modeh Ani prayer: "Thankful am I in your presence, for you have returned to me my soul, how great is your mercy." Every morning, as she utters morning prayers, Buzaglo says the blessing of Refaeinu: "Heal us, God, then we will be healed; save us, then we will be saved, for You

are our praise. Bring complete recovery for all our ailments, for You are G-d, King, the faithful and compassionate Healer. Blessed are You, Hashem, Who heals the sick of His people Israel." Buzaglo prays for her students suffering from physical and mental ailments when she says this prayer. She prayed for herself, when she contracted Covid last year, and God answered her prayers. Within a week she was feeling stronger and healthier.

i. Buzaglo's faith is in God as the ultimate healer, and she feels that her faith must be in him one-hundred percent, for that is the covenant she entered with him. Buzaglo keep his commandments, and in turn she believes that He will not bring pestilence or disease into her home. (Exodus 15:26). Seeking health from a vaccine, as if it were a solution to illness, or able to protect her from whatever fate God has planned for her, is sinful and heretical in her view. She believes that to do so would weaken her belief in God. Reliance upon a vaccine, as she sees it, would remove the opportunity for prayer and ruin the spiritual connection between herself and God. She believes that reliance on vaccines promises eternal and perfect health without earning it. As a Torah observant Jew, Buzaglo refuses to bow before a false God, like a pharmaceutical company or a vaccine. She will turn with prayers as she always has to the ultimate healer – her creator.

j. Altering God's Creation: The Book of Genesis states that God created man in His image. It

is Buzaglo's belief that God knew what he was doing and the body of man needs no "fixing" by mankind. Buzaglo sees vaccines as "fixing," for mankind cannot improve on G-d's creation. As she sees it, the mRNA vaccine inserts a synthetic genetic code into her body, to prompt her body to create spiked proteins which will "save her" from the virus. But God has created man, not Moderna or Pfizer or J&J, or any scientist working for any team of vaccine researchers and developers. Buzaglo believes that if she were to accept the vaccine-makers' synthetic code into her body it would be as if she were telling God, "Hey, Creator, you forgot to give me this code that will save my life!" To Buzaglo, that would be sinful, heretical and blasphemous.

613. On September 20, 2021, Buzaglo submitted her request for a religious exemption to the DOE. She supported her exemption request with substantially all the information that is set forth above.

614. On September 22, 2021, DOE denied her request in an email that stated the following:

We have reviewed your application and supporting documentation for a religious exemption from the DOE COVID-19 vaccine mandate. Your application has failed to meet the criteria for a religious based accommodation. Per the Order of the Commissioner of Health, unvaccinated employees cannot work in a Department of Education (DOE) building or other site with contact with DOE students, employees,

or families without posing a direct threat to health and safety. We cannot offer another worksite as an accommodation as that would impose an undue hardship (i.e. more than a minimal burden) on the DOE and its operations.

615. Notably, the denial also stated that "[t]his application was reviewed in accordance with applicable law as well as the Arbitration Award in the matter of your union and the Board of Education regarding the vaccine mandate."

616. On September 23, 2021, Buzaglo submitted an appeal letter to the DOE, explaining that she did not agree that a clergy letter was constitutionally required, but complying with the request for such a letter.

617. Buzaglo's rabbi stated in his letter that he had discussed the matter with her, that she cited authentic scriptural sources that underlie valid objections under Torah law, and that he and the congregation are in complete agreement. He asserted, "[i]n fact, our congregation categorically opposes this vaccine as a matter of religious tenet, ..."

618. During her appeal hearing on October 5, 2021, Buzaglo explained that various communities in Judaism have differing levels of religious observance. She gave an example from her visit to a South American town where no kosher food was available. Her Conservative Jewish friend had permission from her rabbi to eat a kosher species of fish at a non-kosher restaurant. Her Orthodox Ashkenazi friend had permission to eat a salad served on a plastic plate

(not contaminated by non-kosher meat). Buzaglo's rabbi, however, told her that she was forbidden from ingesting anything at all in that restaurant as there was no way of knowing if non-kosher meat had touched any of the cutlery or foodstuffs. As a result, Buzaglo had to buy raw fruit at a market.

619. When it was his turn to speak, the DOE's representative admitted that he was unfamiliar with how diverse Judaism and its leadership and laws can be. He then shared a link to an article from the Jerusalem Post citing how the Sephardic Chief Rabbi of Israel had spoken in favor of a vaccine.

620. Buzaglo was not allowed to respond to the article, but the Sephardic Chief Rabbi of Israel is an elected political position, the Sephardic Chief Rabbi of Israel is not her rabbi nor her rabbi's mentor, and she is not bound by his opinions or rulings.

621. Buzaglo never received direct notice of the denial of her appeal, but DOE informed her via email on October 8, 2021 that she had been placed on leave without pay, signifying that her appeal had been denied.

622. On information and belief, several other Orthodox Jews who based their religious exemptions requests to the DOE vaccine mandate on the same sincerely held religious beliefs that Buzaglo expressed in her application were granted religious exemptions.

623. Pursuant to the orders of the United States Court of Appeals for the Second Circuit on November 15 and 30, 2021, Buzaglo submitted to a "fresh look" examination of her application for religious exemption by the Citywide Appeals Panel.

624. Buzaglo was told on December 6, 2021 that her position as a DOE classroom teacher had been filled by a full-time replacement teacher by November 30, if not sooner. Upon information and belief, by December 6, the replacement teacher had already announced to the class that she will be the class's teacher until the end of the year. This is despite the fact that the DOE was purportedly giving Buzaglo's claims fresh consideration during that time.

625. On or about December 10, 2021, Buzaglo received a notice informing her that her appeal was denied, and requiring her to vaccinate herself to remain employed by DOE, or to "opt-in" to an extended leave without pay program along with a waiver of rights by December 28, 2021, or to face termination of her employment and insurance coverage.

626. Corporation Counsel sent an email to Plaintiffs' counsel on December 13, 2021 that purported to explain Buzaglo's denial by the Citywide Panel as follows:

APPEAL NO. 00004822, Sarah Buzaglo

After carefully reviewing the documentation provided by all parties, the Citywide Appeal Panel has voted to AFFIRM the DOE's

determination to deny Appellant Buzaglo's reasonable accommodation. The record before the Panel demonstrated that the employee's sincerely held religious beliefs, which the panel does not question, are not preventing the employee from vaccination. Rather, the appellant's decision not to vaccinate comes from non-religious sources: a belief that the mandate is unconstitutional — a legal contention that has been rejected by courts of competent jurisdiction -- and factual beliefs about the vaccination that conflicts with the factual findings of the DOHMH Commissioner in imposing the mandate.

Even assuming the appellant had established a valid basis for a reasonable accommodation, the panel believes the DOE has satisfied what is necessary under the law to demonstrate undue hardship. Appellant is a classroom teacher who, under the present circumstances, cannot physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student population. DOE has met its burden under the law that diverting the appellant from classroom duties constitutes an undue hardship.

627. Buzaglo submitted a 12-page letter comprehensively and eloquently explaining her religious objections to the vaccination. Nevertheless, the panel determined that her beliefs were *not* rooted in her understanding of Judaic law and Scriptures, her advice from her rabbi, or her understanding of her God's

requirements—which she thoroughly outlined in her statement and which are entitled to protection under governing Supreme Court and Second Circuit case law—but instead by her "belief that the mandate is unconstitutional ... and factual beliefs about the mandate that conflict with factual findings of the DOHMH Commissioner."

628. If counsel's depiction of the panel's conclusions is accurate, it is clear that the panel applied improper standards and legally improper reasoning. Buzaglo's beliefs regarding the constitutionality of the mandate do not undermine, weaken, or cancel her sincerely held religious objections.

629. Furthermore, any difference between Buzaglo's understanding of the facts and the factual findings of the Health Commissioner are irrelevant as a matter of law. *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996) (finding it inappropriate for defendant to delve into whether plaintiff's sincerely held religious belief was "accurate or logical" or whether "plaintiff has been in some way 'misinformed'" and holding that plaintiff's beliefs were still entitled to free exercise protection); *Smith v. Board of Education*, 844 F.2d 90, 93 ("Generally it is not proper for courts to evaluate the truth or correctness of an individual's sincerely held religious beliefs.")

630. Buzaglo is now faced with a wrenching choice imposed by the Exemption Standards: because she holds religious beliefs that forbid her from accepting vaccination, she must either resign

from her employment with DOE, with limited benefits, and waive her constitutional rights; or continue on unpaid leave until September 5, 2022, with limited benefits and a prohibition on gainful employment, and waive her constitutional rights; or be fired effective December 1, 2021.

631. If Buzaglo wishes, or needs, to continue to receive her DOE health insurance between now and next September, the Defendants are requiring her to surrender any rights she has to challenge her dismissal. She is ready, willing and able to work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment — as she has done in the past.

632. Because the Defendants have refused to respect Buzaglo's constitutional right to religious freedom, have inflicted substantial harm upon her because she has stood up for her rights, and are on the precipice of a deadline, set by themselves, that will change her status even further with the DOE and inflict still more harm, Buzaglo is forced to go to court to restrain further harm and to defend her constitutional rights.

Edward a/k/a Eli Weber

633. Plaintiff Edward a/k/a Eli Weber ("Weber") has been employed by the DOE since 2001 as a teacher. He is unvaccinated and he refuses to be vaccinated for religious reasons. The Vaccine Mandate threatens to deprive him not only of his career but also of economic and retirement benefits that he has accrued during his employment with the Department.

634. During the 2020-2021 school year, Weber fulfilled his job responsibilities remotely.

635. Weber has been a Chassidic Jew for 24 years.

636. Weber attends synagogue every day, keeps the Sabbath, and observes all of the Jewish Holidays.

637. Weber prays three times a day. He begins his day at 3 a.m. and studies Jewish books for at least an hour before he attends synagogue and goes to work. He immerses in a Mikvah, a purifying bath every day before prayer. He studies with a habrusa (friend) every night after dinner.

638. Everything he does, outside of his work with the DOE, is involved in spiritual practice.

639. Weber is bound by Jewish law in all aspects of his life. He does not eat without saying a blessing before and after. He kisses a mezuzah upon entering his house. He follows all the laws of family purity, has a full beard, and wears a yarmulke and strings on his shirt, even when he sleeps.

640. Under Jewish law, and according to his sincerely held religious beliefs, he is bound by the authority of his rabbi.

641. He therefore asked his rabbi—Rabbi Daniel Green, the Director and spiritual leader of Keystone Jewish Center in Brooklyn—to provide him with an opinion on whether any of the Covid-19 vaccines are permissible by "Halacha," which refers to Jewish law as delineated by biblical and Talmudic dictates.

642. On October 1, 2021, Weber applied for a religious exemption from the DOE. He submitted his letter from Rabbi Green, which stated, among other things, the following:

> It is categorically forbidden by Jewish religious law to be injected with said vaccine, otherwise known as the mRNA injection (whether that of Pfizer, Moderna, or Johnson & Johnson). The prohibition is Halachically binding, as it involves various serious breaches of Shulchan Aruch (Jewish Code of Religious Law).

643. His union representative told him that his letter was the strongest he had seen yet.

644. Weber believes that making any use of human cell lines (including research, testing, or manufacturing)—like the Covid-9 vaccines do—is forbidden in Judaic Law, because Judaism honors the sanctity of life of the unborn and strictly prohibits abortions of otherwise-viable fetuses who pose no mortal risk to the mother. This is tantamount to murder and infanticide, and is strictly prohibited, as stated in Bereishis 9:6: "Whoever sheds the blood of a human being inside another human being shall his blood be shed, for in the image of God He made (each) human being." Furthermore, Judaic law prohibits deriving benefits from any human corpse, including that of a miscarried fetus.

645. It is also forbidden under Jewish law to take a medication that is coerced, or to coerce preventative medicine. The very notion of a mandatory vaccine policy is anathema in Judaism

since it usurps body sovereignty, a Biblical imperative (Vayikra 25:55). Scripture requires its adherent to reject any and all forms of bodily subjugation to any human overlord, irrespective of alleged benefit to oneself or one's community.

646. Weber believes the body was created by a Creator; therefore, changing the blue-print for the creation, by means of altering genetic function of cells, runs contrary to Halachic Judaic law and ethics. Any such reprehensible mingling of the genetic function of body cells with a foreign substance plainly runs afoul of Judaic law, and includes in modified messenger RNA and recombinant DNA technologies, both of which constitute a profound alteration of the implicit genetic function as designed by the Creator.

647. Weber would never consider putting something in his body that would affect his DNA. The idea of harming his ancestral DNA in any way is abhorrent to him; likewise, the thought of putting aborted material, or even to be in the same room as such material, goes against everything he believes in, according to his religious worldview.

648. His religious beliefs also extend to his diet. He does not eat pork or shellfish. He is careful not to mix milk and meat and he has two sinks and separate sets of utensils for each. He only eats kosher food. He is stricter than most orthodox Jews in his practice.

649. Even though he received vaccines as a child, when he lived a secular lifestyle, he now avoids

vaccines completely as he relies on God to protect him from disease.

650. On October 1, 2021, the DOE denied his application, and on October 2, 2021, he was placed on leave without pay.

651. He tried to send more information from another Rabbi about his beliefs but SOLAS, the computerized vaccination portal, refused to accept further information.

652. He did not choose to appeal his religious exemption denial at that time because his personal religious beliefs did not match the requirements of the standards that were set forth in the application and appeal process, so he concluded an appeal would be futile.

653. Since that time, the DOE has admitted that the standards it used to assess his religious exemption request and thousands of others were constitutionally suspect and has made assurances to the Second Circuit in both its oral argument and in multiple briefings to that Court that "the City has been working on making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious exemptions pursuant to the appeals process (2d Cir. 21-2678 ECF No. 53; 2d Cir. 21-2711 ECF No. 70)." 2d Cir., 21-2711, ECF No. 90 at 18; *id.* at 27 ("the City is making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious exemptions pursuant to the arbitration award's appeal process").

654. On November 19, 2021, he emailed the DOE and explained that he had not chosen to appeal his religious exemption denial earlier because his personal religious beliefs did not match the requirements of the standards that were set forth in the application and appeal process, so he concluded an appeal would be futile.

655. He hoped the DOE would give him an opportunity to appeal under the Citywide Panel process, given the fact that it admitted the standards it used when evaluating his initial request were unconstitutional.

656. He never heard back from the DOE. He has not received an opportunity to file an appeal pursuant to the Citywide Appeal Panel process.

657. He is currently at risk of being terminated and losing his health insurance. He has not been paid since October, and cannot apply for unemployment.

Carolyn Grimando

658. Plaintiff Carolyn Grimando has been employed by the DOE for the past 18 years. She is unvaccinated and she refuses to be vaccinated for religious reasons. The Vaccine Mandate threatens to deprive her not only of her career but also of economic and retirement benefits that she has accrued during her employment with the Department.

659. In September when Grimando originally found out about the DOE's vaccination mandate, she was recovering from Covid-19.

660. She therefore applied for a medical exemption from the Mandate, because the Centers for Disease Control and Prevention had stated that anyone recovering from Covid-19 should wait a prescribed amount of time before getting a vaccination.

661. Even though she had religious objections to the vaccine, she did not request a religious exemption at the same time, because she did not know that she could.

662. Grimando later found out that even though the DOE had a religious exemption process, it was not accepting both religious and medical exemption requests from the same person.

663. In any event, when she found out about the religious exemption process, she was intimidated by the requirements she saw listed in the Exemption Standards, especially the one that said that requests "shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine," since she is a Catholic and know that the pope has spoken publicly in favor of the vaccine.

664. Grimando submitted a medical exemption request on September 13, 2021. Even though the SOLAS system acknowledged that individuals recovering from Covid should not be vaccinated for 90 days, her medical exemption was denied. She tried again and was denied a second time.

665. She tried multiple times to get ahold of the DOE to ask why her medical exemption was denied. A representative from Human Resources

eventually got back to her to tell her that her documentation was not properly uploaded. Both that individual and her union representative recommended that she apply again.

666. Upon Grimando's third application, the DOE granted her a temporary medical exemption for 45 days, even though the SOLAS system said that individuals with Covid-19 should not be vaccinated for 90 days.

667. On October 12, even though her medical exemption had not yet expired, she submitted another medical exemption seeking to extend her first exemption for another 45 days. The DOE denied her request.

668. Her medical exemption expired after the deadline for submitting a religious exemption request expired. However, she found out that the DOE was still accepting religious exemption requests.

669. Even though Grimando was nervous that the DOE would not grant her a religious exemption request due to the Exemption Standards, she decided to submit a religious exemption request anyway.

670. Her religious exemption request was submitted on her parish's letterhead and signed by her priest, Father Italo Barozzi. He serves at the Church of Saint Mel in Flushing, New York, which is her parish. Grimando also periodically attends Queen of Martyrs parish in Forest Hills.

671. She explained that she was baptized into the Catholic Church as a child, and she has been a

faithful practitioner of the Catholic religion her entire life.

672. Grimando believes that the Roman Catholic Church teaches that a person may refuse a medical intervention, including a vaccination, if his or her informed conscience comes to this sure judgment.

673. In her statement, Grimando cited to the *Catechism of the Catholic Church* which instructs that following one's conscience is following Christ Himself:

> In all he says and does, man is obliged to follow faithfully what he knows to be just and right. It is by the judgment of his conscience that man perceives and recognizes the prescriptions of the divine law: "Conscience is a law of the mind; yet Christians would not grant that it is nothing more; ... Conscience is a messenger of him, who, both in nature and in grace, speaks to us behind a veil, and teaches and rules us by his representatives. Conscience is the aboriginal Vicar of Christ."

674. Therefore, if a Catholic comes to an informed and sure judgment in conscience that he or she should not receive a vaccine, Grimando believes that the Catholic Church requires that the person follow this certain judgment of conscience and refuse the vaccine.

675. Grimando believes that the Bible outlines the fact that God created the body both "fearfully and wonderfully." (Psalm 139:13-16). She believes that by manipulating genetic operations, the

Covid-19 shots alter what God has made, which literally assumes the position of God. She believe this to be a sinful practice under these circumstances.

676. Grimando also believes that the Bible states that the body is the Temple of the Holy Spirit. She believes she is commanded to take good care of it, not to defile it, and certainly not introduce something into it that could potentially harm it (1 Corinthians3:16-17, 1 Corinthians 6:19-20, 2 Corinthians 5:10, and 2 Corinthians 7:1).

677. She believes that these vaccines (by the very disclosure of the vaccine manufacturers) contain carcinogens, neurotoxins, animal viruses, animal blood, allergens, and heavy metals. She believes that introducing these substances into her body would violate the Bible's command to honor it as God's temple.

678. Grimando also believes she has a general moral duty to refuse the use of medical products, including certain vaccines, that are produced using human cells lines derived from direct abortions. Since the Covid-19 vaccinations were either researched and tested or manufactured using aborted fetal cells, she objects to them on this basis as well.

