APP NO. 22A-_____

IN THE SUPREME COURT OF THE UNITED STATES

NEW YORKERS FOR RELIGIOUS LIBERTY; et al.,

Applicants,

v.

CITY OF NEW YORK; et al.,

Respondents.

To the Honorable Sonia Sotomayor,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Second Circuit

EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant New Yorkers for Religious Liberty, Inc., states that it is a not-for-profit corporation organized under New York law, and that it neither issues stock nor has a parent company. The remaining Applicants are individuals.

PARTIES TO THE PROCEEDING

Applicants (Plaintiffs-Appellants below) are New Yorkers for Religious Liberty, Inc.; Gennaro Agovino, Curtis Cutler, Liz Delgado, Janine DeMartini, Brendan Fogarty, Sabina Kolenovic, Krista O'Dea, Dean Paolillo, Dennis Pillet, Matthew Rivera, Laura Satira, Frank Schimenti, James Schmitt, Michael Kane, William Castro, Margaret Chu, Heather Clark, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Natasha Solon, Trinidad Smith, and Amaryllis Ruiz-Toro, individually and for all others similar situated; Sasha Delgado, Matthew Keil, John De Luca, Dennis Strk, Sarah Buzaglo, Benedict Loparrino, Joan Giammarino, Amoura Bryan, Edward Weber, and Carolyn Grimando.

Respondents (Defendants-Appellees below) are the City of New York, Eric Adams, Dave Chokshi, in his official capacity as Health Commissioner of the City of New York, and the New York City Department of Education. Roberta Reardon was also a Defendant below.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Second Circuit, No. 22-1801, *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, order denying injunction pending appeal, entered October 11, 2022.

U.S. District Court for the Southern District of New York, No. 21-cv-7863 (NRB), No. 21-cv-8773 (NRB), *Kane et al.* v. *Bill de Blasio, et al.*, order denying motion for a preliminary injunction and dismissing Plaintiffs' complaint with prejudice, entered August 26, 2022.

U.S. District Court for the Eastern District of New York, No. 22-cv-00752 (DG), *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, order denying Plaintiffs' motion for a preliminary injunction, entered August 11, 2022.

DECISIONS BELOW

As noted in the List of All Proceedings, this consolidated appeal involves three different actions—*Kane* and *Keil*, which were consolidated in the district court, and *NYFRL*, into which *Kane* and *Keil* were consolidated by the Second Circuit. The *Kane* and *Keil* district court's unreported August 26, 2022 Memorandum and Order dismissing the complaints is reprinted in Appendix ("App.") A. The *NYFRL* district court's unreported August 11, 2022 Order and relevant pages from the transcribed bench opinion are reprinted in App.B. The Second Circuit's summary, unreported October 11, 2022 Order denying an injunction pending appeal in *Kane*, *Keil*, and *NYFRL* is reprinted in App.C.

JURISDICTION

Kane and *Keil*

The *Kane* and *Keil* Applicants filed their verified complaints in late 2021 alleging, among other things, that New York City violated their right to freely exercise their faith by forcing them to choose between maintaining public employment or taking the COVID-19 vaccine against their sincere religious beliefs. *Kane* v. *De Blasio*, No. 1:21-cv-07863 (S.D.N.Y.), ECF No. 1; *Keil* v. *City of New York*, No. 1:21-cv-08773 (S.D.N.Y.), ECF No. 10. The *Kane* and *Keil* Applicants then moved for emergency injunctive relief. *Kane*, ECF No. 12; *Keil*, ECF No. 8. Those motions were denied, *Kane*, ECF No. 60; *Keil*, 10/28/21 Text Order, and the *Kane* and *Keil* Applicants promptly appealed. *Kane*, ECF No. 67; *Keil,* ECF No. 33. The Second Circuit consolidated the appeals and reversed, holding that the *Kane* and *Keil* Applicants were likely to succeed and remanding the case for further proceedings. *Kane*, 2d Cir. No. 21-2678, ECF No. 98.

On remand, the *Kane* and *Keil* Applicants moved for further emergency relief after the City failed to obey the Second Circuit's order. *Kane*, ECF No. 85; *Keil*, ECF No. 50. The district court denied that motion. *Kane*, ECF No. 90; *Keil*, ECF No. 54. The *Kane* and *Keil* Applicants appealed again. *Kane*, ECF No. 91; *Keil*, ECF No. 55. This time, the Second Circuit denied the appeal on procedural grounds only. *Keil*, 2d Cir. No. 21-3043, ECF No. 163.

In February 2022, the City moved to dismiss the consolidated cases. *Kane*, ECF No. 111. Two months later, the *Kane* and *Keil* Applicants moved again for preliminary

injunctive relief, providing the fuller record the Second Circuit requested. *Kane*, ECF No. 121. The district court denied the *Kane* and *Keil* Applicants' motion and granted the City's motion to dismiss. *Kane*, ECF No. 184, App.A. The *Kane* and *Keil* Applicants timely appealed, *Kane*, ECF No. 186, and moved for injunctive relief pending appeal in the district court, *Kane*, ECF No. 187. After the district court denied that request, *Kane*, ECF No. 188, the *Kane* and *Keil* Applicants moved the Second Circuit for emergency relief, *Kane*, 2d Cir. No. 22-1876, ECF No. 12, which that court summarily denied on October 11, 2022, *NYFRL*, 2d Cir. No. 22-1801, ECF No. 107, App.B.

The district court had jurisdiction under 28 U.S.C. 1331 and 1343 and authority to issue declaratory and injunctive relief under 28 U.S.C. 1343 and 2201. The United States Court of Appeals for the Second Circuit had jurisdiction over the *Kane* and *Keil* Applicants' appeal under 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1651. The *Kane* and *Keil* Applicants' application is "in aid of [this Court's] jurisdiction," *id.*, because it will take several months to obtain a ruling from the Second Circuit on the *Kane* and *Keil* Applicants' appeal of the district court's dismissal and their appeal of the district court's denial of their preliminary injunction, during which time the irreparable harm to the *Kane* and *Keil* Applicants' families and the Applicants' First Amendment rights will be irreversible.