679. Due to Grimando's sincerely held religious beliefs, she has not been vaccinated since she was a child, she almost never takes prescription drugs, and she eats a vegetarian diet.

680. On November 23, 2021, Grimando's religious exemption request was denied because it "failed

to meet the criteria for a religious based accommodation."

681. The DOE did not give her an opportunity to appeal that denial.

682. This was despite the fact that the DOE made assurances to the Second Circuit in both its oral argument and in multiple briefings to that Court that "the City has been working on making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious exemptions pursuant to the appeals process (2d Cir. 21-2678 ECF No. 53; 2d Cir. 21-2711 ECF No. 70)." 2d Cir., 21-2711, ECF No. 90 at 18; *id.* at 27 ("the City is making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious exemptions pursuant to the arbitration award's appeal process").

683. On November 30, 2021, Grimando was forced to choose whether to be vaccinated in violation of her sincerely held religious beliefs, be placed on unpaid leave with benefits for a limited time period (but only if she surrendered her legal right to challenge the DOE's actions), or to lose her job and her health insurance.

684. While she chose to extend her leave without pay status in SOLAS, she signed the waiver under duress.

685. In an email that she wrote to various DOE officials later that day, she stated that "[t]he

> reason why I am signing the waiver in SOLAS is because SOLAS doesn't give me a choice to skip the waiver to extend my leave without pay status."

686. She also stated the following:

> I am NOT waiving my right to seek religious exemption and accommodation from any requirement that conflicts with my sincerely held religious beliefs, and I am not waiving my rights to seek legal redress from any wrongful denial of such exemption or accommodation.
>
> I am NOT waiving my right to challenge the involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process.
>
> I am NOT waiving my right to challenge any wrongful termination.

687. Grimando is now faced with the choice imposed by the Exemption Standards: because she holds religious beliefs that forbid her from accepting vaccination, she must either violate her religious beliefs and vaccinate herself; or resign from her employment with DOE, with limited benefits, and waive her constitutional rights; or go on unpaid leave until September 5, 2022, with limited benefits and a prohibition on gainful employment, and waive her constitutional rights; or be fired effective December 1, 2021.

688. If Grimando wishes, or needs, to earn paid income between now and next September, instead of draining her savings, the Defendants are

requiring her to surrender almost all of the benefits and other seniority and economic rights that she has earned from loyal service with the DOE. She is ready, willing and able to work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment.

689. Because the Defendants have refused to respect Grimando's constitutional right to religious freedom, have inflicted substantial harm upon her because she has stood up for her rights, and are on the precipice of a deadline, set by themselves, that will change Grimando's status even further with the DOE and inflict still more harm, Grimando is forced to go to court to restrain further harm and to defend her constitutional rights.

Amoura Bryan

690. Plaintiff Amoura Bryan has been employed by the DOE for the past 13 years. She is unvaccinated and she refuses to be vaccinated for religious reasons. The Vaccine Mandate threatens to deprive her not only of her career but also of economic and retirement benefits that she has accrued during her employment with the Department.

691. Bryan began working for the DOE as a special education teacher with DOE Home Instruction Schools starting in August 2021.

692. The DOE mandated all employees to be vaccinated or submit exemption/accommodation requests without consideration of working

conditions that do not require Covid-19 vaccination.

693. On September 13, 2021, Bryan submitted her request for a religious exemption from SOLAS. In the SOLAS portal, there was a preference to submit a letter from a religious leader/clergy and select an option that stated "I do not work in a school building." No further questions were asked in the online application, such as what Bryan's current teaching position is.

694. On September 17, 2021, the DOE denied Bryan's application in an email that stated,

> your application has failed to meet the criteria for a religious based accommodation because, per the Order of the Commissioner of Health, unvaccinated employees cannot work in a school building without posing a direct threat to health and safety. Due to the configuration for the 2021-2022 school year, which includes no remote class work, we cannot offer another worksite as an accommodation, as that would impose an undue hardship (i.e. more than a minimal burden) on the DOE and its operations.

695. The denial also stated that "[t]his application was reviewed in accordance with applicable law as well as the Arbitration Award in the matter of the UFT and the Board of Education regarding the vaccine mandate."

696. The denial stated that Bryan had one school day to appeal.

697. Bryan was confused and shocked by the DOE's decision because she is a remote teacher working in an isolated, non-school building workspace, and she does not interact with students or staff. Bryan's DOE Home School Instruction administrators have assigned her to a stationary location where she works remotely using Google Classroom to teach students who are learning from home due to medical accommodations.

698. That is because Bryan's students are medically fragile and unable to attend school due to either medical or psychiatric conditions.

699. Employees who successfully obtain religious or medical exemptions from DOE's vaccination mandate have been accommodated by working remotely, which Bryan already did.

700. Bryan was unable to reply to the email from DOE's SOLAS portal to inform them of their erroneous assumption that she provides in-person instruction in a school building.

701. A UFT representative named Michael Sill informed Bryan that he would reach out to the DOE regarding her situation. Mr. Sill also advised her to appeal her denial and mention her current working conditions as a remote worker in a non-school building.

702. Bryan submitted a sworn affidavit in support of her appeal.

703. Although she is affiliated with the Seventh Day Adventist Church, Bryan did not mention that affiliation in her sworn statement, because

she believes her spiritual and moral obligations are ultimately to God, and not to any church. It is her religious belief that the church does not have authority over the decisions she makes pertaining to her health or her body; only God does. Additionally, even though she was baptized, she believes that organized religions and religious leaders do not control her relationship and commitment to God and the Bible. She instead made her request for a religious accommodation based upon her own faith practices and religious beliefs, which are protected under the law, regardless of their affiliation with any church.

704. Due to Bryan's church upbringing and faith in the Bible, she believes that God is the manufacturer/creator of all life on this earth and in the universe and as the manufacturer, God has authority to give instructions on how best to care for this complex machinery called the body since the Bible explains God is the creator in Genesis Chapter 1.

705. The Bible is Bryan's guide and directs her life, including her health care choices. She believes that she does not own her body but that her body is the temple of God (1 Corinthians 6:19) and that "[i]f any man defile the temple of God, him shall God destroy: for the temple of God is holy, which temple ye are" (1 Corinthians 3:17).

706. She also believe based on 1 Corinthians 3:17 that she must not defile her body with anything that can change the natural functions of her organs, that she must not ingest any "unclean substances" (as discussed in Leviticus 7:21 and 2

Corinthians 6:17), and that she must not take any action that would cause her cells to function contrary to how God manufactured them to work naturally.

707. Bryan believes firmly what it says in Exodus 15:26 that if she keeps God's commands and laws and if some sickness does come upon her (like Covid 19), that God is "the Lord that heal[s]" me. But she does understand that healing does not always come in this life, and that true healing is in the promised after life in eternity with God.

708. She also adheres to what her Bible school teacher calls the ten laws of health, which are religious medical practices rooted in Scripture and that include such things as trusting in the God of the Bible (Exodus 23:25), temperance (Acts 15:29 and 1 Peter 2:11), and plant-based nutrition (Genesis 1:29).

709. As a result of these beliefs, she does not smoke, drink, or use any illicit drugs, and her diet is predominantly plant-based.

710. Bryan also believes it would be a violation of these religious beliefs to receive a Covid 19 vaccination.

711. On September 24, 2021, Bryan attended the arbitration hearing on her appeal.

712. At the arbitration hearing Bryan explained her sincerely held religious beliefs as stated in her sworn statement and informed the arbitrator of her current working conditions as a remote worker at a non-school building with no interactions with students or staff.

713. Bryan's UFT representative Matt Kirwan confirmed her current working conditions and acknowledged that Mr. Sill from UFT said he would speak with DOE on her behalf about how she does not engage in in-person instruction. She asked the arbitrator if she could submit an email as part of her supporting documents confirming this, and he said she did not need to since she was already sworn in and he believed her.

714. At the hearing, the representative from the DOE inquired about Bryan's affiliation with the Seventh Day Adventist Church and stated that the Seventh Day Adventist Church does not oppose the vaccine.

715. Bryan explained that it was her personal religious belief in God's laws and the requirements of the Bible that she should not take the vaccine, regardless of her affiliation with the Seventh Day Adventist Church. She repeated what she said in her opening statement given at the arbitration.

716. Bryan does not believe any UFT representative ever spoke to DOE on her behalf.

717. On October 18, 2021, Bryan's assistant principal James Maresca wrote a letter in support regarding her current teaching position as a remote worker in a non-school building.

718. In that letter, he confirmed that Bryan works remotely with her students from a non-school setting.

719. He stated further:

> [Ms. Bryan's] instruction is primarily with elementary students with various disabilities, requiring her to instruct these students via Zoom on a daily basis, covering all aspects of the curriculum for each student. In addition, Miss Bryan is required to set up and maintain a Google Classroom for each student as evidence of work completed. As a remote teacher, she does not pose a risk to the health and safety of the children because she does not work from a school building. There is no discernible reason Miss Bryan would need to be vaccinated to perform her duties, as she is in no direct contact with students or staff members.

720. On October 4, Bryan reached out to Mr. Sill and Mr. Kirwan, explaining that she had not heard from them regarding their promised advocacy on her behalf.

721. On October 5, 2021, she received an email stating that the arbitrator denied her exemption request and that she is placed on a Leave of Absence without pay. There was no explanation about why she was denied.

722. Mr. Sill responded to Bryan's October 4 communication in a dismissive email, stating that he was sorry that her appeal did not turn out the way she had hoped but that he could no longer help her, and that her only recourse was the courts or vaccination.

723. On October 6, 2021, she submitted a new application with documentation explaining that

she does not provide in-person instruction within a school building.

724. On October 7, 2021, she was denied the reasonable accommodation via an email which stated "[r]epeat Application previously reviewed and determined." The email did not address the fact that her original denial was based on incorrect facts.

725. She is distraught over this situation because it has prevented her from being able to be there for her students. Bryan's religious exemption denial was based on factually incorrect information and an unconstitutional exemption process.

726. After the DOE admitted and the Second Circuit determined that the Exemption Standards were constitutionally suspect, Bryan was given the opportunity to re-appeal her denial.

727. On December 2, Bryan submitted additional documentation showing clearly, as her original documentation did, that her position is remote, which is the accommodation the DOE was already providing to people who obtained religious exemptions.

728. The DOE has not yet decided Bryan's re-appeal, but she risks termination and loss of her health insurance if she is not reinstated.

729. Bryan is therefore faced with a wrenching choice imposed by the Vaccine Mandate and the Exemption Standards: because she holds religious beliefs that forbid her from accepting vaccination, she must either resign from her

employment with DOE, with limited benefits, and waive her constitutional rights; or continue on unpaid leave until September 5, 2022, with limited benefits and a prohibition on gainful employment, and waive her constitutional rights; or be fired effective December 1, 2021.

730. If Bryan wishes, or needs, to continue to receive her DOE health insurance between now and next September, the Defendants are requiring her to surrender any rights she has to challenge her dismissal. She is ready, willing and able to work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment.

731. Because the Defendants have refused to respect Bryan's constitutional right to religious freedom, have inflicted substantial harm upon her because she has stood up for her rights, and are on the precipice of a deadline, set by themselves, that will change her status even further with the DOE and inflict still more harm, Bryan is forced to go to court to restrain further harm and to defend her constitutional rights.

Joan Giamarrino

732. Plaintiff Joan Giammarino has been employed by the DOE since September 2007. She is unvaccinated and she refuses to be vaccinated for religious reasons. The Vaccine Mandate threatens to deprive her not only of her career but also of economic and retirement benefits that she has accrued during her employment with the Department.

733. In September when Giammarino originally found out about the DOE's vaccination mandate, she chose not to apply for a religious exemption, because she knew she could not meet the Exemption Standards

734. Specifically, the Exemption Standards required the submission of a clergy letter.

735. Giammarino is a practicing Catholic, but she did not think she could find a priest who would support her position, even though it stemmed from her sincerely held religious beliefs.

736. She was raised with a strong very religious background as a Christian, and her entire family life from childhood was built upon Christian teachings. She attended Catholic elementary school for eight years, a Catholic high school for four years, and a Catholic University for four years as well.

737. Giammarino cannot participate in taking the Covid-19 vaccine because the vaccines involve the use of aborted fetuses in either their testing or manufacturing. She is strongly opposed to abortion in any form as a Christian, and could never allow one of these vaccines to be put into her body without feeling like she was committing a sin by accepting the murder of one of God's precious children.

738. The Ten Commandments are one of the core foundations of Giammarino's personal religious beliefs and therefore dictate how she lives her life as a Christian. Since the Fifth Commandment clearly states, "[t]hou shalt not kill," she believes

that she cannot consciously participate in a process that she believes forsakes not only the sanctity of a human life, but also that of a human soul. She also believes that time and distance from an evil that originated long ago does not excuse it or make her free of responsibility for participating in it. Injecting fetal cells into her body therefore violates her religious beliefs.

739. Giammarino prayed for quite some time about taking the vaccine, as she knew the repercussions to her professional life and her ability to provide for herself would both be negatively impacted, but she knew from meeting God in prayer that it would be against her religious beliefs to take it.

740. As a result of her sincerely held religious beliefs regarding vaccination, she has not been vaccinated in 20 years.

741. Despite learning that the DOE admitted to the Second Circuit Court of Appeals that the process and standards it used to consider religious exemption applications, including the clergy letter requirement, were "constitutionally suspect" and proposed an alternative process with purportedly constitutional standards, the DOE did not make this process available to Giammarino.

742. In addition to her religious objection to the vaccine, Giammarino's doctor advised her against taking the vaccine due to two autoimmune disorders. However, she chose not to apply for a medical exemption because her personal medical conditions did not match the requirements of the

Exemption Standards, so she concluded an application would be futile.

743. On November 29, 2021, Giammarino sent Michael Mulgrew, UFT president, and Beth Norton, UFT general counsel, an email explaining why she did not apply for a medical exemption.

744. In that email, she also explained that the DOE conceded that the Exemption Standards were "constitutionally suspect" and that the DOE had proposed an alternative process with purportedly constitutional standards.

745. Since a great number of UFT members' applications and appeals were also considered under the same admittedly unconstitutional process, Giammarino demanded that the UFT bring a claim directly to Scheinman Arbitration and Mediation Services by November 30, 2021 for expedited resolution, because she did not believe the Arbitration Agreement was created and implemented in good faith.

746. She never heard back.

747. On December 6, Giammarino mailed a certified letter to the DOE stating that she originally chose not to apply for a religious exemption because her personal religious beliefs did not match the narrow requirements of the Exemption Standards, so she concluded an application would be futile. She also stated that she was unable to secure a letter from a religious leader as required, as few clergy members would oblige. Since the Second Circuit Court of Appeals declared and the DOE admitted that these

standards were "constitutionally suspect," she demanded that she have the option to have her religious exemption application considered under a fair, constitutionally sound process.

748. She also attached a statement explaining her religious beliefs and requesting a religious exemption.

749. On the same day, she also sent a certified letter to the DOE requesting a medical exemption.

750. On December 14, 2021, she received an email from the DOE stating that it received her paper application for a reasonable medical accommodation, that all accommodation requests were transferred to the SOLAS system, that the DOE was administratively closing her request, and that she should apply online via SOLAS.

751. After the Second Circuit's ruling, the DOE never offered Giammarino the opportunity to apply for a religious exemption, even though it was on notice that she declined to apply originally because of its admittedly unconstitutional requirements.

752. She also never heard back from the DOE regarding the religious exemption request that she submitted by mail in December.

753. Giammarino has been placed on unpaid leave and she is at risk of being terminated and losing her health insurance.

754. Giammarino is therefore faced with a wrenching choice imposed by the Vaccine

Mandate and the Exemption Standards: because she holds religious beliefs that forbid her from accepting vaccination, she must either resign from her employment with DOE, with limited benefits, and waive her constitutional rights; or continue on unpaid leave until September 5, 2022, with limited benefits and a prohibition on gainful employment, and waive her constitutional rights; or be fired effective December 1, 2021.

755. If Giamarrino wishes, or needs, to continue to receive her DOE health insurance between now and next September, the Defendants are requiring her to surrender any rights she has to challenge her dismissal. She is ready, willing and able to work, and capable of working remotely or, if in person, in a fully-masked, socially-distanced, fully tested work environment.

756. Because the Defendants have refused to respect Giamarrino's constitutional right to religious freedom, have inflicted substantial harm upon her because she has stood up for her rights, and are on the precipice of a deadline, set by themselves, that will change her status even further with the DOE and inflict still more harm, Giamarrino is forced to go to court to restrain further harm and to defend her constitutional rights.

Benedict LoParrino

757. Plaintiff Benedict LoParrino lives in the Bronx and has been employed by the New York City Department of Education as an elementary school teacher for 17 years.

758. In September when he originally learned of the DOE's vaccination mandate, he chose not to apply for a religious exemption by the September 20, 2021 deadline because he knew he could not meet the requirements stated in the Arbitration Award.

759. Specifically, the Arbitration Award required the submission of a clergy letter.

760. LoParrino is a practicing Catholic, but he did not think he could find a priest who would support his position, even though it stems from his sincerely held religious beliefs.

761. LoParrino was also discouraged from applying because Mayor de Blasio said that religious exemptions would only be granted for Christian Scientists and Jehovah's Witnesses.

762. LoParrino was baptized Catholic and served as an altar boy when he was in grammar school. He attended Catholic school his entire life, from elementary school through college. He lives his life based on the teachings of Jesus Christ and engages in daily prayer.

763. According to the teachings of the Roman Catholic Church, a person may be required to refuse a medical intervention if his or her informed conscience comes to a sure judgment. Further, there are authoritative church teachings that demonstrate a principled religious basis on which a Catholic may determine that he or she ought to refuse certain vaccines on the basis of conscience.

764. One of these is that there is a general moral duty to refuse the use of medical products, including certain vaccines, that are produced using human cell lines derived from direct abortions.

765. Since each of the three Covid-19 vaccines was either tested or produced using aborted fetal cells, it is LoParrino's sincerely held religious belief that he has a moral duty to refuse them to avoid being complicit in the sin of abortion.

766. The Catechism of the Catholic Church instructs that following one's conscience is akin to following Christ Himself, and if a Catholic comes to an informed and sure judgment that he or she is not to receive the vaccine, then the Catholic Church requires that the person refuse it.

767. Therefore, since LoParrino has come to an informed and sure judgment that taking any of the Covid-19 vaccines would make him complicit in the sin of abortion, he understands the teachings of the Catholic Church to require that he refuse them.

768. Due to his sincerely held religious beliefs, LoParrino has not been vaccinated since he was a child.

769. Even though he had missed the deadline and did not think his request would be accepted due to the requirements in the Arbitration Award and Mayor de Blasio's statements, on November 3, 2021, LoParrino decided to apply anyway.

770. He was unable to apply online, so he sent his request via certified mail to the DOE. He also emailed it to the DOE.

771. In his application, LoParrino provided a detailed explanation of Catholic doctrine on moral decision-making involving vaccines, and provided reference material in support of the specific points that he made concerning that doctrine, including the points made above. He also described his individual decision-making process in which he applied Catholic doctrine and deduced that he, individually, was required by his understanding of vaccine facts and Catholic doctrine to refuse vaccination.

772. Since submitting his application for exemption to the DOE, LoParrino has learned that the DOE admitted to the Second Circuit Court of Appeals that the process and standards that it had used to consider religious exemption applications, including the clergy letter requirement, were "constitutionally suspect" and proposed an alternative process with purportedly constitutional standards. However, the DOE has not made this process available to LoParrino, even though he had sent them his request by mail and email.

773. On December 13, LoParrino received an email from the DOE stating that it had received his request for a medical exemption, that it had transferred all accommodation requests to the Self-Service Online Leave Application System ("SOLAS"), that his request was being

administratively closed, and that he should re-apply online via SOLAS.

774. LoParrino was confused about this email because he had requested a religious exemption, not a medical exemption from the Mandate.

775. Nevertheless, LoParrino tried to re-submit his religious exemption request on SOLAS that day, but received an error message that stated "[y]ou have been identified as being noncompliant to the vaccine mandate. You can't submit an application for Reasonable Accommodation or Covid-19 Vaccine Related Exemption/ Accommodation at this time."

776. LoParrino then emailed the DOE, explaining that he had received an error message when attempting to submit his religious exemption request, and asked for help getting this resolved.

777. The email he received in response stated that the DOE's "records indicated" that he was "currently on leave without pay" and that he needed to contact his union for further assistance.

778. On December 19, a union representative reached out to LoParrino to help him with his religious exemption application. She asked whether LoParrino had applied by the September 20 deadline. He replied that he had missed that deadline.

779. She responded that "[i]f you missed the deadline, your application is not eligible for consideration."

780. LoParrino has been placed on unpaid leave and is at risk of being terminated and losing his health insurance and other employment rights. The DOE's efforts to force LoParrino to violate his religious beliefs in order to retain his job is causing LoParrino to suffer great distress.

FIRST CLAIM FOR RELIEF
(Liability under the Free Exercise Clause By All Plaintiffs Against All Defendants)

781. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint as if fully set forth herein.

782. The Vaccine Mandate is unconstitutional, both facially and as applied to the plaintiffs and others, because it violates their right to religious freedom under the First Amendment.

783. The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that Congress (and by extension, State and City governments) shall make no law prohibiting the free exercise of religion.

784. Laws that burden religion are subject to strict scrutiny under the Free Exercise Clause unless they are neutral and generally applicable.

785. Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.

786. A law is not generally applicable if it invites the government to consider the particular reasons

for a person's conduct by providing a mechanism for individualized exemptions.

787. A law is not generally applicable if exceptions are carved out on its face or in practice, or if it is just one of many specifically applicable mandates relating to the same issue.

788. A law that is overinclusive in its restrictions on religious activity or beliefs, by encompassing more protected conduct than necessary to achieve its goal, is invalid.

789. Laws that burden religious exercise must survive strict scrutiny if they are not neutral and generally applicable or if they are overinclusive or underinclusive.

790. A government policy can survive strict scrutiny under the Free Exercise Clause only if it advances interests of the highest order and is narrowly tailored to achieve those interests. Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.

791. The Mandate requires all DOE employees to be vaccinated, but by its terms it acknowledges religious accommodations are required to be considered. The Vaccine Mandate contains no other guidance as to how DOE is to determine which "accommodations" are "reasonable" and "otherwise required by law." Adjudicators of requests are, therefore, given discretion to determine whether or not to grant exemption requests based on their own individual

determinations as to whether such requests are "reasonable" or "required by law."

792. Because the Mandate gives the DOE and outsourced appellate examiners unrestricted discretion to determine the validity of various religious exemption applications, it is by definition, not neutral or generally applicable, and thus must be subject to strict scrutiny.

793. The United States Supreme Court has made it clear that Government fails to act neutrally when it proceeds in a manner that is intolerant of religious beliefs, and that religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

794. The First Amendment protects the unorthodox religious beliefs of people who dissent from the doctrines of the faith traditions to which they belong just as strongly as it protects the orthodox beliefs and practices of those who are faithful to those traditions.

795. The Mandate is overinclusive on its face. As one of many examples, it requires all employees of the DOE to submit to vaccination, no matter where they work. The Mandate's requirement of vaccination even for employees of DOE who do not "work in-person in a DOE school setting, DOE building, or charter school setting" is not necessary for the achievement of the Defendants' interest of protecting the health of schoolchildren. With respect to non-DOE employees of the City, however, the same Mandate only requires vaccination of those employees "who work in-

person in a DOE school setting, DOE building, or charter school setting." There is no rational basis for extending the Mandate to all DOE employees and enforcing it against remote workers. The Mandate is invalid on its face as a result.

796. Moreover, the Mandate is underinclusive, in that it allows infected vaccinated employees to teach in the classrooms even though they can and are spreading COVID-19, while excluding uninfected unvaccinated employees who pose far less risk to anyone.

797. The Mandate is not neutral. Mayor de Blasio routinely dismisses and marginalizes religious objections to vaccines when discussing the Mandate. His comments and context of the passage and implementation of the Mandate show a lack of neutrality and open hostility towards religious objections to vaccination. Mayor de Blasio and other decision-makers went so far as to state that religious objections to vaccination are invalid because they conflict with the Pope's interpretation of scriptures.

798. Moreover, the DOE implemented the Mandate through a facially unconstitutional and discriminatory set of Exemption Standards. Under these standards, they suspended thousands of people for holding religious beliefs that they deemed heretical, or out of line with the discriminatory standards.

799. Adjudicators who decided religious exemption applications and SAMS appeals under the Vaccine Mandate were directed to apply standards set forth in the Exemption Standards

in obeying the Mandate. The Exemption Standards did not cure the Mandate's Constitutional defects. Rather, they highlighted them. On their face, the Exemption Standards violate the Free Exercise Clause in the following ways:

800. First, the Exemption Standards require that exemption requests "must be documented in writing by a religious official (e.g., clergy)." Since the constitutionally required definition of religion is not limited to traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also includes religious beliefs that are new, uncommon, not part of a formal church or sect, or only held by a small number of people, the "clergy writing" requirement requires the exemption adjudicator to refuse exemption requests filed by people who may not be able to supply a "clergy letter" because they do not belong to a formal church or who may belong to a denomination that does not have "clergy" or who, indeed, may possess sincere religious beliefs that are not shared by others. This requirement also excludes persons who may not be able to get a "clergy letter" from religious officials of their own denomination because they possess unorthodox views concerning vaccination that are at odds with the orthodox viewpoint of that particular sect.

801. Secondly, under the Exemption Standards, adjudicators are required to deny any request made by a person who belongs to a denomination of which "the leader ... has spoken publicly in favor of the vaccine" and states that only

applicants from "recognized and established religious organizations" will be granted an exemption. This prohibition violates Free Exercise (and Establishment Clause) principles because it makes religious orthodoxy a requirement of exemption from the Vaccine Mandate. The slogan "heretics have no rights" should be consigned to histories of the Inquisition and religious wars: it has no place in a country in which religious freedom is a fundamental right and establishment of religion is proscribed by our basic law. However, the DOE has enshrined the precept in the provisions of its Exemption Standards.

802. Thirdly, the Exemption Standards require adjudicators to deny exemption applications "where the documentation is readily available (e.g., from an online source)." This entirely irrational requirement seems to be intended to prevent religious exemption applicants from getting assistance from the very first place where everybody goes for information in 2021: Google and the worldwide web. A rule that disqualifies everyone who looks to the internet for information to support their religious objections cannot assist the adjudicator in determining whether or not a particular applicant possesses a genuine religious objection to vaccination: it is vastly overbroad.

803. Fourthly, the Exemption Standards contain a negative pronouncement as to what types of ideas the applicant is not permitted to hold concerning vaccination, namely, those that are "personal, political or philosophical in nature," but no positive guidance as to what types of beliefs and

objections must be considered to be religious beyond adherence to Christian Science and, perhaps, other similar sects. American Constitutional law recognizes that religion includes all aspects of religious observance and practice, as well as belief. *See also* 42 U.S.C.S. § 2000e(j) (defining religion under Title VII and the First Amendment). Many religious individuals may sincerely hold ideas concerning vaccination that qualify as both religious and also as "personal, political or philosophical." The Exemption Standards entirely ignore these well-known Constitutional interpretations and violate the Free Exercise Clause by guiding adjudicators only on how to deny applications under such circumstances, and not on how to discern whether beliefs are also religious and therefore approvable.

804. The UFT Arbitrator's Order recites that the arbitrator personally relied upon submissions from the City's legal team in formulating the specific terms of the order, a task which he was incapable of completing on his own. Thus, the City had a hand in the drafting of the very terms which the order requires DOE employees to apply and enforce.

805. The City also expressly adopted the unconstitutional Exemption Standards as official policy. The arbitrators award states that it will be the City's exclusive policy for granting exemptions to their Mandate, and Mayor de Blasio admitted to the press that the City adopted the standards in the award.

806. The government cannot adopt and enforce an unconstitutional policy. The City and the DOE not only adopted and enforced the policy, but zealously advocated for even more discrimination than the Exemption Standards required.

807. The City and the DOE each have a constitutional duty to respect the religious freedoms of employees, a responsibility which it cannot avoid by outsourcing its unconstitutionally directed exemption denials to a well-connected arbitration service.

808. The DOE violates the Free Exercise Clause every time it applies the terms of the Exemption Standards to deny an individual request for religious exemption. It violates the Free Exercise Clause every time it takes any action with respect to an individual's employment, enforcing the provisions of the Mandate and Exemption Standards or fails to reinstate and remedy the suspensions carried out under the Mandate and Exemption Standards.

809. The Mandate and the Exemption standards are also being applied to individual cases in ways that violate the Free Exercise Clause. On countless occasions, DOE representatives and the exemption adjudicators themselves have made statements in appellate exemption hearings that violate the City's First Amendment responsibilities, including *inter* alia arguments that "as a Christian, you can't have a valid exemption claim, because every Christian leader is in favor of vaccination," claims that clergy letters that assert an individual right to

conscience as an element of orthodox religious faith must be disregarded because the Pope or other denominational leaders support vaccination, and arguments that moral conscience and guidance from prayer or the Holy Spirit are not valid religious sources of objection to vaccination.

810. The Department's system of adjudicating exemption requests also produces arbitrary results. In numerous instances, DOE staff and appellate adjudicators have rendered completely inconsistent decisions in cases involving applicants with substantially similar circumstances who submitted substantially similar evidence in support of their applications.

811. They have even rendered conflicting decisions with regard to the same individual applicants.

812. Religious exemption determinations are, by their very nature, discretionary and must be strictly scrutinized when made by government actors.

813. The Mandate is not "narrowly tailored" to promote the compelling interests of the DOE with the least amount of interference with the religious beliefs and practices of DOE employees. Rather, as implemented by the DOE, it seems to be drafted to inflict maximum harm on persons who believe that vaccination is unholy, by denying the greatest number of exemption applications with the least amount of due process. The requirement that applicants present a clergy letter; the prohibition of exemptions when denominational leaders favor vaccination; the requirement that

applicants be part of a recognized and established religious organization; the identification of a religious group that is presumptively entitled to exemption; the dire consequences of rejection, including termination of employment or mandatory unpaid unemployment on leave, the cramped deadlines for submission of applications, appeals, and elections under the Exemption Standards — none of these is necessary for or even related to the protection of schoolchildren from infection. One wonders whether the Defendants may be using the vaccination issue as a pretext to cut expenses on the backs of teachers and other staff who hold unpopular religious beliefs.

814. The "black box" decisions of the Citywide Appeals Panel, and the purported explanations for those decisions provided by Corporation Counsel, indicate that Citywide Appeals Panel process is also constitutionally flawed. On information and belief, the decision makers are using justifications similar to those that are stated in the Exemption Standards. Their refusal or inability to provide evidence of narrow tailoring of their decisions in all instances, and their profligate use of the "undue hardship" rationale to deny appeals even of DOE employees whose religious objections to vaccination they concede to be genuine and sincerely held, and who are willing to work remotely, show that the Defendants are hiding behind an opaque Citywide Appeals Panel process to mask their refusal to protect religious liberties guaranteed by the Constitution. The panel is simply another sham

intended to enable Defendants to deprive Plaintiffs, and others similarly situated, of their religious freedom.

815. Case in point: while the Citywide Appeals Panel routinely asserts that it would be an undue hardship to grant any accommodation whatsoever to the Plaintiffs or Class members, it would be no burden at all for the City to relieve them of the "no outside employment" requirement while they are in "leave without pay" status. Their failure to go even that far shows that no one on the Panel has given even a fleeting thought about how to lighten the burdens the Defendants impose upon unvaccinated DOE employees who wish to remain faithful to their religious beliefs.

816. The DOE also apparently does not find it to be an undue hardship to allow actively infected teachers to return to school due to the present teacher shortage, while simultaneously finding it to be an undue hardship to allow unvaccinated, uninfected teachers who have tested negative for Covid to return to their positions. The inconsistency in the DOE's approach completely de-legitimizes its undue hardship argument and shows its undeniable targeting of individuals with religious objections to the vaccine, even at the cost of harming the very children its Mandate purports to protect.

817. Defendants are not entitled to rely on Title VII standards that may permit private employers to use a lesser "undue hardship" analyses to deny religious exemption requests to their employees. The First Amendment requires the Court to apply

strict scrutiny to the Vaccine Mandate and its implementation through the Citywide Appeals Panel process, because that process involves an individualized assessment of the reasons why DOE employees refuse to be vaccinated. In an important federal case involving religious exemptions from a COVID-19 mandate imposed by the United States military, the Court found that the applications process imposed by the United States Navy invoked the requirement of strict scrutiny:

> The Navy's mandate is not neutral and generally applicable. First, by accepting individual applications for exemptions, the law invites an individualized assessment of the reasons why a servicemember is not vaccinated. See Pls.' App. 153-55 (NAVADMIN 190/21) (describing the exemption process and authority to grant exemption). Consequently, favoritism is built into the mandate.
>
> *U.S. Navy Seals 1-26 v. Biden*, 4:21-cv-01236, Dkt 66 at 20 - 21 (N.D. Tex. Jan. 3, 2022) (citing *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) – "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions.") (cleaned up).

818. The deleterious effect of unfair denial is that employees whose applications are denied by this corrupt process were required either to elect by October 29, 2021 to resign from their jobs or to

opt-in by November 30, 2021 to an agreement to spend the next ten months without income — and with a waiver of legal rights. Everyone who refused to do so is now subject to termination, with the exception that Plaintiffs' deadline is temporarily suspended, and other DOE employees who have submitted appeals to the Citywide Appeals Panel are subject to rolling deadlines based on the dates of their denials.

819. The Defendants' policies require Plaintiffs and other unvaccinated DOE employees to make this Hobson's Choice, giving up any right of contest in any court. This court has power to stay that choice, and the effects of choices already made pursuant to Defendants' unconstitutional and anti-religious policies, until it is able to make a final determination that the Mandate is unconstitutional on its face and as applied, and it is necessary for the Court to exercise its power in order to prevent manifest injustice to the rights of all of those DOE employees whose exemption applications have been denied by unjust and unconstitutional proceedings (or who refused to make such applications because of the clear unconstitutionality of such proceedings).

WHEREFORE, Plaintiffs ask the Court to declare that the Mandate and the Exemption Standards are invalid on their face and as applied to the Plaintiffs and the Class because they violate the Free Exercise Clause of the First Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely

affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

SECOND CLAIM FOR RELIEF
(Liability under the Establishment Clause By All Plaintiffs Against All Defendants)

820. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint as if fully set forth herein.

821. The Mandate preferences certain religions over others and is not "neutral" when it comes to the various religions practiced by the employees of the DOE. The Defendants' representatives have tried to defend it by declaring that it has the approval of religious leaders of many denominations, and in appellate hearings, the DOE's advocates declare that all the religions of the world support vaccination, with the unique exceptions of Jehovah's Witness and Christian Science adherents, and thus all heretics who disagree should be denied.

822. This is not true. It is also an impermissible attempt by government officials to establish an official orthodoxy on "valid" religious sentiment regarding vaccines.

823. The Mayor and the DOE representatives have gone so far as to repeatedly assert that religious objections to vaccination are invalid because the

Pope says that scripture does not prevent vaccination.

824. The Mandate facially and as applied is expressly designed to financially coerce those who disagree with the Pope on vaccination into getting vaccinated in spite of their sincere religious objections. This is a clearcut violation of the Establishment Clause under the Larson test, the Coercion test and multiple other Establishment Clause tests.

825. The Establishment Clause is America's constitutional bulwark against theocracy. Any official action to prescribe orthodoxy in religion, or to force citizens against their will to profess adherence to such orthodoxy or to act in conformity with it, is a violation of the Establishment Clause.

826. Through the Exemption Standards, the Mandate confirms a preference of the DOE for religious orthodoxy and an intolerance of religious dissent. Its requirement of a clergy letter confers a preference on persons who belong to an organized religion with distinctions between laity and clergy. Its blanket rejection of claims that contradict a denominational leader's published position, as well as members of unrecognized or unestablished religious organizations, treats sincere dissenters in a manner that is inferior to the treatment of persons who hold orthodox beliefs. Its rejection of materials published online betrays a suspicion of religious groups that organize to oppose vaccine mandates. And its explicit acceptance of Christian Science's position

of vaccine opposition privileges adherents to that belief system over others in the exemption process.

827. As a result of these standards for adjudication, adherents to the Christian Science faith and individuals whose individual anti-vaccination beliefs accord with the orthodox statements of clergy in a hierarchical faith receive a government-created advantage in applying for, and receiving, religious exemptions from the Mandate. Others are disfavored as a matter of black-letter government policy.

828. The inclusion of offensive and unconstitutional standards in the Exemption Standards, and the application of such standards in DOE and appellate decisions denying exemption applications, including those of the Plaintiffs and Class members, violate the Establishment Clause by giving members of some religious groups a preference over others.

829. The inclusion of attorneys from the Office of Corporation Counsel, which is the law firm that represents the City of New York and the DOE, and the same law firm that zealously advocated for discrimination in the zoom appeals originally held under the unconstitutional standards, violates the Establishment Clause, as it involves the Defendants not only in the administrative determination of Plaintiffs' claims to religious exemption and accommodation, in which they are required to perform in a non-partisan role, but also in the process of defending those very same denials in adversary judicial proceedings. In the

course of this work Corporation Counsel is required to determine what is, and is not, religious, and to apply the standards that are determined by the Defendants at every step of the process to the evaluation and determination of Plaintiffs' claims and to the opposition of such claims in court. This impermissibly and excessively entangles the Defendants in religious affairs.