New Yorkers for Religious Liberty (NYFRL)

On February 10, 2022, the *NYFRL* Applicants filed a complaint alleging, among other things, that New York City had violated their right to freely exercise

their faith by forcing them to choose between maintaining public employment or taking the COVID-19 vaccine against their sincere religious beliefs. *New Yorkers for Religious Liberty, Inc. (NYFRL)* v. *City of New* York, No. 22-CV-0752 (E.D.N.Y.), ECF No. 1. They then moved for a preliminary injunction and temporary restraining order. ECF No. 7, 7-1. After several interim rulings and submissions, the district court denied the *NYFRL* Applicants' request for preliminary relief on August 11, 2022, reading its ruling into the record that same day. ECF No. 107, App.B. The *NYFRL* Applicants timely appealed, ECF No. 109, and moved for injunctive relief pending appeal in the district court, ECF No. 111. After that motion was denied, they moved the Second Circuit for the same relief. *NYFRL*, 2d Cir. No. 22-1801, ECF No. 13. The Second Circuit summarily denied that motion in an order dated October 11, 2022. 2d Cir. No. 22-1801, ECF No. 110, App.C.

The district court had jurisdiction under 28 U.S.C. 1331 and 1343 and authority to issue declaratory and injunctive relief under 28 U.S.C. 1343 and 2201. The United States Court of Appeals for the Second Circuit had jurisdiction over the *NYFRL* Applicants' interlocutory appeal under 28 U.S.C. 1292. This Court has jurisdiction under 28 U.S.C. 1651. The *NYFRL* Applicants' application is "in aid of [this Court's] jurisdiction," *id.*, because it will take several months to obtain a ruling from the Second Circuit on the *NYFRL* Applicants' appeal of the district court's denial of their preliminary injunction, during which time the irreparable harm to the *NYFRL* Applicants' families and the Applicants' First Amendment rights will be irreversible.

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To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

It is now widely acknowledged that COVID-19 vaccines are "non-sterilizing" and cannot meaningfully halt the spread of disease. Yet the City of New York continues to insist that public employees set aside their religious objections and be vaccinated to work for the City and, until November 1, 2022, the City barred the unvaccinated from working for *any* employer within the City's jurisdiction.

That decision might be afforded substantial discretion if it allowed exceptions for no one. But the exact opposite is true. The City provides exemptions from its omnibus COVID vaccination requirements for athletes, entertainers, and strippers; exempts thousands of unvaccinated municipal employees whose applications have been allowed to pend indefinitely because of staffing shortages and other secular concerns; offers a medical exemption; and provides a religious exemption for City employees—one granted rarely in officials' unfettered and standardless discretion.

Plaintiffs-Applicants in these consolidated cases are New York City firefighters, teachers, police officers, sanitation workers, and other public employees who lost their livelihoods and are losing their homes due to the City's discretionary vaccine policies. Below, one district court dismissed a case brought by the City's teachers (*Kane* and *Keil*), and another district court denied a preliminary injunction in a case brought by a broader range of public employees (*New Yorkers for Religious Liberty*, or *NYFRL*). And while Applicants appealed both decisions, the Second Circuit denied Applicants an injunction pending appeal, causing irreparable harm.

A law that burdens religious exercise is not generally applicable and triggers strict scrutiny if (1) "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," or (2) "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (cleaned up). Here, the City's Mandates do both, triggering strict scrutiny two ways, a standard that the City has not even tried to satisfy.

First, the City provides a mechanism for individualized exemptions—a "Citywide Panel" to consider religious exemptions—that is entirely discretionary. Eric Eichenholtz, the Panel's architect, testified that the Panel's decisions are not supported by any objective evidence or individualized assessment of need. "[T]hese determinations truly are individualized," he testified. *NYFRL*, ECF No. 81-29 at 326:8-15]. This Court has already held that where the government "has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Emp. Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 884 (1990) (*Smith II*). Specifically, *Smith II* recognized the possibility of a ceremonial exemption as the type of mechanism that would defeat general applicability. Other circuits, too, apply strict scrutiny to religious exemption denials if, as here, government actors have discretion. *E.g.*, *Dahl* v. *Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733–34 (6th Cir. 2021) (per curiam).

Second, at the policy-making level, the City exempts secular conduct that impacts the City the same way as granting Applicants an exemption would. Chief

among these exemptions is the City's decision to allow thousands of other unvaccinated City employees to continue working simply by not processing their exemption requests. They also included the Mayor's blanket exemptions for athletes, performing artists, and strippers. The City never justified why an unvaccinated stripper can spend hours in close proximity to customers in an indoor venue, while a City sanitation worker cannot pick up refuse, outside, with virtually no person-to-person contact absent a vaccination that violates his religious convictions.

Applicants do not ask for merits review at this stage. The Second Circuit has expedited Applicants' appeal, and that decision should issue within a few months. But in the meantime, as detailed in the Argument, below, Applicants are suffering the loss of First Amendment rights, are facing deadlines to move out of homes in foreclosure or with past-due rents, are suffering health problems due to loss of their City health insurance and the stress of having no regular income, and resorting to food stamps and Medicaid just to keep their families afloat. As each Applicants' situation becomes more fraught, the coercion to violate their faith so that they can return to their City job increases. Forcing a person to choose between job and faith is per se irreparable harm. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

Accordingly, the Court should grant the Application and enter a preliminary injunction on appeal, partially restoring the status quo ante by enjoining the enforcement of any City Mandate against any Applicant—including reinstatement and the removal of any negative personnel file notations resulting from a Mandate—while the Second Circuit proceeds with the expedited appeal.

STATEMENT OF THE CASE

A. Applicants and the City's vaccine Mandates

Applicants are firefighters, building inspectors, police officers, EMTs, teachers, sanitation workers, and other hardworking New Yorkers, including New Yorkers for Religious Liberty, Inc. (NYFRL), a New York not-for-profit membership organization that consists of applicants and others affected by New York City's COVID-19 vaccine mandates. These heroes are dedicated to serving their neighbors. But the City suspended and fired them because they cannot take the COVID-19 vaccine without violating their religious beliefs.

Through a series of "emergency" executive orders, the City forced most public and private sector employees to take the COVID-19 vaccine. First, in late August 2021, the Mayor and the Commissioner of the Department of Health and Mental Hygiene issued an order requiring all Department of Education ("DOE") employees and contractors to become fully vaccinated by September 27, 2021. *Kane* and *Keil* Consolidated Am. Class Action Compl. [CACAC], ECF No. 102 ¶¶ 61–62. The original mandate contained no medical or religious exemptions. *Id.* ¶ 62. Lawsuits ensued and a TRO issued. *Id.* ¶¶ 77–81. The TRO was resolved through an arbitration award—later held unconstitutional by the Second Circuit—granting religious and medical accommodations, referred to herein as the "Stricken Standards." *Kane*, ECF No. 1-2.