WHEREFORE, Plaintiffs ask the Court to declare that the Mandate and the Exemption Standards are invalid on their face and as applied to the Plaintiffs and the Class because they violate the Establishment Clause of the First Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Vaccine Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

THIRD CLAIM FOR RELIEF
(Deprivation of Procedural Due Process By All Plaintiffs Against All Defendants)

830. Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint as if fully set forth herein.

831. The Constitutional right of procedural due process provided in the Fourteenth Amendment encompasses the right to notice, an opportunity to

be heard, and a fair, unbiased decision sufficient to adequately protect the rights at stake.

832. The Mandate, both facially and as applied, denies Plaintiffs and other DOE employees a meaningful right to be heard by leaving them in the position of not knowing what material to present to the adjudicator to make a decision or what the grounds for appeal might be.

833. Under the original Exemption Standards, no notice was given to articulate the reasons that applications were denied. Rather, arbitrary and capricious autogenerated notices were provided that failed to individually assess each applicant or provide meaningful evaluation of their request for religious accommodation.

834. The Citywide Panel has not cured the problem. First, as a matter of law, Plaintiffs have already proven a prima facie case of being discriminated against.

835. The burden then shifts to the Defendants to prove that they have valid nondiscriminatory reasons that can cure the problem. This burden was not met for any of the Named Plaintiffs. Rather, the Citywide Panel simply rubber-stamped Defendants' original decisions with no explanation or care given to each applicant's application.

836. The hasty emails sent three days after Plaintiffs applied for injunctive relief against the "final" denials issued on December 10, 2021 do not cure the issue either.

837. The emails revealed that the Panel failed thoroughly to review the applications, applied improper and unconstitutional standards, and failed to provide an opportunity to be heard. Rather, they were simply cherry-picking facts (or making them up), looking for reasons to deny each Plaintiff in order to justify their prior open discrimination.

838. The decision makers were inherently biased and conflicted, and given the property interests at stake (including tenure and substantial sums of money and other property rights belonging to the Plaintiffs and other persons similarly situated) the process was woefully inadequate.

839. For these reasons, the lack of standards in the Mandate as applied by the DOE renders the religious exemption process unconstitutionally vague and in contravention of the procedural due process clause of the Fourteenth Amendment.

840. The Mandate sets no lawful standards by which the Plaintiffs and other DOE employees may compare the Exemption Standards or the decisions made by DOE employees or agents with respect to their individual exemption applications. To the contrary, the Mandate permitted the Defendants to make each succeeding decision in Plaintiffs' cases without any procedural protections, without right of rebuttal to the Defendants' input, and without application of Constitutionally-mandated adjudication standards. Since their exemption denials were imposed pursuant to the Mandate, its vagueness deprived them of their

Constitutional right to due process of law under the Fourteenth Amendment.

WHEREFORE, Plaintiffs ask the Court to declare that the Mandate and Enforcement Standards are invalid facially and as applied because they are unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

FOURTH CLAIM FOR RELIEF
(Hybrid Rights Claim: Violation of Substantive Due Process Rights Guaranteed by The Fourteenth Amendment to the United States Constitution And First Amendment Rights Claims By *Kane* Plaintiffs and Class Against all Defendants)

841. The *Kane* Plaintiffs reallege and incorporate by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

842. Plaintiffs have a protected substantive due process right to be free from the forced or coerced administration of medical products, especially medical products that are experimental or could cause them harm.

843. This right is also a fundamental human right, so widely recognized as to be defined by the world courts, the laws of nations, and by the Second Circuit Court of Appeals and the Supreme Court of the United States as a *Jus Cogens* norm.

844. As well, or in the alternative, this right to refuse experimental medicine is secured by the Due Process Clause of the United States Constitution and corresponding provisions in the New York State Constitution, international protocols and treaties adopted by and entered into by the United States, and by the laws and regulations of the United States and New York, to be free from burdens on rights deemed "fundamental" in nature.

845. All of the available COVID-19 vaccines are still experimental in nature.

846. They were rushed to market in a matter of months, skipping years of the normally required testing process.

847. The only available vaccines in this country are available under Emergency Use Authorization, which forbids compulsory mandates.

848. The FDA has approved one vaccine — Pfizer's "Comernaty" vaccine — but Comernaty is not available in New York, rendering this fact meaningless for all operative purposes.

849. Even if Comernaty was available, or other vaccines were licensed, these vaccines are all still undergoing clinical trials and are still blatantly experimental in nature.

850. Under international law, national law, state law and local law, experimental medical products cannot be mandated.

851. All vaccines, including these ones, can cause harm to some people. People with natural immunity face a greater risk of harm from COVID-19 vaccines as do certain demographic groups represented in this class — including men under twenty-five and people with certain pre-existing conditions.

852. Under the United States Constitution, people also have a fundamental right to refuse any medicine, whether it is experimental or not, even lifesaving medication.

853. Considering the serious rights at stake, and the dearth of evidence to show this policy is necessary or effective in light of the fact that the vaccinated can transmit disease and have inferior immunity to those who have caught the disease, there is no rational reason to mandate vaccines for school employees. Given that the vaccines are still experimental, this mandate shocksthe conscience.

854. The Vaccine Mandate is not narrowly tailored to impose the least restrictive burdens on fundamental rights. Rather, it is intentionally tailored to create an outsized burden in order to coerce participation in experimental medicine for no apparent reason.

855. Moreover, Plaintiffs are entitled to strict scrutiny review of their Free Exercise claims because this case is a hybrid rights case, and the mandate

burdens not only Plaintiffs' First Amendment rights but also burdens Plaintiff's fundamental right to refuse experimental medicine.

856. Plaintiffs have no adequate remedy at law available against defendants for the injuries and the irreparable harm they imminently suffer as a direct result of the Vaccine Mandate.

WHEREFORE, Plaintiffs ask the Court to declare that the Vaccine Mandate and Enforcement Standards are invalid facially and as applied because they violate the substantive due process rights of all DOE employees, as well as hybrid rights under the First and Fourteenth Amendment, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Vaccine Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

FIFTH CLAIM FOR RELIEF
(Violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the New York State Constitution — By *Kane* Plaintiffs Against all Defendants)

857. On behalf of themselves and the Class, the *Kane* Plaintiffs reallege and incorporate by reference all paragraphs of this Complaint as if fully set forth herein.

858. By their actions, as described herein, Defendants, acting under color of statute, ordinance, regulation, custom, or usage, subjected Plaintiffs to the deprivation of the rights, privileges, or immunities secured by the United States Constitution and New York Constitution.

859. The Mandate violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (and the corresponding provision of the New York State Constitution) because it discriminates against unvaccinated people who need to exercise their fundamental rights to refuse experimental vaccines that conflict with their sincerely held religious beliefs.

860. As applied through the Exemption Standards and other official policy of the DOE, the Mandate also discriminates against minority religious viewpoints.

861. There is no rational basis for this discrimination. Plaintiffs pose no more danger to others than a person who is vaccinated. Both groups are equally able to spread COVID-19.

862. The policy of discriminating based on an individual's willingness or ability to subject themselves to medical experimentation or to give up their deeply held religious beliefs shocks the conscience and cannot be justified as relating to any rational, permissible goal. It is notgrounded in science, but rather in the effort to coerce people into waiving their protected rights.

863. Plaintiffs face the loss of their employment, ability to practice their vocation, contractual rights and violation of civil rights and liberties as a result of the discriminatory regulation.

864. Moreover, the policies adopted by the DOE facially discriminate against Plaintiffs and their similarly situated class members on the basis of religion by refusing to afford accommodations to people who hold minority or unorthodox religious viewpoints.

865. The acts or omissions of Defendants were conducted within the scope of their official duties and employment under color of law.

866. While performing those duties, Defendants intentionally deprived Plaintiffs of securities, rights, privileges, liberties, and immunities secured by the Constitution of the United States of America and the State of New York by arbitrarily discriminating against them based on medical status, religious beliefs, and creed.

WHEREFORE, Plaintiffs ask the Court to find that the Vaccine Mandate and Enforcement Standards are invalid facially and as applied because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal

damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

SIXTH CLAIM FOR RELIEF
(Violation of the Supremacy Clause of the United States Constitution and Violations of Federal Statutory Provisions Governing EUA products — By *Kane* Plaintiffs Against all Defendants)

867. The *Kane* Plaintiffs reallege and incorporate by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

868. Federal laws and regulations governing the approval and administration of medical products preempt all contrary or inconsistent laws of the states and/or local governments.

869. The Vaccine Mandate is patently contrary to United States law, and thus preempted and invalid.

870. Title 21 of the United States Code, Section 360bbb-3(e)(1)(A)(ii), and regulations and internal protocols of the United States Food and Drug Administration promulgated thereunder, provide in relevant part that all individuals to whom an investigational product is to be administered under an Emergency Use Authorization be informed "of the option to accept or refuseadministration of the product."

871. Because all available vaccines in New York are each investigational products, only permitted for use under an Emergency Use Authorization, the laws and regulations of the United States

prohibit state and local governments from requiring them for any person who does not consent to their administration, including Plaintiffs.

872. Plaintiffs do not consent to being vaccinated with an experimental vaccine, especially one which violates their sincerely held religious beliefs.

873. As well, Title 21, Part 50 of the Code of Federal Regulations governs the protection of human subjects in the conduct of all clinical investigations regulated by the U.S. Food and DrugAdministration.

874. 21 C.F.R. § 50.20 provides that, "[e]xcept as provided in §§ 50.23 and 50.24, no investigator may involve a human being as a subject in research covered by these regulations unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative."

875. EUA vaccines and the licensed Comirnaty vaccine are all still being subjected to clinical trials. Population-wide surveillance and data are still being gathered for all of them, whether the "test subjects" consent or not. Whether licensed or not, all available COVID-19 vaccines are classified as experimental medicine.

876. None of the exemptions provided in sections 50.23 and 50.24 apply to Plaintiffs.

877. Plaintiffs are competent to make a decision concerning medical treatment and experimentation and will not consent.

878. Accordingly, the Vaccine Mandate also violates federal law and regulations governing the administration of experimental medicine and is thus preempted.

879. Plaintiffs have no adequate remedy at law available against Defendants for the injuries and the irreparable harms they are suffering as a direct result of the Mandate.

WHEREFORE, Plaintiffs respectfully request that the Court enter a declaratory judgment that the Vaccine Mandate violates and is preempted by the laws and regulations of the United States governing the administration of investigational medical products, for an injunction prohibiting enforcement of the Mandate, for attorneys' fees, costs pursuant to 42 U.S.C. § 1988, and such further relief as the Court deems just.

SEVENTH CLAIM FOR RELIEF
(Violation of Matthew Keil's Constitutional and Statutory Rights)

880. Plaintiff Matthew Keil realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

881. Factual allegations concerning Keil's claims for relief are set forth above at paragraphs 495 - 515 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back

pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

EIGHTH CLAIM FOR RELIEF
(Violation of John De Luca's Constitutional and Statutory Rights)

882. Plaintiff John De Luca realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

883. Factual allegations concerning De Luca's claims for relief are set forth above at paragraphs 516 - 539 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

NINTH CLAIM FOR RELIEF
(Violation of Sasha Delgado's Constitutional and Statutory Rights)

884. Plaintiff Sasha Delgado ("Delgado") realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

885. Factual allegations concerning Delgado's claims for relief are set forth above at paragraphs 540 - 573 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TENTH CLAIM FOR RELIEF
(Violation of Dennis Strk's Constitutional and Statutory Rights)

886. Plaintiff Dennis Strk realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

887. Factual allegations concerning Strk's claims for relief are set forth above at paragraphs 574 - 598 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

ELEVENTH CLAIM FOR RELIEF
(Violation of Sarah Buzaglo's Constitutional and Statutory Rights)

888. Plaintiff Sarah Buzaglo realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

889. Factual allegations concerning Buzaglo's claims for relief are set forth above at paragraphs 599 - 632 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWELFTH CLAIM FOR RELIEF

(Violation of Edward (Eli) Weber's Constitutional and Statutory Rights)

890. Plaintiff Edward (Eli) Weber realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

891. Factual allegations concerning Weber's claims for relief are set forth above at paragraphs 633 - 657 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a

permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

THIRTEENTH CLAIM FOR RELIEF

(Violation of Carolyn Grimando's Constitutional and Statutory Rights)

892. Plaintiff Carolyn Grimando realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

893. Factual allegations concerning Grimando's claims for relief are set forth above at paragraphs 658 - 689 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

FOURTEENTH CLAIM FOR RELIEF

(Violation of Amoura Bryan's Constitutional and Statutory Rights)

894. Plaintiff Amoura Bryan realleges and incorporates by reference the allegations recited

in all paragraphs of this Complaint as if fully set forth herein.

895. Factual allegations concerning Bryan's claims for relief are set forth above at paragraphs 690 - 731 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

FIFTEENTH CLAIM FOR RELIEF

(Violation of Joan Giammarino's Constitutional and Statutory Rights)

896. Plaintiff Joan Giammarino realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

897. Factual allegations concerning Giamarrino's claims for relief are set forth above at paragraphs 732 - 756 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service

and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

SIXTEENTH CLAIM FOR RELIEF

(Violation of Benedict LoParrino's Constitutional and Statutory Rights)

898. Plaintiff Benedict LoParrino realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

899. Factual allegations concerning LoParrino's claims for relief are set forth above at paragraphs 757 - 781 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

SEVENTEENTH CLAIM FOR RELIEF

(Violation of Michael Kane's Constitutional and Statutory Rights)

900. Plaintiff Michael Kane realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

901. Factual allegations concerning Mr. Kane's claims for relief are set forth above at paragraphs 218 - 240 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

EIGHTEENTH CLAIM FOR RELIEF

(Violation of William Castro's Constitutional and Statutory Rights)

902. Plaintiff William Castro realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

903. Factual allegations concerning Mr. Castro's claims for relief are set forth above at paragraphs 241 - 283 of this Complaint.

WHEREFORE, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

NINETEENTH CLAIM FOR RELIEF

(Violation of Margaret Chu's Constitutional and Statutory Rights)

904. Plaintiff Margaret Chu realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

905. Factual allegations concerning Ms. Chu's claims for relief are set forth above at paragraphs 284 - 307 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTIETH CLAIM FOR RELIEF

(Violation of Heather Clark's Constitutional and Statutory Rights)

906. Plaintiff Heather Clark realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

907. Factual allegations concerning Ms. Clark's claims for relief are set forth above at paragraphs 308- 325of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a

permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-FIRST CLAIM FOR RELIEF

(Violation of Stephanie Di Capua's Constitutional and Statutory Rights)

908. Plaintiff Stephanie Di Capua realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

909. Factual allegations concerning Ms. Di Capua's claims for relief are set forth above at paragraphs 326 - 353 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-SECOND CLAIM FOR RELIEF

(Violation of Robert Gladding's Constitutional and Statutory Rights)

910. Plaintiff Robert Gladding realleges and incorporates by reference the allegations recited

in all paragraphs of this Complaint as if fully set forth herein.

911. Factual allegations concerning Mr. Gladding's claims for relief are set forth above at paragraphs 354 — 374 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-THIRD CLAIM FOR RELIEF

(Violation of Nwakaego Nwaifejokwu's Constitutional and Statutory Rights)

912. Plaintiff Nwakaego Nwaifejokwu realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

913. Factual allegations concerning Mrs. Nwaifejokwu's claims for relief are set forth above at paragraphs 375 — 395 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service

and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-FOURTH CLAIM FOR RELIEF

(Violation of Ingrid Romero's Constitutional and Statutory Rights)

914. Plaintiff Ingrid Romero realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

915. Factual allegations concerning Mrs. Romero's claims for relief are set forth above at paragraphs 396 - 415 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-FIFTH CLAIM FOR RELIEF

(Violation of Trinidad Smith's Constitutional and Statutory Rights)

916. Plaintiff Trinidad Smith realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

917. Factual allegations concerning Mrs. Smith's claims for relief are set forth above at paragraphs 416 - 447 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-SIXTH CLAIM FOR RELIEF

(Violation of Natasha Solon's Constitutional and Statutory Rights)

918. Plaintiff Natasha Solon realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

919. Factual allegations concerning Ms. Solon's claims for relief are set forth above at paragraphs 448 - 464 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-SEVENTH CLAIM FOR RELIEF

(Violation of Amaryllis Ruiz-Toro's Constitutional and Statutory Rights)

920. Plaintiff Amaryllis Ruiz-Toro realleges and incorporates by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

921. Factual allegations concerning Mrs. Toro's claims for relief are set forth above at paragraphs 465 - 494 of this Complaint.

Wherefore, Plaintiff asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

TWENTY-EIGHTH CLAIM FOR RELIEF

(Liability Under 42 U.S.C. Sec. 1983 by all Plaintiffs against all Defendants)

922. Plaintiffs reallege and incorporate by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

923. Defendants NYC and DOE acted under the color of state law, and at the direction of the individual Defendants, when they imposed the Vaccine Mandate, cooperated in the creation of the Exemption Standards and acceded thereto, enforced and applied the terms of the Vaccine

Mandate and the Exemption Standards and denied Plaintiffs' requests for religious exemption and appeals from such denials.

924. The Plaintiffs have been, and are being, deprived by the activities of the Defendants of their right effectively to apply for and receive religious exemptions from the vaccination requirements of the Vaccine Mandate. Their right to religious freedom is being substantially and unfairly burdened.

925. Defendants' Vaccine Mandate created a system of unconstitutional and unfair exemption application procedures that are designed to deny the religious exemption applications of as many people as possible, including Plaintiffs. Through the creation, application and enforcement of the standards and procedures set forth in the Exemption Standards, Defendants have ensured that the Plaintiffs, and many others, have been denied a fair adjudication and accommodation of their religious freedom rights.

926. The Plaintiffs did not at any point or in any way effectively consent to the unconstitutional actions of the Defendants, nor have they ever effectively waived their civil right to demand in court that the Defendants respect their First Amendment freedoms.

927. On information and belief, Defendants Commissioner Chokshi and former NYC Schools Chancellor Meisha Porter, or subordinates directly subject to their control, formulated the Vaccine Mandate that NYC and the DOE have enforced against the Plaintiffs, and conspired in

the establishment of unconstitutional standards for the consideration of Plaintiffs' religious exemption requests.

928. Plaintiffs have suffered damages, including without limitation lost salaries, lost potential earnings, loss of health insurance coverage, loss of seniority, loss of employment and deprivation of their right to religious freedom.

WHEREFORE, Plaintiffs request judgment declaring that the Vaccine Mandate, as implemented by the Exemption Standards and the Citywide Appeals Panel process, is void and unenforceable as against them and all other persons similarly situated, an award of damages as further described above in an amount to be determined by the Court, or nominal damages, and an award requiring Defendants to pay Plaintiffs' legal fees and expenses in this matter pursuant to 42 U.S.C. sec. 1983.

TWENTY-NINTH CLAIM FOR RELIEF

Violation of the New York City Human Rights Law by all Plaintiffs against All Defendants

929. Plaintiffs reallege and incorporate by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

930. In 2005, the City Council amended the administrative code to emphasize that the New York City Human Rights Law's uniquely broad and remedial purposes, and again in 2016 to clarify its intent to foster jurisprudence that maximally protects civil rights in all circumstances. The Second Circuit has therefore construed this statute "more liberally than its

State and federal counterparts." *Makinen v. City of NY*, 857 F3d 491, 495 (2d Cir 2017) (internal quotation marks omitted); *Albunio v. City of New York*, 16 N.Y.3d 472, 477-78, 947 N.E.2d 135, 922 N.Y.S.2d 244 (2011) (requiring the NYCHRL to be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible").

931. Defendants have adopted an unlawful discriminatory practice by imposing the Vaccine Mandate upon Plaintiffs and Class Members as a condition of retaining their employment, while denying their religious exemption requests, because complying with the Mandate would require Plaintiffs and Class Members to violate their sincerely held religious beliefs and practices.

932. Plaintiffs and all similarly situated Class Members have sincere religious beliefs against vaccination. They alerted the Defendants that they are unable to be vaccinated because of these beliefs, but were nonetheless suspended or segregated or otherwise adversely impacted because Defendants refused to accommodate their sincerely held religious beliefs.

933. Plaintiffs and Class Members were furthermore then harassed, retaliated against and further discriminated against as a result of their sincerely held religious beliefs and creed.

934. Defendants engaged in no bona fide effort to demonstrate that an undue hardship exists. Despite the fact that Plaintiffs' and Class Members' initial denials stated that their applications were reviewed under the Arbitration

Award and applicable law, Plaintiffs' and Class Members' initial denials stated that accommodating them would be an "undue hardship (i.e. more than a minimal burden) on the DOE and its operations."

935. Applicable law includes the New York City Human Rights Law.

936. "Importantly, in contrast to Title VII which does not define 'undue hardship' in the context of religious accommodation, the NYCHRL adopts a rigorous definition of an employer's 'undue hardship' as 'an accommodation requiring significant expense or difficulty,' and mandating that '[t]he employer shall have the burden of proof to show such hardship.'" *Id.* (quoting N.Y.C. Admin. Code § 8-107(3)(b)).

937. Therefore, the DOE's claim that accommodating Plaintiffs would be more than a minimal burden on the DOE incorrectly states the standard for undue hardship and cannot constitute a valid reason for denying Plaintiffs' requests.

938. Plaintiffs' and Class members' appeal denials did not even attempt to state an undue hardship, and certainly did not constitute a bona fide effort to demonstrate an undue burden. They were merely rubber-stamped denials from the arbitrator that provided no elaboration whatsoever.

939. Plaintiffs' and Class Members' third denials, the result of the so-called "fresh consideration" of the City-wide panel, again stated undue

hardship, but made no attempt to distinguish why it was an undue hardship under Title VII and why it was an undue hardship under the New York City Rights Law—which is what the law requires.

940. Indeed, although Title VII's analytical framework is applicable to the NYCHRL, claims under the City law must be reviewed 'independently from and more liberally' than their federal counterparts." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009) (citing The Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005)).

941. Accommodating Plaintiffs and Class members will not result in their inability to perform the essential functions of their positions, as most are willing to engage in masking, social distancing, and periodic testing. Further, Plaintiffs taught their students remotely during the height of the pandemic.

942. Defendants have not stated a cost of accommodating Plaintiffs, including the costs of loss of productivity and of retaining or hiring employees. In fact, Defendants' cost of *not* accommodating Plaintiffs itself constitutes a significant expense or difficulty on the DOE, as the DOE is currently facing a teaching shortage and has invited teachers who have tested positive for Covid-19 back into the classrooms, when Plaintiffs are ready and willing to resume their teaching positions.

WHEREFORE, Plaintiffs ask the Court to declare that the Defendants have violated their rights and the rights of Class Members under the New York City

Human Rights Law, to permanently enjoin the enforcement of the Mandate and the Exemption Standards against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

THIRTIETH CLAIM FOR RELIEF

Violation of the New York State Human Rights Law by all Plaintiffs against All Defendants

943. Plaintiffs reallege and incorporate by reference the allegations recited in all paragraphs of this Complaint as if fully set forth herein.

944. Plaintiffs reallege and incorporate by reference the allegations recited in paragraphs of this Complaint as if fully set forth herein.

945. Defendants have adopted an unlawful discriminatory practice by imposing the Vaccine Mandate upon Plaintiffs and Class Members as a condition of retaining their employment, while denying their religious exemption requests, because complying with the Mandate would require Plaintiffs and Class Members to violate their sincerely held religious beliefs and practices.

946. Plaintiffs and all similarly situated Class Members have sincere religious beliefs against vaccination. They alerted the Defendants that they are unable to be vaccinated because of these

beliefs, but were nonetheless suspended or segregated or otherwise adversely impacted because Defendants refused to accommodate their sincerely held religious beliefs.

947. Plaintiffs and Class Members were furthermore then harassed, retaliated against and further discriminated against as a result of their sincerely held religious beliefs and creed.

948. Defendants engaged in no bona fide effort to demonstrate that an undue hardship exists. Despite the fact that Plaintiffs' and Class Members' initial denials stated that their applications were reviewed under the Arbitration Award and applicable law, Plaintiffs' and Class Members' initial denials stated that accommodating them would be an "undue hardship (i.e. more than a minimal burden) on the DOE and its operations."

949. Applicable law includes the New York State Human Rights Law, which states that an undue hardship exists when the accommodation would cause significant expense or difficulty, not "more than a minimal burden" (which is the standard under Title VII).

950. Therefore, the DOE's claim that accommodating Plaintiffs would be more than a minimal burden on the DOE incorrectly states the standard for undue hardship and cannot constitute a valid reason for denying Plaintiffs' requests.

951. Plaintiffs' and Class members' appeal denials did not even attempt to state an undue hardship,

and certainly did not constitute a bona fide effort to demonstrate an undue burden. They were merely rubber-stamped denials from the arbitrator that provided no elaboration whatsoever.

952. Plaintiffs' and Class Members' third denials, the result of the so-called "fresh consideration" of the City-wide panel, again stated undue hardship, but made no attempt to distinguish why it was an undue hardship under Title VII, why it was an undue hardship under the New York State Human Rights Law.

953. Accommodating Plaintiffs and Class members will not result in their inability to perform the essential functions of their positions, as most are willing to engage in masking, social distancing, and periodic testing. Further, Plaintiffs taught their students remotely during the height of the pandemic.

954. Defendants have not stated a cost of accommodating Plaintiffs, including the costs of loss of productivity and of retaining or hiring employees. In fact, Defendants' cost of *not* accommodating Plaintiffs itself constitutes a significant expense or difficulty on the DOE, as the DOE is currently facing a teaching shortage and has invited teachers who have tested positive for Covid-19 back into the classrooms, when Plaintiffs are ready and willing to resume their teaching positions.

WHEREFORE, Plaintiffs ask the Court to declare that the Defendants have violated their rights and the rights of Class Members under the New York State

Human Rights Law, to permanently enjoin the enforcement of the Mandate and the Exemption Standards against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

REQUEST FOR RELIEF

955. Plaintiffs respectfully ask this Court for the following relief:

1. Certifying the proposed Class pursuant to Rule 23;

2. On the First Claim for Relief (paragraphs 782 through 820 hereof), Plaintiffs ask the Court to declare that the Mandate and the Exemption Standards are invalid on their face and as applied to the Plaintiffs and the Class because they violate the Free Exercise Clause of the First Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to

Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

3. On the Second Claim for Relief (paragraphs 821 through 830 hereof), Plaintiffs ask the Court to declare that the Mandate and the Exemption Standards are invalid on their face and as applied to the Plaintiffs and the Class because they violate the Establishment Clause of the First Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Vaccine Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

4. On the Third Claim for Relief (paragraphs 831 through 841 hereof), Plaintiffs ask the Court to declare that the Mandate and Enforcement Standards are invalid facially and as applied because they are unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with

DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

5. On the Fourth Claim for Relief (paragraphs 842 through 857 hereof), Plaintiffs ask the Court to declare that the Mandate and Enforcement Standards are invalid facially and as applied because they violate the substantive due process rights of all DOE employees, as well as hybrid rights under the First and Fourteenth Amendment, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Vaccine Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

6. On the Fifth Claim for Relief (paragraphs 858 through 867 hereof), Plaintiffs ask the Court to find that the Mandate and Enforcement Standards are invalid facially and as applied because they violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, to permanently enjoin their enforcement against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all

employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members, and to award attorney's fees and costs to Plaintiffs.

7. On the Sixth Claim for Relief (paragraphs 868 through 880 hereof), Plaintiffs respectfully request that the Court enter a declaratory judgment that the Mandate violates and is preempted by the laws and regulations of the United States governing the administration of investigational medical products, for an injunction prohibiting enforcement of the Mandate, for attorneys' fees, costs pursuant to 42 U.S.C. § 1988, and such further relief as the Court deems just.

8. On the Seventh Claim for Relief (paragraphs 881 through 882 hereof), Plaintiff Matthew Keil asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

9. On the Eighth Claim for Relief (paragraphs 883 through 884 hereof), Plaintiff John De

Luca asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

10. On the Ninth Claim for Relief (paragraphs 885 through 886 hereof), Plaintiff Sasha Delgado asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

11. On the Tenth Claim for Relief (paragraphs 887 through 888 hereof), Plaintiff Dennis Strk asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

12. On the Eleventh Claim for Relief (paragraphs 889 through 890 hereof), Plaintiff Sarah Buzaglo asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

13. On the Twelfth Claim for Relief (paragraphs 891 through 892 hereof), Plaintiff Edward (Eli) Weber asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

14. On the Thirteenth Claim for Relief (paragraphs 893 through 894 hereof), Plaintiff Carolyn Grimando asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and

CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

15. On the Fourteenth Claim for Relief (paragraphs 895 through 896 hereof), Plaintiff Amoura Bryan asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

16. On the Fifteenth Claim for Relief (paragraphs 897 through 898 hereof), Plaintiff Joan Giammarino asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

17. On the Sixteenth Claim for Relief (paragraphs 899 through 900 hereof), Plaintiff Benedict LoParrino asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment

status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

18. On the Seventeenth Claim for Relief (paragraphs 901 through 902 hereof), Plaintiff Michael Kane asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

19. On the Eighteenth Claim for Relief (paragraphs 903 through 904 hereof), Plaintiff William Castro asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

20. On the Nineteenth Claim for Relief (paragraphs 905 through 906 hereof), Plaintiff Margaret Chu asks this Court to issue declaratory and injunctive relief including a

permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

21. On the Twentieth Claim for Relief (paragraphs 907 through 908 hereof), Plaintiff Heather Clark asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

22. On the Twenty-First Claim for Relief (paragraphs 909 through 910 hereof), Plaintiff Stephanie Di Capua asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

23. On the Twenty- Second Claim for Relief (paragraphs 911 through 912 hereof), Plaintiff Robert Gladding asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

24. On the Twenty-Third Claim for Relief (paragraphs 913 through 914 hereof), Plaintiff Nwakaego Nwaifejokwu asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

25. On the Twenty-Fourth Claim for Relief (paragraphs 915 through 916 hereof), Plaintiff Ingrid Romero asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in

Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

26. On the Twenty-Fifth Claim for Relief (paragraphs 917 through 918 hereof), Plaintiff Trinidad Smith asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

27. On the Twenty- Sixth Claim for Relief (paragraphs 919 through 920 hereof), Plaintiff Natasha Solon asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

28. On the Twenty- Seventh Claim for Relief (paragraphs 921 through 922 hereof), Plaintiff Amaryllis Ruiz-Toro asks this Court to issue declaratory and injunctive relief including a permanent injunction forbidding the Defendants from enforcing the Mandate against Plaintiff, reinstating Plaintiff to active

employment status, awarding back pay and nominal, actual and compensatory damages, restoring all seniority, tenure rights, Years in Service and CAR and awarding attorney's fees, costs and expenses to the Plaintiff.

29. On the Twenty-Eighth Claim for Relief (paragraphs 923 through 929 hereof), Plaintiffs request judgment declaring that the Vaccine Mandate, as implemented by the Exemption Standards and the Citywide Appeals Panel process, is void and unenforceable as against them and all other persons similarly situated, an award of damages as further described above in an amount to be determined by the Court, or nominal damages, and an award requiring Defendants to pay Plaintiffs' legal fees and expenses in this matter pursuant to 42 U.S.C. sec. 1983.

30. On the Twenty-Ninth Claim for Relief (paragraphs 930 through 943 hereof), Plaintiffs request judgment declaring that the Defendants have violated their rights and the rights of Class Members under the New York City Human Rights Law, to permanently enjoin the enforcement of the Mandate and the Exemption Standards against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class

Members and Class Members, and to award attorney's fees and costs to Plaintiffs.

31. On the Thirtieth Claim for Relief (paragraphs 944 through 955 hereof), Plaintiffs request judgment declaring that the Defendants have violated their rights and the rights of Class Members under the New York State Human Rights Law, to permanently enjoin the enforcement of the Mandate and the Exemption Standards against employees asserting sincere religious objection to vaccination, and to order the DOE to restore all employees who have been adversely affected by the Mandate or the Exemption Standards to employment with DOE with back pay and restoration of time in service, seniority and tenure rights, to award actual, consequential and nominal damages to Plaintiffs and Class Members and Class Members, and to award attorney's fees and costs to Plaintiffs.

32. On all Claims for Relief: awarding relief to the Class equivalent to the relief requested for the individual named Plaintiffs identified herein.

33. On all Claims for Relief: awarding costs of suit; investigation costs; payment of reasonable attorneys' fees; declaratory relief, injunctive relief, and such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs and the Class respectfully demand a trial by jury for all issues so triable in this action.

Dated: New York, New York
January 10, 2021

Respectfully submitted,

NELSON MADDEN BLACK LLP

Attorneys for Keil Plaintiffs and the Class

/s/ Jonathan R. Nelson
By: Jonathan Robert Nelson (JN8796)
475 Park Avenue South, Suite 2800
New York, NY 10016
(212) 382-4300
jnelson@nelsonmaddenblack.com

GIBSON LAW FIRM, PLLC

/s/ Sujata S. Gibson
Sujata S. Gibson
Attorney for Kane Plaintiffs and the Class
Gibson Law Firm, PLLC
408 W Martin Luther King, Jr. Street
Ithaca, NY 14850
(607)327-4125
sujata@gibsonfirm.law

Mary Holland, Esq., *Of Counsel*

Michael Howard Sussman, Esq.,
Of Counsel

VERIFICATION

I, Heather Clark, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED AMENDED JOINT COMPLAINT are true and correct based on my personal knowledge (unless otherwise indicated) and if called upon to testify as to their truthfulness, I would and could do so. I declare under penalties of perjury, under the law of the United States of America, that the foregoing statements are true and correct.

Dated: 01/10/2022

Signed: Heather J. Clark
Heather Clark

VERIFICATION

I, Stephanie di Capua, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED AMENDED JOINT COMPLAINT are true and correct based on my personal knowledge (unless otherwise indicated) and if called upon to testify as to their truthfulness, I would and could do so. I declare under penalties of perjury, under the law of the United States of America, that the foregoing statements are true and correct.

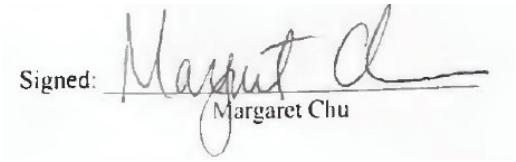
Dated: 01/10/2022

Signed: Stephanie di Capua
Stephanie di Capua

VERIFICATION

I, Margaret Chu, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED AMENDED JOINT COMPLAINT are true and correct based on my personal knowledge (unless otherwise indicated) and if called upon to testify as to their truthfulness, I would and could do so. I declare under penalties of perjury, under the law of the United States of America. that the foregoing statements are true and correct.

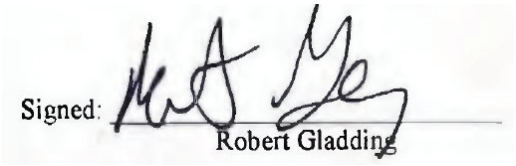
Dated: 01/10/2022

Signed: 
Margaret Chu

VERIFICATION

I, Robert Gladding, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED AMENDED JOINT COMPLAINT are true and correct based on my personal knowledge (unless otherwise indicated) and if called upon to testify as to their truthfulness, I would and could do so. I declare under penalties of perjury, under the law of the United States of America, that the foregoing statements are true and correct.

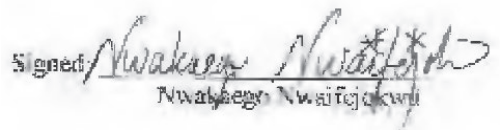
Dated: 01/10/2022

Signed: 
Robert Gladding

VERIFICATION

I, Nwakaego Nwaifejokwu, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED AMENDED JOINT COMPLAINT are true and correct based on my personal knowledge (unless otherwise indicated) and if called upon to testify as to their truthfulness, I would and could do so, I declare under penalties of perjury, under the laws of the United States of America, that the foregoing statements are true and correct.

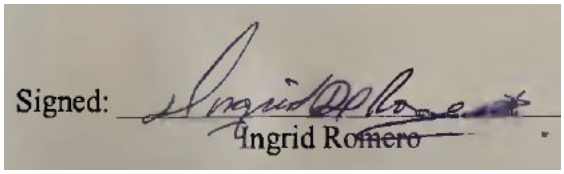
Dated: 01/10/2022



VERIFICATION

I, Ingrid Romero, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED AMENDED JOINT COMPLAINT are true and correct based on my personal knowledge (unless otherwise indicated) and if called upon to testify as to their truthfulness, I would and could do so. I declare under penalties of perjury, under the law of the United States of America, that the foregoing statements are true and correct.

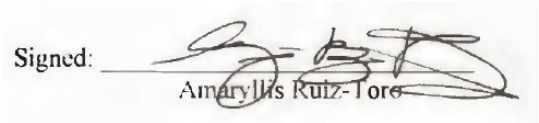
Dated: 01/10/2022



VERIFICATION

I, Amaryllis Ruiz-Toro, am over the age of 18 and am a Plaintiff in this action. The allegations that pertain to me in this VERIFIED AMENDED JOINT COMPLAINT are true and correct based on my personal knowledge (unless otherwise indicated) and if called upon to testify as to their truthfulness, I would and could do so. I declare under penalties of perjury, under the law of the United States of America, that the foregoing statements are true and correct.