Applicants each have sincerely held religious objections that do not allow them to take a COVID-19 vaccine. CACAC ¶¶ 218–780. Most *Kane* and *Keil* Applicants and many of their colleagues timely applied for religious exemptions in September 2021.

Others, like Applicant Trinidad Smith, elected to file or support a proposed class-action lawsuit because the Stricken Standards were discriminatory and designed to result in widespread denials. *Kane*, ECF No. 1. As the lawsuit foreshadowed, all applications were denied through an auto-boilerplate email that DOE issued to the City's public-school employees. CACAC ¶¶ 111, 833.

Applicants had one day to appeal their denial to an arbitrator's Zoom hearing. CACAC ¶¶ 112–13. DOE representatives aggressively engaged in heresy inquisitions during the appeals, discriminating even more zealously than the already unconstitutional policy required. For example, they argued that Applicant Michael Kane, a non-denominational Buddhist, should be denied because though sincere, his religious beliefs conflict with the Catholic Pope's. *Id.* ¶¶ 221–22, 232. Such comments were common and well documented. Only 162 were accommodated.

Last November, on interlocutory appeal, the Second Circuit declared the DOE's religious exemption policies unconstitutional, holding that denying a religious exemption "based on someone else's publicly expressed religious views—even the leader of her faith—runs afoul" of the First Amendment. *Kane* v. *De Blasio*, 19 F.4th 152, 168 (2d Cir. 2021) (per curiam). The Court also held that government should not second-guess religious adherents' "interpretations of [their] creeds." *Ibid.* (quoting *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989)).

While the *Kane* appeal was pending, the City issued dozens of additional vaccine mandates that require vaccination for nearly all private sector and municipal jobs in the City (collectively, the "Mandates"). After the Second Circuit held the

Stricken Standards unconstitutional, the City *expanded* their use to most municipal employees. CACAC ¶ 805–06; *NYFRL* First Am. Proposed Class-Action Compl. [FAPCAC], ECF No. 77 ¶¶ 192–97.

Alternatively, the City offers the new Citywide Panel process to determine religious accommodations, leading to *more* religious discrimination. The Stricken Standards do not provide a mechanism for denial based on undue hardship. So, if an employee is lucky enough to have a "valid" religious objection under the discriminatory criteria, they keep their jobs. CACAC ¶ 70(i); *Kane*, ECF No. 1-2 at 12. But the Citywide Panel tacks on "undue hardship" as an alternative, unsupported reason for denial on most religious accommodation decisions.

Consider *NYFRL* applicant Sabina Kolenovic. The DOE denied her a religious exemption under the Stricken Standards because DOE representatives alleged that though Kolenovic was sincere, a Muslim leader—whom Kolenovic does not follow—publicly said he was vaccinated against COVID-19. *NYFRL*, ECF No. 52 ¶ 37. The DOE believed this announcement somehow invalidates religious exemption claims of *all* Muslims. If Kolenovic had been part of a religious organization whose leader publicly *opposed* the vaccine, the City would have had to approve her exemption under the Stricken Standards, as it has done for 162 other workers. Conversely, when the City provided "fresh consideration" of Kolenovic's exemption request by the Citywide Panel, the City again denied her request, now claiming "undue hardship," which is *not* an available reason for denial under the Stricken Standards. *Id.* ¶ 52. So as applied, the City plays denominational favorites.

This result surprised no one. The Citywide Panel exercises substantial and unchecked discretion. At his deposition, Eric Eichenholtz—the architect of the Citywide Panel and Chief Assistant Corporation Counsel for Employment Policy and Litigation at the Office of the New York City Corporation Counsel—testified that Panel decisions are truly "individualized" and are constrained by no objective criteria. *NYFRL*, ECF 81-29 at 101, 147–48, 263, 271, 308, 326. Panelists are not given formal training other than vague links to EEOC guidance which do not reflect the heightened undue hardship standard that state and local statutes require. *E.g.*, N.Y. Exec. Law § 296 (McKinney) ("undue hardship" means an accommodation requiring significant expense or difficulty). And Mr. Eichenholtz admitted that the Panel was not following statutory standards for undue hardship even under the more forgiving federal standards: the Panel did not review or rely on objective evidence to establish that Applicants are a direct threat and need to be segregated based on their religious practices, nor any economic evidence to support the determination that they cannot be reasonably accommodated.

Applicants submitted evidence that the Panel used that discretion to judge not only the sincerity of workers' beliefs but their *value*. For example, the City instructed the Panel to deny exemptions based on personal—versus institutional—beliefs and those rooted in opposition to participating in abortion, such as taking COVID-19 vaccines tested on or developed from aborted fetal cell lines. *NYFRL*, ECF No. 64-1.

Most Applicants were arbitrarily denied under this deeply flawed, discretionary process. Applicant Agovino, a 26-year employee of the Department of Corrections

("DOC"), was denied on the basis of "undue hardship" even though, under the municipal mandate, "uniformed" unvaccinated DOC officers were able to continue working in person due to the secular concern of "staffing shortages," FAPCAC ¶¶ 186–89, inmates and visitors could remain unvaccinated, and Agovino had no contact with detainees and little contact with anyone. *Id.* ¶ 341.

Applicant Paolillo, a dedicated police officer who worked through the worst of the pandemic on the front lines, was terminated March 25, 2022, after the Citywide Panel denied his application, stating only "does not meet criteria." Discovery revealed that two panelists found him sincere, one voted to deny because they disputed whether aborted fetal cells are in fact implicated in the production or testing of the vaccines (they are), and the Law Department voted to deny based on "undue hardship," which Mr. Eichenholtz admitted was not supported by any objective data or analysis. FAPCAC ¶¶ 456–61. Meanwhile, 4,650 of Paolillo's similarly situated unvaccinated colleagues are still working today due to secular considerations about staffing and administrative backlog. *NYFRL*, ECF No. 81-21.