Dated: 0l/10/2022

Signed: 
Amaryllis Ruiz-Toro

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N. Y. 10007

EMERGENCY EXECUTIVE ORDER NO. 225

August 16, 2021

KEY TO NYC: REQUIRING COVID-19 VACCINATION FOR INDOOR ENTERTAINMENT, RECREATION, DINING AND FITNESS SETTINGS

WHEREAS, the COVID-19 pandemic has severely impacted New York City and its economy, and is addressed effectively only by joint action of the City, State, and Federal governments;

WHEREAS, the state of emergency to address the threat and impacts of COVID-19 in the City of New York first declared in Emergency Executive Order No. 98, and extended most recently by Emergency Executive Order No. 220, remains in effect;

WHEREAS, this Order is necessary because of the propensity of the virus to spread person-to-person, and also because the actions taken to prevent such spread have led to property loss and damage;

WHEREAS, the U.S. Centers for Disease Control ("CDC") reports that new variants of COVID-19, classified as "variants of concern," are present in the United States;

WHEREAS, some of these new variants currently account for the majority of COVID-19 cases sequenced in New York City and are much more transmissible than earlier variants;

WHEREAS, the CDC has stated that vaccination is the most effective tool to mitigate the spread of COVID-19 and protect against severe illness;

WHEREAS, the CDC has also stated that vaccination benefits both vaccine recipients and those with whom they come into contact, including individuals who are ineligible for the vaccine due to age, health or other conditions;

WHEREAS, the recent appearance in the City of the highly transmissible Delta variant of COVID-19 has substantially increased the risk of infection;

WHEREAS, indoor entertainment, recreation, dining and fitness settings generally involve groups of unassociated people interacting for a substantial period of time and requiring vaccination for all individuals in these areas, including workers, will protect the public health, promote public safety, and save the lives of not just those vaccinated individuals but the public at large;

WHEREAS, 56% of City residents are fully vaccinated and 62% of residents have received at least one dose, and mandating vaccinations at the types of establishments that residents frequent will

incentivize vaccinations, increasing the City's vaccination rates and saving lives; and

WHEREAS, a study by Yale University demonstrated that the City's vaccination campaign was estimated to have prevented about 250,000 COVID-19 cases, 44,000 hospitalizations and 8,300 deaths from COVID-19 infection since the start of vaccination through July 1, 2021, and the City believes the number of prevented cases, hospitalizations and death has risen since then; and that between January 1, 2021, and June 15, 2021, over 98% of hospitalizations and deaths from COVID-19 infection involved those who were not fully vaccinated;

NOW, THEREFORE, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law, the New York City Charter and the Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency:

Section 1. I hereby order that a covered entity shall not permit a patron, full- or part-time employee, intern, volunteer, or contractor to enter a covered premises without displaying proof of vaccination and identification bearing the same identifying information as the proof of vaccination.

§ 2. I hereby order that the following individuals are exempted from this Order, and therefore may enter a covered premises without displaying proof of vaccination, provided that such individuals wear a face mask at all times they are unable to maintain six

(6) feet of distance from other individuals inside the covered premises:

a. Individuals entering for a quick and limited purpose (for example, using the restroom, placing or picking up an order or service, changing clothes in a locker room, or performing necessary repairs);

b. A nonresident performing artist not regularly employed by the covered entity while they are in a covered premises for purposes of performing;

c. A nonresident professional athlete/sports team who enters a covered premises as part of their regular employment for purposes of competing; and

d. A nonresident individual accompanying a performing artist or professional athlete/sports team into a covered premises as part of their regular employment so long as the performing artist or professional athlete/sports team are performing or competing in the covered premises.

§ 3. I hereby direct each covered entity to develop and keep a written record describing the covered entity's protocol for implementing and enforcing the requirements of this Order. Such written record shall be available for inspection upon a request of a City official as allowed by law.

§ 4. I hereby direct each covered entity to post a sign in a conspicuous place that is viewable by prospective patrons prior to entering the establishment. The sign must alert patrons to the vaccination

requirement in this Order and inform them that employees and patrons are required to be vaccinated. The Department for Health and Mental Hygiene ("DOHMH") shall determine the text of such sign and provide a template on its website that a covered entity may use. A covered entity may use the sign available online at nyc.gov/keytoNYC, or use its own sign provided its sign must be no smaller than 8.5 inches by 11 inches, with text provided by DOHMH in at least 14-point font.

§ 5. For the purposes of this Order:

a. "Contractor" means the owner and/or employees of any business that a covered entity has hired to perform work within a covered premise, except that it shall not include nonresident owners and/or employees.

b. "Covered entity" means any entity that operates one or more covered premises, except that it shall not include pre-kindergarten through grade twelve (12) public and non-public schools and programs, child care programs, senior centers, community centers, or as otherwise indicated by this Order.

c. "Covered premises" means any location, except a location in a residential or office building the use of which is limited to residents, owners, or tenants of that building, that is used for the following purposes:

(i) **Indoor Entertainment and Recreational Settings**, including indoor portions of the following locations, regardless of the activity at

such locations: movie theaters, music or concert venues, adult entertainment, casinos, botanical gardens, commercial event and party venues, museums and galleries, aquariums, zoos, professional sports arenas and indoor stadiums, convention centers and exhibition halls, performing arts theaters, bowling alleys, arcades, indoor play areas, pool and billiard halls, and other recreational game centers;

(ii) **Indoor Food Services**, including indoor portions of food service establishments offering food and drink, including all indoor dining areas of food service establishments that receive letter grades as described in section 81.51 of the Health Code; businesses operating indoor seating areas of food courts; catering food service establishments that provide food indoors on its premises; and any indoor portions of food service establishment that is regulated by the New York State Department of Agriculture and Markets offering food for on-premises indoor consumption. The requirements of this Order shall not apply to any food service establishment offering food and/or drink exclusively for off-premises or outdoor consumption, or to a food service establishment providing

charitable food services such as soup kitchens;

(iii) **Indoor Gyms and Fitness Settings**, including indoor portions of standalone and hotel gyms and fitness centers, gyms and fitness centers in higher education institutions, yoga/Pilates/barre/dance studios, boxing/kickboxing gyms, fitness boot camps, indoor pools, CrossFit or other plyometric boxes, and other facilities used for conducting group fitness classes.

d. "Indoor portion" means any part of a covered premises with a roof or overhang that is enclosed by at least three walls, except that the following will not be considered an indoor portion: (1) a structure on the sidewalk or roadway if it is entirely open on the side facing the sidewalk; and (2) an outdoor dining structure for individual parties, such as a plastic dome, if it has adequate ventilation to allow for air circulation.

e. "Nonresident" means any individual who is not a resident of New York City.

f. "Patron" means any individual 12 years of age or older who patronizes, enters, attends an event, or purchases goods or services within a covered premise.

g. "Identification" means an official document bearing the name of the individual and a photo or date of birth. Examples of acceptable identification include but are not limited to:

driver's license, non-driver government ID card, IDNYC, passport, and school ID card.

h. "Proof of vaccination" means proof of receipt of at least one dose of a COVID-19 vaccine authorized for emergency use or licensed for use by the U.S. Food and Drug Administration or authorized for emergency use by the World Health Organization. Such proof may be established by:

i. A CDC COVID-19 Vaccination Record Card or an official immunization record from the jurisdiction, state, or country where the vaccine was administered or a digital or physical photo of such a card or record, reflecting the person's name, vaccine brand, and date administered; or

ii. A New York City COVID Safe Pass (available to download on Apple and Android smartphone devices); or

iii. A New York State Excelsior Pass.

§ 6. I hereby direct that each instance that a covered entity fails to check an individual's vaccination status shall constitute a separate violation of this Order.

§ 7. I hereby direct the City's Commission on Human Rights to develop guidance to assist covered entities in complying with this Order in an equitable manner consistent with applicable provisions of the New York City Human Rights Law.

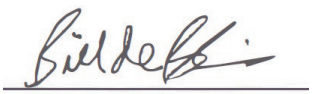
§ 8. I hereby direct, in accordance with Executive Law § 25, that staff from any agency as may hereafter

be designated by the DOHMH Commissioner shall enforce the directives set forth in this Order.

§ 9. I hereby direct that any person or entity who is determined to have violated this Order shall be subject to a fine, penalty and forfeiture of not less than $1,000. If the person or entity is determined to have committed a subsequent violation of this Order within twelve months of the initial violation for which a penalty was assessed, such person or entity shall be subject to a fine, penalty and forfeiture of not less than $2,000. For every violation thereafter, such person or entity shall be subject to a fine, penalty and forfeiture of not less than $5,000 if the person or entity committed the violation within twelve months of the violation for which the second penalty was assessed. This Order may be enforced pursuant to sections 3.05, 3.07, and/or 3.11 of the Health Code and sections 558 and 562 of the Charter. I hereby suspend Appendix 7-A of Chapter 7 of the Rules of the City of New York to the extent it would limit a violation of this Order to be punished with a standard penalty of $1,000 or a default penalty of $2,000.

§ 10. Covered entities shall comply with further guidelines issued by DOHMH to further the intent of this Order and increase the number of vaccinated individuals in the City.

§ 11. This Emergency Executive Order shall take effect on August 17, 2021, except for section 9 of this Order, which shall take effect on September 13, 2021.



Bill de Blasio,
MAYOR

ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION FOR DEPARTMENT OF EDUCATION EMPLOYEES, CONTRACTORS, AND OTHERS

WHEREAS, on March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents, and such order remains in effect; and

WHEREAS, on March 25, 2020, the New York City Commissioner of Health and Mental Hygiene declared the existence of a public health emergency within the City to address the continuing threat posed by COVID-19 to the health and welfare of City residents, and such declaration and public health emergency continue to be in effect; and

WHEREAS, pursuant to Section 3.01(d) of the New York City Health Code ("Health Code"), the existence of a public health emergency within the City as a result of COVID-19, for which certain orders and actions are necessary to protect the health and safety of the City of New York and its residents, was declared; and

WHEREAS, pursuant to Section 558 of the New York City Charter (the "Charter"), the Board of Health may embrace in the Health Code all matters and subjects to which the power and authority of the Department of Health and Mental Hygiene (the "Department") extends; and

WHEREAS, pursuant to Section 556 of the Charter and Section 3.01(c) of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health; and

WHEREAS, the U.S. Centers for Disease Control ("CDC") reports that new variants of COVID-19, identified as "variants of concern" have emerged in the United States, and some of these new variants which currently account for the majority of COVID-19 cases sequenced in New York City, are more transmissible than earlier variants; and

WHEREAS, the CDC has stated that vaccination is an effective tool to prevent the spread of COVID-19 and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated; and

WHEREAS New York State has announced that, as of September 27, 2021 all healthcare workers in New York State, including staff at hospitals and long-term care facilities, including nursing homes, adult care, and other congregate care settings, will be required to be vaccinated against COVID-19 by Monday, September 27; and

WHEREAS, section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and effective measures to prevent the communication of infection diseases such as COVID-19; and

WHEREAS, in accordance with section 17-109(b) of such Administrative Code, the Department may adopt vaccination measures in order to most effectively prevent the spread of communicable diseases; and

WHEREAS, pursuant to Section 3.07 of the Health Code, no person "shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any individual" or "fail to do any reasonable act or take any necessary precaution to protect human life and health;" and

WHEREAS, the CDC has recommended that school teachers and staff be "vaccinated as soon as possible" because vaccination is "the most critical strategy to help schools safely resume] full operations… [and] is the leading public health prevention strategy to end the COVID-19 pandemic;" and

WHEREAS the New York City Department of Education ("DOE") serves approximately 1 million students across the City, including students in the communities that have been disproportionately affected by the COVID-19 pandemic and students who are too young to be eligible to be vaccinated; and

WHEREAS, a system of vaccination for individuals working in school settings or other DOE buildings will potentially save lives, protect public health, and promote public safety; and

WHEREAS, pursuant to Section 3.01(d) of the Health Code, I am authorized to issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public

health action is necessary to protect the public health against an existing threat and a public health emergency has been declared pursuant to such section; and

WHEREAS, on July 21, 2021, I issued an order requiring staff in public healthcare and clinical settings to demonstrate proof of COVID-19 vaccination or undergo weekly testing; and

WHEREAS, on August 10, 2021, I issued an order requiring staff providing City operated or contracted services in residential and congregate settings to demonstrate proof of COVID-19 vaccination or undergo weekly testing;

NOW THEREFORE I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that it is necessary for the health and safety of the City and its residents, do hereby exercise the power of the Board of Health to prevent, mitigate, control and abate the current emergency, and hereby order that:

1. No later than September 27, 2021 or prior to beginning employment, all DOE staff must provide proof to the DOE that:
   a. they have been fully vaccinated; or
   b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
   c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

2. All City employees who work in-person in a DOE school setting or DOE building must provide proof to their employer no later than September 27, 2021 or prior to beginning such work that:

   a. they have been fully vaccinated; or
   b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
   c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

3. All staff of contractors of DOE and the City who work in-person in a DOE school setting or DOE building, including individuals who provide services to DOE students, must provide proof to their employer no later than September 27, 2021 or prior to beginning such work that:

   a. they have been fully vaccinated; or
   b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
   c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

   Self-employed independent contractors hired for such work must provide such proof to the DOE.

4. All employees of any school serving students up to grade 12 and any UPK-3 or UPK-4 program that is located in a DOE building who work in-person, and all contractors hired by such schools or programs to work in-person in a DOE building, must provide proof to their employer, or if self-employed to the contracting school or program, no later than September 27, 2021 or prior to beginning such work that:

   a. they have been fully vaccinated; or
   b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
   c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

5. For the purposes of this Order:

   a. "DOE staff" means (i) full or part-time employees of the DOE, and (ii) DOE interns (including student teachers) and volunteers.

   b. "Fully vaccinated" means at least two weeks have passed after a person received a single dose of a one-dose series, or the second dose of a two-dose series, of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization.

   c. "DOE school setting" includes any indoor location, including but not limited to DOE buildings, where instruction is provided to

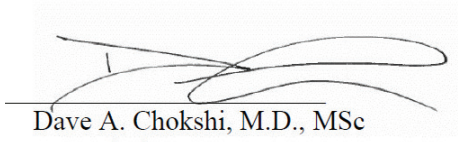
DOE students in public school kindergarten through grade 12, including residences of pupils receiving home instruction and places where care for children is provided through DOE's LYFE program.

d. "Staff of contractors of DOE and the City" means a full or part-time employee, intern or volunteer of a contractor of DOE or another City agency who works in-person in a DOE school setting or other DOE building, and includes individuals working as independent contractors.

e. "Works in-person" means an individual spends any portion of their work time physically present in a DOE school setting or other DOE building. It does not include individuals who enter a DOE school setting or other DOE location only to deliver or pickup items, unless the individual is otherwise subject to this Order. It also does not include individuals present in DOE school settings or DOE buildings to make repairs at times when students are not present in the building, unless the individual is otherwise subject to this Order.

6. This Order shall be effective immediately and remain in effect until rescinded, subject to the authority of the Board of Health to continue, rescind, alter or modify this Order pursuant to Section 3.01(d) of the Health Code.

Dated: August 24th, 2021



Dave A. Chokshi, M.D., MSc
Commissioner

SCHEINMAN
ARBITRATION & MEDIATION SERVICES

September 10, 2021

Via E-Mail Only
Renee Campion, Commissioner
Steven H. Banks, Esq.
New York City Office of Labor Relations
The Office of Labor Relations
22 Cortlandt Street, 14th Floor
New York, NY 10007

Alan M. Klinger, Esq.
Stroock & Stroock & Lavan, L.L.P.
180 Maiden Lane, 33rd Floor
New York, NY 10038

Beth Norton, Esq.
Michael Mulgrew, President
United Federation of Teachers
52 Broadway, 14th Floor
New York, NY 10004

Re: Board of Education of the City School District of the City of New York
and
United Federation of Teachers, Local 2, AFT, AFL-CIO
(Impact Bargaining)

Dear Counsel:

Enclosed please find my Award in the above referenced matter.

Thank you.

Sincerely,

MFS/sk

BOE.UFT.Impact Bargaining.awd

322 Main Street ♦ Port Washington, NY 11050 ♦ 516.944.1700 ♦ fax: 516.944.1771 ♦ www.ScheinmanNeutrals.com

In the Matter of the Arbitration	X	Re: Impact
between	X	Bargaining
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK	X	
"Department"	X	
-and-	X	
UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO	X	
"Union"	X	

APPEARANCES

For the Department
Renee Campion, Commissioner of Labor Relations
Steven H. Banks, Esq., First Deputy Commissioner
and General Counsel of Labor Relations

For the Union
STROOCK & STROOCK & LAVAN, L.L.P.
Alan M. Klinger, Esq.

Beth Norton, Esq., UFT General Counsel
Michael Mulgrew, UFT President

BEFORE: Martin F. Scheinman, Esq., Arbitrator

BACKGROUND

The Union ("Union" or "UFT") protests the Department of Education's ("Department" or "DOE") failure to reach agreement on the impact of its decision mandating all employees working in Department buildings show proof they started the Covid-19 vaccination protocols by September 27, 2021. The Union contends the Department failed to adequately provide, among other things, for those instances where employees have proof of a serious medical condition making the vaccine a danger to their health, as well as for employees who have a legitimate religious objection to vaccines.

Most of the basic facts are not in dispute.

For those in the New York City ("NYC" or "City") metropolitan area, we are now in the 18th month of the Covid-19 pandemic. During that time, we have seen substantial illness and loss of life. There have been periods of significant improvement and hope, but sadly, we have seen resurgence with the Delta variant. Throughout this period, NYC and its municipal unions have worked collaboratively to provide needed services for the City's 8.8 million residents in as safe an environment as possible. Yet, municipal employees have often borne great risk. The

Department and the UFT are no exception. The DOE and the UFT immediately moved to remote instruction and then later a hybrid model of both in-person and remote learning for the 2020-2021 school year. Educators at all levels strove to deliver the best experience possible under strained circumstances. For this coming school year, both the DOE and the UFT have endeavored to return, as much as possible, to in-person learning. They have developed protocols regarding masking and distancing to effectuate a safe environment for the City's students and educators.

To this end, the Delta resurgence has complicated matters. In recognition of increased risk, there have been various policies implemented at City agencies and other municipal entities. Mayor de Blasio in July 2021 announced a "Vaccine-or-Test" mandate which essentially requires the City workforce, including the UFT's educators, either to be vaccinated or undergo weekly testing for the Covid-19 virus effective September 13, 2021.

Most relevant to this matter, on August 23, 2021, the Mayor and the NYC Commissioner of Health and Mental Hygiene, David A. Chokshi, MD, announced a new policy for those workforces in NYC DOE buildings. Those employees would be subject to a "Vaccine Only" mandate. That is, such employees would need to show by September 27, 2021, they had at least started the vaccination protocol or would not be allowed onto DOE premises, would not be paid for work and would be at risk of loss of job and benefits. This mandate was reflected in an Order of Commissioner Chokshi, dated August 24, 2021. That Order, by its terms, did not expressly provide for exceptions or accommodations for those with medical

contraindications to vaccination or sincerely-held religious objections to inoculation. Nor did it address matters of due process with regard to job and benefits protection.