Applicant Fogarty, who worked for the FDNY for almost 20 years and was a captain, was denied religious accommodation based on the "*potential* for undue hardship." FAPCAC ¶ 350 (emphasis added). Mr. Eichenholtz admitted that the FDNY submitted nothing to support this determination. *NYFRL,* ECF No 81-29 at 236–38. The FDNY, like all municipal departments, now faces a staffing crisis. FAPCAC ¶ 314–318. If Applicant Fogerty were to get vaccinated, he could easily recover his job.

Applicants O'Dea and Pillet, also FDNY employees, worked until February and May 2022, respectively, all while engaging in periodic testing, daily temperature checks, and daily masking. *NYFRL*, ECF Nos. 15, 17, 53, and 55. During this time, O'Dea helped save the life of a patient in cardiac arrest. *NYFRL*, ECF No. 53 ¶ 51. Nevertheless, their religious exemption requests were denied due to the "potential undue hardship." *Id.* ¶ 49; *NYFRL*, ECF No. 55 ¶ 33. O'Dea now works at the same job in New Jersey, and Pillet was vaccinated in violation of his religious beliefs, causing spiritual trauma.

Applicant Cutler worked for the Sanitation Department since 2014. Mr. Eichenholtz denied Cutler's religious exemption because he received vaccines before he became religious. FAPCAC ¶ 373. Cutler is a born-again Christian, a deacon at his church, and provided ample evidence of his deep religious commitments to his church and religious objections to vaccination. *Id.* ¶ 371; *NYFRL*, ECF No. 10-1, 10-2, 10-4. His application explained that since the date when he was born again, he has received no vaccine. FAPCAC ¶ 372. His exemption was denied based solely on the fact that he got vaccinated *before* his conversion years ago, even though Mr. Eichenholtz testified that such a conversion would "compel a grant of an accommodation . . . ." *NYFRL*, ECF No. 81-29 at 166–67. The stories go on.

B. Carve outs and ongoing coercion

As public views shifted, the Mayor exercised his discretion to exempt from the City's omnibus COVID Mandates many more preferred workers. For example, in March, Mayor Adams issued Emergency Executive Order 62, which exempted from

the City's blanket employee mandates classes of athletes, entertainers, and strippers—not because they posed less risk of infection, but because the Mayor believed the City would benefit from this economically. FAPCAC ¶¶ 13–14. So, while NBA star Kyrie Irving could return to the basketball court, Broadway entertainers could return to the stage (along with their make-up artists and entourages), and strippers could return to airless, enclosed adult entertainment parlors, hardworking sanitation workers, building inspectors, police officers and other public and private-sector workers could not return to work—even if they had no in-person contact with the public. This favoritism worried Jay Varma, a physician, epidemiologist, and senior advisor to Mayor Bill de Blasio for public health and COVID-19, who warned that the new carve-outs would open the City to "legal action" on the basis that its remaining mandates were "arbitrary and capricious." *NYFRL*, ECF No. 81-22 at 5.[1]

Since then, the City continues to make arbitrary exceptions. The *New York Times* reported that the City is enforcing very little of its private-employee mandates. Lola Fadulu, *Eric Adams Stopped Enforcing Covid Vaccine Mandate for NYC Business*, The New York Times (June 23, 2022), https://www.nytimes.com/2022/06/23/nyregion/nyc-vaccine-mandate-adams.html. And the *New York Post* reported that the City exercised discretion to "pause" its review of appeals for over 4,600 unvaccinated NYPD workers denied an exemption, allowing them to continue working. *NYFRL*, ECF No. 81-21. While Applicants' appeal was pending in the

[1] See also, *Jay Varma*, Wikipedia (May 16, 2021, 3:14 PM), https://en.wikipedia.org/wiki/Jay_Varma.

Second Circuit, the Mayor even announced that mandates for all private sector employees would end November 1, 2022. Yet, the City continues to refuse to reinstate municipal employees, including Applicants, with sincere religious objections to the vaccines on the unsupported claim of "undue hardship." No public health justification was ever used to explain this discrimination—each carve out was justified by secular concerns such as the "economic health of the city" or "staffing shortages" or "administrative backlog."

Meanwhile the religious coercion continues. The City regularly offers new "last chances" for terminated municipal employees to be reinstated if they take the vaccine. FAPCAC ¶¶ 257–58. The June and September 2022 "last chances" have come and gone while motions for injunctive relief and appeals pended. But the City's staffing crisis persists. *E.g.*, Yoav Gonen, *One in Five Jobs Unfilled at Health and Buildings Departments, City Council Finds*, The City (Sept. 6, 2022), https://on.nyc.gov/3yy3sc9; Dana Rubinstein and Emma G. Fitzsimmons, *Why City Workers in New York Are Quitting in Droves*, The New York Times (July 13, 2022), https://nyti.ms/3RUZgdB. These last-chance offers will likely continue. But no matter; every employee knows that given staffing shortages, all they need to do is get vaccinated and they can return to work for the City, if not in their same position, at least in some comparable position.

When Applicants first moved for preliminary relief, all were still employed and able to work unvaccinated. *E.g.*, *NYFRL*, ECF No. 1 ¶¶ 266–67, 271–72, 278–79, 286, 295, 300–302, 306–307, 311, 328–29, 334–35. Today, all but four of the *NYFRL* applicants and three of the *Kane* and *Keil* applicants have been terminated or forced

to resign. Some already had to violate their faith to keep their jobs. *E.g.*, *Kane*, ECF No. 162. Those Applicants are emotionally traumatized. *Ibid.* Each day this discrimination persists, the remaining Applicants are faced with the same unconstitutional choice—hold out or capitulate their beliefs to avoid eviction. They each submitted sworn statements that the pressure to violate their faith is causing unbearable, irreparable harm, including lost health insurance, having to apply for food stamps, and forced moves out of the City and even the country. *E.g.*, *NYFRL*, ECF No. 47 ¶ 39, ECF No. 48 ¶¶ 45–49, ECF No. 49 ¶¶ 41–42, ECF No. 51 ¶ 28, ECF No. 52 ¶¶ 60–64, ECF No. 54 ¶ 57, ECF No. 55 ¶ 46, ECF No. 58 ¶¶ 76–77, 80, ECF No. 59 ¶¶ 56–57; *Kane*, ECF No. 123 ¶¶ 30–39, ECF No. 124 ¶¶ 10–14, ECF No. 125 ¶¶ 10–14, ECF No. 126 ¶¶ 18–23, ECF No. 127 ¶¶ 7–13, ECF No. 128 ¶¶ 27–28, 31, ECF No. 129 ¶¶ 335–36, 48–49, 52, 55, 57, ECF No. 130 ¶¶ 7–13, ECF No. 131 ¶¶ 13–17, ECF No. 132 ¶¶ 22, 38–39, 41, ECF No. 133 ¶¶ 10, 12, 18, 21–25, ECF No. 134 ¶¶ 42, 45–46, ECF No. 135 ¶¶ 13, 15–16, 18–22, ECF No. 136 ¶¶ 29–32, ECF No. 137 ¶¶ 17–25, ECF No. 138 ¶¶ 12–21, ECF No. 139 ¶¶ 24–33, ECF No. 140 ¶¶ 37–39, 42–44, 46–47, ECF No. 163 ¶¶ 5–9, 16–17.