The UFT promptly sought to bargain the impact and implementation of the Vaccine Only mandate. A number of discussions were had by the parties but important matters remained unresolved.

On September 1, 2021, the UFT filed a Declaration of Impasse with the Public Employment Relations Board ("PERB") as to material matters. The City/DOE did not challenge the statement of impasse and PERB appointed me to mediate the matters. Given the exigencies of the imminent start of the school year and the coming of the September 27, 2021, mandate, together with the importance of the issues involved to the workforce, mediations sessions were held immediately on September 2, 3, 4 and 5, 2021, with some days having multiple sessions. Progress was made, and certain tentative understandings were reached, but significant matters remained unresolved. By agreement of the parties, the process moved to arbitration. They asked I serve as arbitrator.[1]

Arbitration sessions were held on September 6 and 7, 2021. During the course of the hearings, both sides were given full opportunity to introduce evidence and argument in support of their respective positions. They did so. Both parties made strenuous

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[1] My jurisdiction is limited to the issues raised during impact bargaining and not with regard to the decision to issue the underlying "Vaccine Only" order.

and impassioned arguments reflecting their viewpoints on this entire issue.

During the course of these hearings, I made various interim rulings concerning the impact of the "Vaccine Only" mandate. I then directed the parties to draft language reflecting those rulings. Even though I am very familiar with the language of the current Collective Bargaining Agreement, as well as the parties' relationship since I am a member of their permanent arbitration panel and have served as a fact-finder and mediator during several rounds of bargaining, I concluded the parties are more familiar with Department policy and how leave and entitlements have been administered in accordance with prior agreements. As such, my rulings reflect both the understandings reached during the negotiations prior to mediation, those reached in the mediation process and the parties' agreed upon language in response to my rulings. All are included, herein.

I commend the parties for their seriousness of purpose and diligence in addressing these complicated matters. The UFT made clear it supports vaccination efforts and has encouraged its members to be vaccinated. Nonetheless, as a Union, it owes a duty to its members to ensure their rights are protected. The City/DOE demonstrated recognition of the importance of these issues, particularly with regard to employees' legitimate medical or religious claims. I appreciate both parties' efforts in meeting the tight timeline we have faced and the professionalism they demonstrated serving the citizens of the City and what the million plus students deserved. They have invested immense effort to

insure such a serious issue was litigated in such a thoughtful way.

Yet, in the end, it falls to me, as Arbitrator, to arrive at a fair resolution of the matters at hand.

This matter is one of the most urgent events I have been involved with in my forty (40) plus years as a neutral. The parties recognized the complexity of the issues before me, as well as the magnitude of the work that lies ahead to bring this conflict to completion in a timely manner. For this reason, they understood and accepted the scope and complexity of this dispute could not be handled by me alone. They agreed my colleagues at Scheinman Arbitration and Mediation Services ("SAMS") would also be involved.

I want to thank my colleagues at SAMS, especially Barry J. Peek, for their efforts and commitment to implementing the processes to resolve this matter. This undertaking could not be accomplished by any single arbitrator.

Opinion

After having carefully considered the record evidence, and after having the parties respond to countless inquiries. I have requested to permit me to make a final determination, I make the rulings set forth below. While some of the language has been drafted, initially, by the parties in response to my rulings, in the end the language set forth, herein, is mine alone. I hereby issue the following Award:

I. Exemption and Accommodation Requests & Appea1 Process

As an alternative to any statutory reasonable accommodation process, the City, the Board of Education of the City School District for the City of New York (the "DOE"), and the United Federation of Teachers, Local 2, AFT, AFL-CIO (the "UFT), (collectively the "Parties") shall be subject to the following Expedited Review Process to be implemented immediately for full-time staff, H Bank and non-pedagogical employees who work a regular schedule of twenty (20) hours per week or more inclusive of lunch, including but not limited to Occupational Therapists and Physical Therapists, and Adult Education teachers who work a regular schedule of twenty (20) or more hours per week. This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy, and (b) medical accommodation requests where an employee is unable to mount an immune response to COVID-19 due to preexisting immune conditions and the requested accommodation is that the employee not appear at school. This process shall be in place for the 2021-2022 school year and shall only be extended by mutual agreement of the Parties.

Any requests to be considered as part of this process must be submitted via the SOLAS system no later than Monday, September 20, 2021, by 5:00 p.m.

A. Full Medical Exemptions to the vaccine mandate shall only be considered where an employee has a documented contraindication such that an employee cannot receive any of the three (3) authorized vaccines (Pfizer,

Moderna, J&J)–with contraindications delineated in CDC clinical considerations for COVID-19 vaccination. Note that a prior immediate allergic reaction to one (1) type of vaccine will be a precaution for the other types of vaccines, and may require consultation with an allergist.

B. Temporary Medical Exemptions to the vaccine mandate shall only be based on the following valid reasons to defer or delay COVID-19 vaccination for some period:

- o Within the isolation period after a COVID-19 infection;
- o Within ninety (90) days of monoclonal antibody treatment of COVID-19;
- o Treatments for conditions as delineated in CDC clinical considerations, with understanding CDC guidance can be updated to include new considerations over time, and/or determined by a treating physician with a valid medical license responsible for the immunosuppressive therapy, including full and appropriate documentation that may warrant temporary medical exemption for some period of time because of active therapy or treatment (e.g., stem cell transplant, CAR T-cell therapy) that would temporarily interfere with the patient's ability to respond adequately to vaccination;
- o Pericarditis or myocarditis not associated with COVID-19 vaccination or pericarditis

or myocarditis associated with COVID-19 vaccination.

Length of delay for these conditions may vary, and the employee must get vaccinated after that period unless satisfying the criteria for a Full Medical Exemption described, above.

C. Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy) . Requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists).

D. There are cases in which, despite an individual having sought and received the full course of the vaccination, he or she is unable to mount an immune response to COVID-19 due to preexisting immune conditions. In these circumstances, each individual case shall be reviewed for potential accommodation. Medical accommodation requests must be documented in writing by a medical doctor.

E. The initial determination of eligibility for an exemption or accommodation shall be made by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of

Employee Relations. These determinations shall be made in writing no later than Thursday, September 23, 2021, and, if denied, shall include a reason for the denial.

F. If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE within one (1) school day of the DOE's issuance of the initial eligibility determination. The request for appeal shall include the reason for the appeal and any additional documentation. Following the filing of the appeal, any supplemental documentation may be submitted by the employee to the Scheinman Arbitration and Mediation Services ("SAMS") within forty eight (48) hours after the filing of the appeal. If the stated reason for denial of a medical exemption or accommodation request is insufficient documentation, the employee may request from the arbitrator and, upon good cause shown, the arbitrator may grant an extension beyond forty eight (48) hours and permit the use of CAR days after September 27, 2021, for the employee to gather the appropriate medical documentation before the appeal is deemed submitted for determination.

G. A panel of arbitrators identified by SAMS shall hear these appeals, and may request the employee or the DOE submit additional documentation. The assigned arbitrator may also request information from City and/or DOE Doctors as part of the review of the appeal documentation. The assigned arbitrator, at his or her discretion, shall either issue a decision

on the appeal based on the documents submitted or hold an expedited (virtual) factual hearing. If the arbitrator requests a factual hearing, the employee may elect to have a union representative present but neither party shall be required to be represented by an attorney at the hearing. The expedited hearing shall be held via Zoom telecommunication and shall consist of brief opening statements, questions from the arbitrator, and brief closing statements. Cross examination shall not be permitted. Any documentation submitted at the arbitrator's request shall be provided to the DOE at least one (1) business day before the hearing or the issuance of the written decision without hearing.

H. Appeal decisions shall be issued to the employee and the DOE no later than Saturday September 25, 2021. Appeal decisions shall be expedited without full Opinion, and final and binding.

I. While an appeal is pending, the exemption shall be assumed granted and the individual shall remain on payroll consistent with Section K below. However, if a larger number of employees than anticipated have a pending appeal as of September 27, 2021, as determined by SAMS, SAMS may award different interim relief consistent with the parties' intent. Those employees who are vaccinated and have applied for an accommodation shall have the ability to use CAR days while their application and appeal are pending. Should the appeal be granted, these employees shall be reimbursed

any CAR days used retroactive to the date of their initial application.

J. The DOE shall cover all arbitration costs from SAMS under this process. To the extent the arbitrator requests additional medical documentation or information from the DOE, or consultation with City and/or DOE Doctors, arranging and paying for such documentation and/or consultation shall be the responsibility of the DOE.

K. An employee who is granted a medical or religious exemption or a medical accommodation under this process and within the specific criteria identified above shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/ or accommodation is in place. For those with underlying medical issues granted an accommodation under Section I (D), the DOE will make best efforts to ensure the alternate work setting is appropriate for the employee's medical needs. The DOE shall make best efforts to make these assignments within the same borough as the employee's current school, to the extent a sufficient number of assignments exist in the borough. Employees so assigned shall be required to

submit to COVID testing twice per week for the duration of the assignment.

L. The process set forth, herein, shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision. Should either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to SAMS for expedited resolution.

II. <u>Leave</u>

A. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021. Such leave may be unilaterally imposed by the DOE and may be extended at the request of the employee consistent with Section III(B), below. Placement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose.

B. Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes.

C. During such leave without pay, employees shall continue to be eligible for health insurance. As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period.

D. Employees who become vaccinated while on such leave without pay and provide appropriate documentation to the DOE prior to November 30, 2021, shall have a right of return to the same school as soon as is practicable but in no case more than one (1) week following notice and submission of documentation to the DOE.

E. Pregnancy/Parental Leave

i. Any soon-to-be birth mother who starts the third trimester of pregnancy on or before September 27, 2021, (e.g. has a due date no later than December 27, 2021), may commence UFT Parental Leave prior to the child's birth date, but not before September 27, 2021.

ii. No documentation shall be necessary for the early use of Parental Leave, other than a doctor's written assertion the employee is in her third trimester as of September 27, 2021.

iii. Eligible employees who choose to start Parental Leave prior to the child's birth date, shall be required to first use CAR days until either: 1) they exhaust CAR/sick days, at which point the Parental Leave shall begin, or 2) they give birth, at which point they shall be treated as an approved

Parental Leave applicant for all purposes, including their prerogative to use additional CAR days prior to the commencement of Parental Leave.

iv. Eligible employees who have a pregnancy disability or maternity disability outside of the regular maternity period may, in accordance with existing rules, borrow CAR/sick days and use a Grace Period. This eligibility to borrow CAR/sick days does not apply to employees during the regular maternity recovery period if they have opted to use Parental Leave.

v. In the event an eligible employee exhausts CAR/sick days and parental leave prior to giving birth, the employee shall be placed on a leave without pay, but with medical benefits at least until the birth of the child. As applicable, unvaccinated employees may be placed in the leave as delineated in Section II(A).

vi. If not otherwise covered by existing Family Medical Leave Act ("FMLA") or leave eligibility, an employee who takes Parental Leave before the birth of the child shall be eligible to be on an unpaid leave with medical benefits for the duration of the maternity recovery period (i.e., six weeks after birth or eight weeks after a birth via C-Section)

vii. All other eligibility and use rules regarding UFT Parental Leave as well as FMLA remain in place.

III. Separation

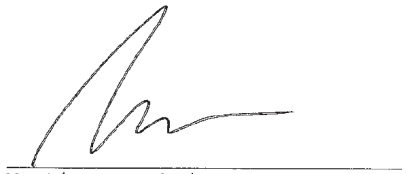
A. During the period of September, 28, 2021, through October 29, 2021, any employee who is on leave without pay due to vaccination status may opt to separate from the DOE. In order to separate under this Section and receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. If an employee opts to separate consistent with this Section, the employee shall be eligible to be reimbursed for unused CAR days on a one (1) for one (1) basis at the rate of 1/200th of the employee's salary at departure per day, up to 100 days, to be paid following the employee's separation with documentation including the general waiver and release. Employees who elect this option shall be deemed to have resigned involuntarily effective on the date contained in the general waiver as determined by the DOE, for non-disciplinary reasons. An employee who separates under this Section shall continue to be eligible for health insurance through September 5, 2022, unless they are eligible for health insurance from another source (e.g., a spouse's coverage or another job).

B. During the period of November 1, 2021, through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternately opt to extend the leave through September 5, 2022. In order to extend this leave

pursuant to this Section, and continue to receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. Employees who select this option shall continue to be eligible for health insurance through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the DOE before September 5, 2022, shall have a right to return to the same school as soon as is practicable but in no case more than two (2) weeks following notice to the DOE. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned.

C. Beginning December 1, 2021, the DOE shall seek to unilaterally separate employees who have not opted into separation under Sections III(A) and III(B). Except for the express provisions contained, herein, all parties retain all legal rights at all times relevant, herein.

September 10, 2021.

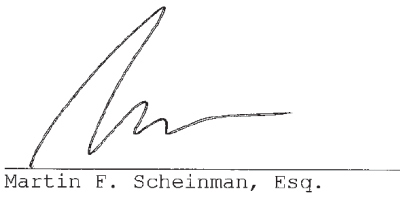


Martin F. Scheinman, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, MARTIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

September 10, 2021.



Martin F. Scheinman, Esq.
Arbitrator

SCHEINMAN
ARBITRATION & MEDIATION SERVICES

September 15, 2021

Via E-Mail Only
Renee Campion, Commissioner
Steven H. Banks, Esq.
New York City Office of Labor Relations
The Office of Labor Relations
22 Cortlandt Street, 14th Floor
New York, NY 10007

Alan M. Klinger, Esq.
Stroock & Stroock & Lavan, L.L.P.
180 Maiden Lane, 33rd Floor
New York, NY 10038

David N. Grandwetter, Esq., General Counsel
Mark Cannizzaro, President
Council of Supervisors and Administrators
40 Rector Street, 12th Floor
New York, NY 10006

Re: Board of Education of the City School District of the City of New York
and
Council of Supervisors and Administrators
(Impact Bargaining)

Dear Counsel:

Enclosed please find my Award in the above referenced matter.

Thank you.

Sincerely,

MFS/sk

BOE.CSA.Impact Bargaining.trans

322 Main Street ♦ Port Washington, NY 11050 ♦ 516.944.1700 ♦ fax: 516.944.1771 ♦ www.ScheinmanNeutrals.com

In the Matter of the Arbitration	X	Re: Impact
between	X	Bargaining
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK	X	
	X	
"Department"	X	
-and-	X	
COUNCIL OF SUPERVISORS AND ADMINISTRATORS	X	
	X	
"Union"	X	

APPEARANCES

For the Department
Renee Campion, Commissioner of Labor Relations
Steven H. Banks, Esq., First Deputy Commissioner
and General Counsel of Labor Relations

For the Union
STROOCK & STROOCK & LAVAN, L.L.P.
Alan M. Klinger, Esq.

David N. Grandwetter, Esq., General Counsel
Mark Cannizzaro, President

BEFORE: Martin F. Scheinman, Esq., Arbitrator

BACKGROUND

In the aftermath of the Arbitration Award issued by the undersigned to resolve the Impasse regarding the implementation of the City's Vaccine Only mandate between the United Federation of Teachers ("UFT"), on the one hand, and the City of New York and NYC Department of Education ("DOE"), dated September 10, 2021, on the other, the Council of Supervisors & Administrators ("CSA") and the City of New York ("City") reached out to me to similarly address their concerns. Given the exigencies of the opening of school and the imminent effective date of the City's mandate, it was agreed the parties would promptly move to arbitration. Accordingly, an arbitration session was held on September 14, 2021, in which representatives of all parties participated.

At the September 14, 2021, session, it became apparent much of the UFT /DOE Award would govern, here. The proceeding thereupon focused on the few, but important matters, at issue. Therefore, I find that the terms of the UFT/DOE Award shall apply with the three (3) modifications set forth below and in my Opinion and Award:

1. Due to the imminent deadlines for submission of exemption requests, I issued an interim

direction that SOLAS portal be opened to any CSA member at the start of business on September 15, 2021. Any CSA member may now apply in SOLAS for a COVID-19 Vaccination Mandate Related Exemption or Accommodation. The deadline for requests to be considered as part of this process must be submitted via SOLAS system by Tuesday, September 21 at 5:00 p.m.

2. The assigned arbitrator identified by SAMS who shall hear appeals for exemptions or accommodations may request the employee or the DOE to submit additional documentation from the Doctors as part of this appeal review process.

3. Section II (E) references to "CSA Parental Leave" shall be changed to "CSA Paid Parental Leave".

Opinion

After having carefully considered the record evidence, and after having the parties respond to countless inquiries, I have requested to permit me to make a final determination, I make the rulings set forth, below. While some of the language has been drafted, initially, by the parties in response to my rulings, in the end the language set forth, herein, is mine alone. I hereby issue the following Award:

I. Exemption and Accommodation Requests & Appeal Process

As an alternative to any statutory reasonable accommodation process, the City, the Board of Education of the City School District for the City of

New York (the "DOE"), and CSA (collectively the "Parties) shall be subject to the following Expedited Review Process to be implemented immediately for Principals, Assistant Principals, Education Administrators and Clinical Supervisors. This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy, and (b) medical accommodation requests where an employee is unable to mount an immune response to COVID-19 due to preexisting immune conditions and the requested accommodation is that the employee not appear at school. This process shall be in place for the 2021-2022 school year and shall only be extended by mutual agreement of the Parties.

Any requests to be considered as part of this process must be submitted via the SOLAS system no later than Tuesday, September 21, 2021, by 5:00 p.m.

A. Full Medical Exemptions to the vaccine mandate shall only be considered where an employee has a documented contraindication such that an employee cannot receive any of the three (3) authorized vaccines (Pfizer, Moderna, J&J)–with contraindications delineated in CDC clinical considerations for COVID-19 vaccination. Note that a prior immediate allergic reaction to one (1) type of vaccine will be a precaution for the other types of vaccines, and may require consultation with an allergist.

B. Temporary Medical Exemptions to the vaccine mandate shall only be based on the following valid reasons to defer or delay COVID-19 vaccination for some period:

- Within the isolation period after a COVID-19 infection;
- Within ninety (90) days of monoclonal antibody treatment of COVID-19;
- Treatments for conditions as delineated in CDC clinical considerations, with understanding CDC guidance can be updated to include new considerations over time, and/or determined by a treating physician with a valid medical license responsible for the immunosuppressive therapy, including full and appropriate documentation that may warrant temporary medical exemption for some period of time because of active therapy or treatment (e.g., stem cell transplant, CAR T-cell therapy) that would temporarily interfere with the patient's ability to respond adequately to vaccination;
- Pericarditis or myocarditis not associated with COVID-19 vaccination or pericarditis or myocarditis associated with COVID-19 vaccination.

Length of delay for these conditions may vary, and the employee must get vaccinated after that period unless satisfying the criteria for a Full Medical Exemption described, above.

C. Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy) . Requests shall be denied where the leader of the religious organization

has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientist).

D. There are cases in which, despite an individual having sought and received the full course of the vaccination, he or she is unable to mount an immune response to COVID-19 due to preexisting immune conditions. In these circumstances, each individual case shall be reviewed for potential accommodation. Medical accommodation requests must be documented in writing by a medical doctor.

E. The initial determination of eligibility for an exemption or accommodation shall be made by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee Relations. These determinations shall be made in writing no later than Thursday, September 23, 2021, and, if denied, shall include a reason for the denial.

F. If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE within one (1) school day of the DOE' s issuance of the initial eligibility determination. The request for appeal shall include

the reason for the appeal and any additional documentation. Following the filing of the appeal, any supplemental documentation may be submitted by the employee to the Scheinman Arbitration and Mediation Services ("SAMS") within forty eight (48) hours after the filing of the appeal. If the stated reason for denial of a medical exemption or accommodation request is insufficient documentation, the employee may request from the arbitrator and, upon good cause shown, the arbitrator may grant an extension beyond forty eight (48) hours and permit the use of CAR days after September 27, 2021, for the employee to gather the appropriate medical documentation before the appeal is deemed submitted for determination.

G. A panel of arbitrators identified by SAMS shall hear these appeals, and may request the employee or the DOE submit additional documentation. The assigned arbitrator may also request information from City and/or DOE Doctors as part of the review of the appeal documentation. The assigned arbitrator, at his or her discretion, shall either issue a decision on the appeal based on the documents submitted or hold an expedited (virtual) factual hearing. If the arbitrator requests a factual hearing, the employee may elect to have a union representative present but neither party shall be required to be represented by an attorney at the hearing. The expedited hearing shall be held via Zoom

telecommunication and shall consist of brief opening statements, questions from the arbitrator, and brief closing statements. Cross examination shall not be permitted. Any documentation submitted at the arbitrator's request shall be provided to the DOE at least one (1) business day before the hearing or the issuance of the written decision without hearing.

H. Appeal decisions shall be issued to the employee and the DOE no later than Saturday September 25, 2021. Appeal decisions shall be expedited without full Opinion, and final and binding.

I. While an appeal is pending, the exemption shall be assumed granted and the individual shall remain on payroll consistent with Section K below. However, if a larger number of employees than anticipated have a pending appeal as of September 27, 2021, as determined by SAMS, SAMS may award different interim relief consistent with the parties' intent. Those employees who are vaccinated and have applied for an accommodation shall have the ability to use CAR days while their application and appeal are pending. Should the appeal be granted, these employees shall be reimbursed any CAR days used retroactive to the date of their initial application.

J. The DOE shall cover all arbitration costs from SAMS under this process. To the extent the arbitrator requests additional medical

documentation or information from the DOE, or consultation with City and/or DOE Doctors, arranging and paying for such documentation and/or consultation shall be the responsibility of the DOE.

K. An employee who is granted a medical or religious exemption or a medical accommodation under this process and within the specific criteria identified above shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/ or accommodation is in place. For those with underlying medical issues granted an accommodation under Section I (D), the DOE will make best efforts to ensure the alternate work setting is appropriate for the employee's medical needs. The DOE shall make best efforts to make these assignments within the same borough as the employee's current school, to the extent a sufficient number of assignments exist in the borough. Employees so assigned shall be required to submit to COVID testing twice per week for the duration of the assignment.

L. The process set forth, herein, shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions

to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision. Should either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to SAMS for expedited resolution.

II. <u>Leave</u>

A. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021. Such leave may be unilaterally imposed by the DOE and may be extended at the request of the employee consistent with Section III(B), below. Placement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose.

B. Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes.

C. During such leave without pay, employees shall continue to be eligible for health insurance. As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period.

D. Employees who become vaccinated while on such leave without pay and provide appropriate documentation to the DOE prior to November 30, 2021, shall have a right of return to the same school as soon as is practicable but in no case more than one (1) week following notice and submission of documentation to the DOE.

E. CSA Paid Parental Leave

i. Any soon-to-be birth mother who starts the third trimester of pregnancy on or before September 27, 2021, (e.g. has a due date no later than December 27, 2021), may commence CSA Paid Parental Leave prior to the child's birth date, but not before September 27, 2021.

ii. No documentation shall be necessary for the early use of Parental Leave, other than a doctor's written assertion the employee is in her third trimester as of September 27, 2021.

iii. Eligible employees who choose to start Parental Leave prior to the child's birth date, shall be required to first use CAR days until either: 1) they exhaust CAR/sick days, at which point the Parental Leave shall begin, or 2) they give birth, at which point they shall be treated as an approved Parental Leave applicant for all purposes, including their prerogative to use additional CAR days prior to the commencement of Parental Leave.

iv. Eligible employees who have a pregnancy disability or maternity disability outside of the regular maternity period may, in accordance with existing rules, borrow CAR/sick days and use a Grace Period. This eligibility to borrow CAR/sick days does not apply to employees during the regular maternity recovery period if they have opted to use Parental Leave.

v. In the event an eligible employee exhausts CAR/sick days and parental leave prior to giving birth, the employee shall be placed on a leave without pay, but with medical benefits at least until the birth of the child. As applicable, unvaccinated employees may be placed in the leave as delineated in Section II(A).

vi. If not otherwise covered by existing Family Medical Leave Act ("FMLA") or leave eligibility, an employee who takes Parental Leave before the birth of the child shall be eligible to be on an unpaid leave with medical benefits for the duration of the maternity recovery period (i.e., six weeks after birth or eight weeks after a birth via C-Section).

vii. All other eligibility and use rules regarding CSA Parental Leave as well as FMLA remain in place.

III. <u>Separation</u>

A. During the period of September, 28, 2021, through October 29, 2021, any employee who

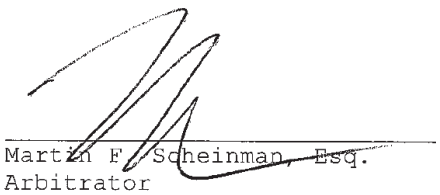
is on leave without pay due to vaccination status may opt to separate from the DOE. In order to separate under this Section and receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. If an employee opts to separate consistent with this Section, the employee shall be eligible to be reimbursed for unused CAR days on a one (1) for one (1) basis at the rate of 1/200th of the employee's salary at departure per day, up to 100 days, to be paid following the employee's separation with documentation including the general waiver and release. Employees who elect this option shall be deemed to have resigned involuntarily effective on the date contained in the general waiver as determined by the DOE, for non-disciplinary reasons. An employee who separates under this Section shall continue to be eligible for health insurance through September 5, 2022, unless they are eligible for health insurance from another source (e.g., a spouse's coverage or another job).

B. During the period of November 1, 2021, through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternately opt to extend the leave through September 5, 2022. In order to extend this leave pursuant to this Section, and

continue to receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. Employees who select this option shall continue to be eligible for health insurance through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the DOE before September 5, 2022, shall have a right to return to the same school as soon as is practicable but in no case more than two (2) weeks following notice to the DOE. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned.

C. Beginning December 1, 2021, the DOE shall seek to unilaterally separate employees who have not opted into separation under Sections III(A) and III(B). Except for the express provisions contained, herein, all parties retain all legal rights at all times relevant, herein.

September 15, 2021.

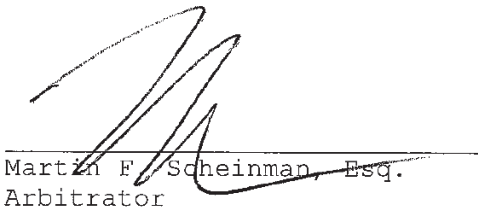


Martin F. Scheinman, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, MARTIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

September 15, 2021.



Martin F. Scheinman, Esq.
Arbitrator

ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION FOR DEPARTMENT OF EDUCATION EMPLOYEES, CONTRACTORS, VISITORS, AND OTHERS

WHEREAS, on March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents, and such order remains in effect; and

WHEREAS, on March 25, 2020, the New York City Commissioner of Health and Mental Hygiene declared the existence of a public health emergency within the City to address the continuing threat posed by COVID-19 to the health and welfare of City residents, and such declaration and public health emergency continue to be in effect; and

WHEREAS, pursuant to Section 558 of the New York City Charter (the "Charter"), the Board of Health may embrace in the Health Code all matters and subjects to which the power and authority of the Department of Health and Mental Hygiene (the "Department") extends; and

WHEREAS, pursuant to Section 556 of the Charter and Section 3.01(c) of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health; and

WHEREAS, the U.S. Centers for Disease Control and Prevention ("CDC") reports that new variants of COVID-19, identified as "variants of concern" have emerged in the United States, and some of these new variants which currently account for the majority of COVID-19 cases sequenced in New York City, are more transmissible than earlier variants; and

WHEREAS, the CDC has stated that vaccination is an effective tool to prevent the spread of COVID-19 and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated; and

WHEREAS, the CDC has recommended that school teachers and staff be "vaccinated as soon as possible" because vaccination is "the most critical strategy to help schools safely resume full operations [and] is the leading public health prevention strategy to end the COVID-19 pandemic;" and

WHEREAS, on September 9, 2021, President Joseph Biden announced that staff who work in Head Start programs and in schools run by the Bureau of Indian Affairs and Department of Defense will be required to be vaccinated in order to implement the CDC's recommendations; and

WHEREAS, on August 26, 2021, New York State Department of Health adopted emergency regulations requiring staff of inpatient hospitals and nursing homes to receive the first dose of a vaccine by September 27, 2021, and staff of diagnostic and treatment centers, hospices, home care and adult care facilities to receive the first dose of a vaccine by October 7, 2021; and

WHEREAS, Section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and effective measures to prevent the communication of infectious diseases such as COVID-19, and in accordance with Section 17-109(b), the Department may adopt vaccination measures to effectively prevent the spread of communicable diseases; and

WHEREAS, the City is committed to safe, in-person learning in all pre-school to grade 12 schools, following public health science; and

WHEREAS the New York City Department of Education ("DOE") serves approximately 1 million students across the City, including students in the communities that have been disproportionately affected by the COVID-19 pandemic and students who are too young to be eligible to be vaccinated; and

WHEREAS, a system of vaccination for individuals working in school settings, including DOE buildings and charter school buildings, will potentially save lives, protect public health, and promote public safety; and

WHEREAS, pursuant to Section 3.01(d) of the Health Code, I am authorized to issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat and a public health emergency has been declared pursuant to such section; and

WHEREAS, on August 24, 2021, I issued an order requiring COVID-19 vaccination for DOE

employees, contractors, and others who work in-person in a DOE school setting or DOE building, which was amended on September 12, 2021; and

WHEREAS, unvaccinated visitors to public school settings could spread COVID-19 to students and such individuals are often present in public school settings and DOE buildings;

NOW THEREFORE I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that it is necessary for the health and safety of the City and its residents, do hereby exercise the power of the Board of Health to prevent, mitigate, control and abate the current emergency, to

RESCIND and **RESTATE** my September 12, 2021 Order relating to COVID-19 vaccination for DOE employees, contractors, visitors, and others; and

I hereby order that:

1. No later than September 27, 2021, or prior to beginning employment, the following individuals must provide proof of vaccination as described below:
    a. DOE staff must provide proof of vaccination to the DOE.
    b. City employees who work in-person in a DOE school setting, DOE building, or charter school setting must provide proof of vaccination to their employer.
    c. Staff of contractors of DOE or the City, as defined below, must provide proof of

vaccination to their employer, or if self-employed, to the DOE.

d. Staff of any charter school serving students up to grade 12, and staff of contractors hired by charter schools co-located in a DOE school setting to work in person in a DOE school setting or DOE building, must provide proof of vaccination to their employer, or if self-employed, to the contracting charter school.

2. An employer to whom staff must submit proof of vaccination status, must securely maintain a record of such submission, either electronically or on paper, and must demonstrate proof of compliance with this Order, including making such records immediately available to the Department upon request.

3. Beginning September 13, 2021, all visitors to a DOE school building must show prior to entering the building that they have:

   a. Been fully vaccinated; or
   b. Received a single dose vaccine, or the second dose of a two-dose vaccine, even if two weeks have not passed since they received the dose; or
   c. Received the first dose of a two-dose vaccine.

4. Public meetings and hearings held in a DOE school building must offer individuals the opportunity to participate remotely in accordance with Part E of Chapter 417 of the Laws of 2021.

5. For the purposes of this Order:

   "Charter school setting" means a building or portion of building where a charter school provides instruction to students in pre-kindergarten

through grade 12 that is not collocated in a DOE building.

"DOE school setting" includes any indoor location where instruction is provided to DOE students in public school pre-kindergarten through grade 12, including but not limited to locations in DOE buildings, and including residences of students receiving home instruction and places where care for children is provided through DOE's LYFE program. DOE school settings include buildings where DOE and charter schools are co-located.

"DOE staff" means (i) full or part-time employees of the DOE, and (ii) DOE interns (including student teachers) and volunteers.

"Fully vaccinated" means at least two weeks have passed after an individual received a single dose of a COVID-19 vaccine that only requires one dose, or the second dose of a two-dose series of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization.

"Proof of vaccination" means proof that an individual:

a. Has been fully vaccinated;
b. Has received a single dose vaccine, or the second dose of a two-dose vaccine, even if two weeks have not passed since they received the dose; or
c. Has received the first dose of a two-dose vaccine, in which case they must additionally provide proof that they have received the

second dose of that vaccine within 45 days after receipt of the first dose.

"Staff of contractors of DOE or the City" means a full or part-time employee, intern or volunteer of a contractor of DOE or another City agency who works in-person in a DOE school setting, a DOE building, or a charter school, and includes individuals working as independent contractors.

"Visitor" means an individual, not otherwise covered by Paragraph 1 of this Order, who will be present in a DOE school building, except that "visitor" does not include:

a. Students attending school or school-related activities in a DOE school setting;
b. Parents or guardians of students who are conducting student registration or for other purposes identified by DOE as essential to student education and unable to be completed remotely;
c. Individuals entering a DOE school building for the limited purpose to deliver or pick up items;
d. Individuals present in a DOE school building to make repairs at times when students are not present in the building;
e. Individuals responding to an emergency, including police, fire, emergency medical services personnel, and others who need to enter the building to respond to or pick up a student experiencing an emergency;
f. Individuals entering for the purpose of COVID-19 vaccination;
g. Individuals who are not eligible to receive a COVID-19 vaccine because of their age; or

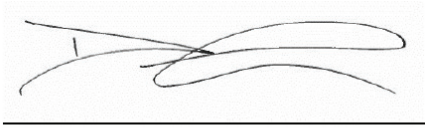
h. Individuals entering for the purposes of voting or, pursuant to law, assisting or accompanying a voter or observing the election.

"Works in-person" means an individual spends any portion of their work time physically present in a DOE school setting, DOE building, or charter school setting. It does not include individuals who enter such locations for the limited purpose to deliver or pick up items unless the individual is otherwise subject to this Order. It also does not include individuals present such locations to make repairs at times when students are not present in the building unless the individual is otherwise subject to this Order.

6. Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law.

7. This Order shall be effective immediately and remain in effect until rescinded, subject to the authority of the Board of Health to continue, rescind, alter or modify this Order pursuant to Section 3.01(d) of the Health Code.

Dated: September 15, 2021



Dave A. Chokshi, M.D., MSc
Commissioner

ORDER OF THE BOARD OF HEALTH AMENDING COVID-19 VACCINATION REQUIREMENTS FOR DEPARTMENT OF EDUCATION EMPLOYEES, CONTRACTORS, VISITORS AND OTHERS

WHEREAS, on March 25, 2020, the Commissioner of Health and Mental Hygiene ("Commissioner") declared the existence of a public health emergency within New York City to address the continuing threat posed by COVID-19 to the health and welfare of City residents, and such declaration and public health emergency continue to be in effect; and

WHEREAS, pursuant to Section 3.01(d) of the Health Code, when urgent public health action is necessary to protect the public health against an existing threat and a public health emergency has been declared, the Commissioner is authorized to issue orders and take actions that are deemed necessary for the health and safety of the City and its residents; and

WHEREAS, on September 15, 2021, the Commissioner issued, and on September 17, 2021, the Board of Health ratified and continued, an Order requiring proof of COVID-19 vaccination by September 27, 2021, for Department of Education ("DOE") employees, visitors to school buildings, charter school staff, and individuals who work in-person in a DOE or charter school setting or DOE building ("September 15, 2021 Order"); and

WHEREAS, on September 28, 2021, the Commissioner extended the deadline by which DOE

employees, visitors to school buildings, charter school staff, and individuals who work in-person in a DOE or charter school setting or DOE building were required to comply with the September 15, 2021 Order ("September 28, 2021 Order"), which extension was ratified and continued by the Board of Health on October 18, 2021; and

WHEREAS, as of January 26, 2023, more than 7.5 million City residents, representing 90% of residents of all ages, have received at least one dose of vaccination against COVID-19, with more than 81% of residents having completed a primary series of vaccination; among 5- to 12-year-olds, 58% have received at least one dose and 51% have completed a primary series; among 13- to 17-year-olds, 93% have completed at least one dose and 83% have completed a primary series; and

WHEREAS, as of February 1, 2023, 171,371 DOE employees, representing 99% of all DOE employees, have completed a primary series of vaccination; and

WHEREAS, high vaccination rates correlate with lower rates of hospitalization and death, and the high rate of vaccination among City residents has proven effective in lessening the burden of COVID-19 on the City's healthcare system; and

WHEREAS, on September 20, 2022, based on guidance from New York State, the Commissioner issued an Order to Rescind the Covid-19 Vaccination Requirement for Participation in High Risk Extracurricular Activities, which was ratified and continued by the Board of Health on October 25, 2022;

NOW THEREFORE BE IT RESOLVED, the Board of Health hereby orders that the September 15, 2021 Order, as amended by the September 28, 2021, Order is further **AMENDED** as follows:

1. Paragraph 1 of the September 15, 2021 Order, as amended by the September 28, 2021 Order, is amended to **REPEAL** the requirement for new DOE staff and new City employees to provide proof of vaccination and **REPEAL** the requirement for staff of any charter school and staff of contractors working in DOE schools or buildings to provide proof of vaccination to their employer, and to **AMEND** the requirement that DOE staff and City employees who worked in-person in a DOE school setting, DOE building, or charter school setting were required to provide proof of vaccination to the DOE or their employer by October 1, 2021 or prior to beginning their employment, so that if any current staff or employee did not provide such proof, they are no longer required to do so.

2. Paragraph 3 of the September 15, 2021 Order, requiring visitors to DOE school buildings to have received at least one dose of a COVID-19 vaccine, as amended by the September 28, 2021 Order, is **REPEALED**.

3. Paragraph 4 of the September 15, 2021 Order, relating to remote participation in public meetings and hearings in DOE school buildings, is **REPEALED**.

Dated: February 9, 2023