C. Repeal of the private sector Mandate

While these appeals were pending below, the City made another carve-out, announcing that the Mandate for private sector employees would be repealed beginning November 1, 2022.[2] But the same relief is still arbitrarily withheld from municipal employees with religious objections.

[2] New York City Department of Health, *COVID-19: Vaccine Workplace Requirement*.

D. Lower court proceedings

The lower-court proceedings are set forth in the Jurisdiction section, above. In sum, one district court dismissed and denied preliminary injunctive relief in the *Kane* and *Keil* actions, App.A, and another district court denied preliminary injunctive relief in *NYFRL*, App.B. The Second Circuit then summarily denied Applicants' motion for an injunction pending appeal, failing to explain why the City can use an individualized system for granting religious exemptions while categorically exercising discretion to exempt athletes and strippers without running afoul of the First Amendment. App.C. The Second Circuit has ordered expedited merits briefing.

Below, the *Kane* and *Keil* district court did not address the City's admission that the Citywide Panel rendered its decisions with unfettered discretion and without discernible standards. Instead, that court said it was enough that the Panel claimed to act "in accordance with Title VII," App.A at 25, despite no evidence of that.

Similarly, the *NYFRL* court did not address the City's admission. Instead, the court stated that Applicants "failed to demonstrate that the mandates and/or the Citywide Panel process for determining religious exemptions allows secularly-motivated conduct to be favored over religiously-motivated conduct," App.B at 38–39, not addressing the City's favoritism for some religious adherents over others.

ARGUMENT

The All Writs Act, 28 U.S.C. 1651(a), authorizes a Justice or the Court to issue an injunction in "exigent circumstances" when the "legal rights at issue are indisputably clear" and relief is "necessary or appropriate in aid of the Court's

jurisdiction." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (cleaned up). The Court's discretion is broad: it may issue an injunction "based on all the circumstances of the case [without] express[ing] . . . the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver* v. *Sebelius*, 134 S. Ct. 1022, 1022 (2014).

Relief is warranted. The Mandates' exemptions are rife with discretion and denominational preference. And the Mayor has unfettered discretion to carve out individuals and classes for secular reasons. When officials exceed the "broad limits" of their discretion to such a degree, an injunction should issue. *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring).[3]

[3] If this Court considers whether "four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction," *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers), Justices Thomas, Alito, and Gorsuch, would have granted the petition in *Dr. A.* v. *Hochul*, No. 21-1143, which involved *non*-discretionary COVID medical exemptions.

I. Applicants plausibly alleged, and will likely succeed in showing, that New York City's vaccine Mandates violate their right to freely exercise their religion.

The First Amendment forbids laws that curb "the free exercise" of religion. U.S. Const., amend I. Here, Applicants faced adverse employment actions because their sincere religious beliefs kept them from taking the COVID-19 vaccine. Laws and regulations that are not generally applicable or lack neutrality facially or as applied trigger strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531–32 (1993). Facially and as applied to Applicants, the Mandates are neither neutral or generally applicable and are therefore subject to strict scrutiny.

A. The City's Mandates are not generally applicable.

1. The Citywide Panel exercises unfettered discretion in deciding religious exemptions.

The City's Mandates are not generally applicable because the Citywide Panel exercises substantial discretion in deciding religious exemptions. This is consistent with *Fulton*, which held that 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." *Fulton*, 141 S. Ct. at 1877 (cleaned up). "Accordingly, where a state extends discretionary exemptions to a policy, it must grant exemptions for cases of "religious hardship" or present compelling reasons not to do so." *Dahl*, 15 F.4th at 733 (vaccine mandate not generally applicable because it allows discretion to grant or deny religious exemptions). Here, the Panel's discretion can hardly be questioned. As noted, Mr. Eichenholtz, the Panel architect, admitted that the Panel makes undue hardship determinations that (1) are unsubstantiated

by any objective scientific or financial evidence, and (2) do not even consider whether Applicants are a threat and require segregation based on their religious need to decline a vaccine. This is a constitutional problem. See *Fulton*, 141 S. Ct. at 1881–82 (criticizing Philadelphia for not showing that giving CSS an exception would put the City's goals at risk).

Mr. Eichenholtz also admitted that the Panel exercises enormous discretion to judge the sufficiency of individual religious beliefs. This problem is seen in the Citywide Panel's improper denials of Appellicants' exemption requests. But it also appears on the Panelists' notes, which show that they routinely substituted their own judgment for the applicants' about what their faith requires. *NYFRL*, ECF No. 64-3 at 1; *Kane*, ECF No. 122-2 at 1–5. The spreadsheet notes even show that Panelists denied applicants whose religious beliefs are formed by prayer instead of orthodoxy. To the Panel, these Applicants had personal choice, so their decision could not be "religious." *Ibid*. That's wrong. "[T]he government . . . cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" because the "Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd*. v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Mr. Eichenholtz further admitted the Citywide Panel denied applicants whose views the City disagrees with—particularly those with objections to products using aborted fetal cell lines in testing or development. *NYFRL*, ECF No. 64-3 at 1; *Kane*, ECF No. 122-2 at 1–5. Whether Mr. Eichenholtz and his Panel members believe the

connection is strong enough to merit concern, or whether they disagree with Applicants' facts, is irrelevant to the determinations of the Panel. The Panel's decisions violate the command that religious beliefs are entitled to protection if sincerely held, even if some reasonable observers would view them as unreasonable or illogical. *E.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

Importantly, as noted above, Mr. Eichenholtz admitted that *there are no real governing standards* employed by Panel members; the process is completely discretionary and "individualized." *NYFRL*, ECF No. 81-29 at 101, 147–48, 263, 271, 308, 326. Such "a formal system of entirely discretionary exceptions . . . renders" a government policy or scheme "not generally applicable." *Fulton*, 141 S. Ct. at 1878. Adoption of the Citywide Panel did not change the Second Circuit's prior holding that these religious exemption decisions involve the exercise of discretion and denials must be strictly scrutinized. *Kane*, 19 F.4th at 169.

2. The City's Mandates play denominational favorites.

The Mandates are also not generally applicable because they prefer some religious denominations over others. Under the Stricken Standards, the City specified that "Requests [for religious accommodation] shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine." *Kane*, CACAC ¶ 70(c). That is why the City denied Sabina Kolenovic a religious exemption twice—even though she does not follow the Muslim leader who publicly said he was vaccinated against COVID-19.

The City did not cure the constitutional infirmity in its approach by offering a second level of review through the Citywide Panel. The City continued to discriminate

against personally held religious beliefs and minority denominations, and it continued to offer the Stricken Standards and preference those who meet the discriminatory criteria therein. Religious adherents who can demonstrate that their denomination's leader opposed the vaccine automatically receive an exemption. Those who cannot—such as Roman Catholics who in good faith have reached a different conclusion as to the COVID vaccine's morality than Pope Francis—or those to whom the Panel imputes such beliefs—such as Sabina Kolenovic—are still denied as an "undue hardship." Such denominational favoritism also triggers strict scrutiny.

This was the precise issue in the *Smith* cases, which specifically noted that a law could not be "generally applicable" if the state allows religious exemptions, even if no secular reasons for exemption are ever favored. *Emp. Div., Dep't of Hum. Res. of Or.* v. *Smith*, 485 U.S. 660, 672 (1988) *(Smith I)*; *Smith II*, 494 U.S. at 874. There, this Court twice addressed whether plaintiffs were improperly denied unemployment benefits after being fired for ceremonial peyote use. In *Smith I*, the Court held that strict scrutiny would apply if Oregon drug laws had a mechanism for exemption for ceremonial peyote use. 485 U.S. at 672 ("A substantial number of jurisdictions have exempted the use of peyote in religious ceremonies from [state drug laws…]. If Oregon is one of those States, [plaintiffs'] conduct may well be entitled to constitutional protection."). Only after the state court decided there was *no* mechanism for a religious exemption for ceremonial drug use did the Court define the drug law as generally applicable and allow a lesser standard of review. *Smith II*, 494 U.S. at 877–90. So, if a state allows religious exemptions, this Court has already held that the law

is not generally applicable and denial of the religious accommodation must be strictly scrutinized. *Ibid.* And that is doubly true where, as here, the government uses a religious-accommodation system to favor some religious denominations and adherents over others.

Accordingly, this case presents a straightforward application of *Smith.* There is no dispute that the City's Mandate offers a religious-exemption mechanism that is applied unevenly depending on one's denomination. Nonetheless, neither district court applied strict scrutiny, or even addressed the clear holding in *Smith,* both electing instead to cite a non-precedential district court opinion stating that if "*Fulton* [and presumably *Smith* which *Fulton* rests on] required strict scrutiny for every religious exception, . . . 'such an interpretation would create a perverse incentive for government entities to provide no religious exemption process in order to avoid strict scrutiny.'" App.A at 24–25 (citing *Ferrelli* v. *Unified Ct. Sys.*, No. 22 Civ. 0068 (LEK) (CFH), 2022 WL 673863, at *7 (N.D.N.Y. Mar. 7, 2022)). That reasoning is flawed. Strict scrutiny is not a barrier to providing religious accommodation; it ensures a principled application of that accommodation. Moreover, such reasoning does not render *Smith* and *Fulton* bad law.

Similarly, the district court in *Kane* made a clear error in deciding that the Citywide Panel's religious accommodation determinations are somehow ministerial in nature and can avoid strict scrutiny pursuant to the Second Circuit's holding in *We the Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 290 n.29 (2d Cir. 2021). According to the Second Circuit in *We the Patriots,* medical exemptions in that case provided

"no meaningful discretion to the State or employers" to issue exemptions since checking for a doctor's note was essentially a ministerial act. *We the Patriots USA, Inc.*, 17 F.4th at 288-89. The individualized determinations, if any, said the court, was on the part of the "physicians and nurse practitioners," and not the government. *Ibid*. In so holding, the Court distinguished the situation where the government is afforded discretion in medical and religious exemption determinations, such that there exists a potential for religious discrimination or arbitrary results. *Id.* at 290 n.29. The Second Circuit was wrong about that; if medical exemptions affect the government interest the same way as religious exemptions, then strict scrutiny applies to the denial of request for a religious exemption. Nevertheless, the three cases here undeniably involve a discretionary determination and secular carveouts.

There can be no serious question that religious accommodation denials involve discretion and carry the risk of arbitrary or even discriminatory denial. This issue was examined in depth in *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940), where the Supreme Court expressly rejected the claim that a state actor's religious exemption decision could be deemed ministerial in nature. Because the Mandates themselves contain a mechanism for individualized review, the Mandates are not generally applicable.

3. The City's Mandates allow ample executive discretion to make arbitrary additional exemptions.

Over the past year, the City's Mayor has issued over 150 executive orders, which function collectively to impose the mandate on nearly every employee in New York, with some notable and ever-expanding exceptions. *E.g.*, *Keil*, ECF No. 57-2.

These Mandates and exemptions clarify that the City's vaccine mandate cannot be deemed a generally applicable "across the board" law in any sense.

General applicability involves "general laws" that govern society at large, not a multitude of *specifically* applicable ever-changing executive branch edicts tailored to differently govern various arbitrary groups and individuals at the whim of a mayor or health commissioner. That a municipality, through executive orders, would create 150 (and counting) vaccine regulations subject to extension, modification or repeal at the mayor's whim, is hardly generally applicable and is subject to strict scrutiny facially and as applied. The government cannot evade the Free Exercise Clause's requirements merely by slicing and dicing mandates into small pieces, each of which is "generally applicable" to a microcosm of the regulated class, at least without explaining the difference in rules. Here for example, Respondents have never attempted to explain why strippers should be exempt from the vaccine mandate but sanitation workers cannot. That's because there is no explanation possible.

Nor is the notion that the Mayor can "peel away" his own promulgations at his discretion—effectively applying the law at his whim—consistent with general applicability. In *Fulton*, the Court held that because the Commissioner *could* issue exemptions to the city's public-accommodation law governing foster-care placement, the law was not generally applicable. 141 S. Ct. at 1879. This was true no matter whether the Commission had ever "granted one." *Ibid.* Here, Mayor Adams has granted many exceptions and exercises substantial discretion in deciding "which reasons" justify bucking the City's mandate. *Ibid.* That, too, triggers strict scrutiny.

4. The City uses its executive discretion to prefer secular conduct that undermines the government's asserted interest in similar ways as non-exempted religious conduct.

This Court has also explained that a "law also lacks general applicability 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. The City's Mandates cross that line as well.

For example, in March, Mayor Adams issued Emergency Executive Order 62, which exempted from the City's Mandate athletes, entertainers, and strippers—not because they posed less risk of infection, but because the Mayor believed the City would benefit economically. FAPCAC ¶¶ 13–15. So, while strippers could return to their venues, and NBA star Kyrie Irving could return to the basketball court, normal hardworking citizens were denied religious exemptions to work anywhere, even in the same stadium where athletes and their entourages were exempted.

Shockingly, Mayor Adams admitted he had no public health justification for these carve-outs. *E.g.*, *NYFRL*, ECF No. 81-24 at 7–8. As noted, the decision was economically motivated. And the public took notice. For example, Harry Nespoli, chairman of the Municipal Labor Committee, which represents over 100 unions and over 400,000 employees citywide, told the New York Times, "[t]here can't be one system for the elite and another for the essential workers of our city." *NYFRL*, ECF No. 81-22 at 3.

And that's not all. The City's Mandates allow most municipal employees to continue working unvaccinated indefinitely until the Citywide Panel issues a final

decision. *E.g.*, FAPCAC ¶¶ 470–71. Facing an extreme staffing crisis in many departments, City officials intentionally paused reviewing thousands of appeals of unvaccinated public employees. *E.g.*, *NYFRL*, ECF No. 81-21. So, to this day, thousands of unvaccinated City workers are allowed to remain on the job, while Applicants and other religious individuals unlucky enough to have been formally denied accommodation are unable to work or get paid. (Remarkably, the Private Sector Mandate is rescinded as of November 1, 2022. That means that nearly four million private sector workers will be subject to no City vaccine requirement, while religious objectors to the City Mandates are freely terminated.[4])

Nothing explains why religious objectors cannot be accommodated while thousands of other City workers can continue to report to work for months on end without compromising public health. An unvaccinated police officer poses no greater risk to the public after he receives his denial. If thousands who have not been processed can safely work in person each week, Applicant Paolillo can as well. Because "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather," the City cannot preference its economic or administrative concerns over the religious concerns of Paolillo and other Applicants. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

[4] New York State Department of Labor, *Labor Statistics for the New York City Region*, https://dol.ny.gov/labor-statistics-new-york-city-region#:~:text=%EF%BB%BFLabor%20Statistics%20for%20the%20New%20York%20City%20Region,-Bronx%2C%20Kings%2C%20New&text=Private%20sector%20jobs%20in%20New,to%203%2C961%2C100%20in%20September%202022 (last visited October 31, 2022).

And it is no excuse that the City is acting here as manager rather than lawmaker. Contra App.A at 25–26, citing *Engquist* v. *Or. Dep't of Agr.*, 553 U.S. 591, 598 (2008). Even if Respondents had been acting as managers, not lawmakers,[5] *Fulton* rejected the argument that *Engquist* would allow a lesser standard of review to religious exemption denials, 141 S. Ct. at 1878–79. So too here. Accordingly, strict scrutiny must be applied.

B. The City's Mandates are not neutral.

Laws that appear neutral on their face, but which are regularly implemented in an unconstitutional manner, are not neutral and thus must be strictly scrutinized when they function to burden religious rights. *Forsyth Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 131 (1992). The City's Mandates fail this neutrality standard, too.

For example, emails produced in discovery and submitted in all cases to the district courts show that the Citywide Panel members believed that objections to vaccines based on the use of aborted fetal cell lines in vaccine testing or development were *not* religious objections. *E.g.*, *NYFRL*, ECF No. 64-1 at 2. Indeed, for all but one Applicant who was raised Jehovah's Witness, the Panel arbitrarily rejected applications focused on religious objections to use of aborted fetal cells, substituting

[5] This point is contested. Two recent state court decisions have held that the Mayor and DOH lack the authority to issue employment conditions, specifically the vaccine requirement, on municipal employees outside of the collective bargaining process. *Police Benevolent Ass'n of N.Y.* v. *City of New York,* Index No. 151531-2022 (Sup. Ct. N.Y. Cnty. Sep. 23, 2022); *Garvey* v. *City of New York*, Index No. 85163-2022 (Sup. Ct. N.Y. Cnty. Oct. 25, 2022). And, the City did not issue these mandates as employee policies, but instead issued them as laws, which covered not only municipal employees, but departments outside of the City's technical control and even most of the private sector.

their judgment about what each person's faith requires, and impermissibly denying applicants because they disagree with their facts. As further proof, Respondents provided correspondence to decision-makers in the appeals stating that such concerns are invalid, which the Citywide Panel referred to as a basis for denying relief. *Kane*, ECF No. 102 ¶¶ 564, 569, 626.

Similarly, the Citywide Panel discriminated against personally held religious beliefs, particularly those arising from prayer, or guidance from the Holy Spirit or one's moral conscience, denying all such applications on the ground that the beliefs, while sincere allegedly allow the applicant to choose to take or abstain from vaccination based on his view of the facts and circumstances. *E.g.*, *Kane*, ECF Nos. 128, 132, 134, 136, 139, 140. When Respondents castigate Applicants' views as sincerely held but "not religious" because they were derived from a personal relationship with Spirit or God rather than denominational dogma, Respondents violate the Constitution. Such determinations indicate impermissible entanglement with religious questions, *Cantwell*, 310 U.S. at 310, and violate other statutory and constitutional standards. And it does not matter whether the religious objector is right about what his or her religion requires; the government cannot "punish the expression of religious doctrines it believes to be false." *Smith II*, 494 U.S. at 877.

C. The City's Mandates violate the Establishment Clause and the Equal Protection Clause.

The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," and that the government may "effect no favoritism among sects." *Larson* v. *Valente*, 456 U.S. 228, 244–246

(1982). Yet the City makes a facial denominational preference, offering a straight path to exemption for those of denominations for which the City decides have no internal dispute about vaccines. If someone meets those criteria, they "shall be permitted the opportunity to remain on payroll" with no undue-hardship exception. *Kane*, ECF No. 102 ¶ 70(i); *Kane*, ECF No. 1-2 at 12. But the City offers another path entirely—including a virtually insurmountable "undue hardship" exception—for those who have personally held or minority religious beliefs, or for those who (like Sabina Kolenovic) happen to be Muslim, when even a single Muslim leader that the individual does not follow has publicly said he was vaccinated.

By applying such a facially discriminatory standard, the City "establish[es]" preferred religion, "impose[s] special disabilit[y]" on religious minorities who do not fall within the definition, takes a position and "lend[s] its power to one or the other side in controversies over religious authority or dogma" and "punish[es] the expression of doctrines it believes to be false," any one of which violates the Establishment Clause and triggers strict scrutiny. *Smith II*, 494 U.S. at 877.

Even if the two religious accommodation policies were equal, the adoption of a facially discriminatory policy itself requires strict scrutiny. When, as here, a government employer adopts a facially discriminatory policy they cannot "rebut" a claim of such direct discrimination by demonstrating the existence of a non-discriminatory reason for reaching the same result – rather, such cases are entitled to summary judgment unless the government can present a valid affirmative defense. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985). None are available

here. There is no valid reason why Christian Scientists should be reviewed under a separate policy than Muslims, Jews, Catholics, or the other religions that the City rejects under the Stricken Standards, and religious discrimination is *per se* unconstitutional. *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu* v. *United States*, 323 U.S. 214 (1944)).

D. The City's Mandates are unconstitutional as applied.

The district court in *Kane* and *Keil* committed further error by dismissing most of Applicants' cases on the ground that the Citywide Panel properly denied accommodations based on undue hardship, because "Plaintiffs' inability to teach their students safely in person presents more than a de minimis cost." App.A at 39. On a motion to dismiss, the issue of undue hardship is irrelevant. The concept of undue hardship is a substantive defense employed in the context of a motion for summary judgment or at a trial on the merits. See, *e.g.*, *Trans World Airlines, Inc* v. *Hardison*, 432 U.S. 63 (1977) (defense adjudicated after bench trial). And the City does not dispute that Applicants established a prima facie case alleging improper denial of accommodation. It was improper to dismiss their case based on Respondents' conclusory and unsupported claim that they could not reasonably accommodate them.

To the extent that undue hardship is even relevant at this early stage, the City did not try to prove it. Mr. Eichenholtz admitted that the Panel did not rely on *any* objective evidence to support undue hardship determinations. *NYFRL*, ECF No. 81-29 at 101, 147–48, 263, 271, 308, 326. And Mr. Eichenholtz admitted that none of the departments even provided any individualized assessment of undue hardship to the Panel. *NYFRL*, ECF No. 81-29 at 236–39.

For example, the City provided *no* evidence that religious employees posed a direct threat because of their religious need to opt out of COVID-19 vaccination and thus need to be segregated. Contra *Hargrave* v. *Vermont*, 340 F.3d 27, 35–36 (2d Cir. 2003) (in a direct threat analysis, employers must consider the best available objective evidence, and, after employing a four-part test, show that the harm is serious and "likely" to occur, not remote or speculative). By contrast, in support of their motions for injunctive relief, Applicants in each case provided the lower courts with extensive evidence and offers of testimony reflecting the fact that they pose *no* direct threat based on their need to remain unvaccinated. *E.g.*, *Kane*, ECF No. 17-6 to 17-8, 18, 19, 85-2 to 85-8.

Conversely, the Citywide Panel even denied Applicants *who already worked remotely* based on "undue hardship," *Kane*, ECF No. 123 ¶¶ 12, 14, and failed to demonstrate why at least 162 employees (many of them classroom teachers) were able to be accommodated under the Stricken Standards, while Applicants cannot be. Nor has the DOE explained why more teachers cannot teach remotely. Thousands of students are still engaging in remote instruction and need teachers, and the various off-site remote accommodation sites for the unvaccinated have ample space to accommodate more teachers, including one site currently only being used to accommodate approximately 30 DOE employees when it has the capacity to accommodate up to 312. *Kane*, ECF No. 137 ¶¶ 26, 28–30.[6]

[6] The *Kane* district court also erred dismissing the as-applied challenges on the theory that vaccination is a condition of employment. DOE policy, and the Mandate itself,

With all that as background, consider the as-applied claims that the district court dismissed, thus denying Applicants any opportunity to prove their claims and request damages:

- Michael Kane's religious beliefs—which the DOE and City acknowledged are sincerely held—are grounded in personal communion with God, prayer, and the sacred teachings of Buddha, Christ and other spiritual guides. *Kane*, ECF No. 102 ¶¶ 222–25. In his initial hearing before the arbitrator's panel, DOE officials argued that Kane should be denied accommodation because his religious beliefs are not supported by Pope Francis. *Id.* ¶ 232. The Citywide Panel denied Kane's exemption on reevaluation because they believe that following guidance from prayer is a personal choice, even though they found Kane sincere. *Id.* ¶ 236; ECF No. 122-2 at 4. At a bare minimum, Kane is entitled to damages from October (when he was placed on leave without pay pursuant to the Stricken Standards) through December 2021 (when he received the new denial).

- William Castro was denied an exemption under the Stricken Standards. Though acknowledging that his beliefs were sincere, and that he met all the Stricken Standards' defined criteria, the DOE representatives argued that he should nevertheless be denied because his church, which is not a Catholic church, holds beliefs contrary to those of the Catholic Pope. *Kane*, ECF No. 102 ¶ 265. The DOE also argued that because former Appellee Commissioner Chokshi says that aborted fetal cells were not used in testing or development of the vaccines (which is incorrect), Castro's religious concerns in that regard were invalid. *Id.* ¶¶ 266–67. Castro was the one Applicant that the Citywide Panel admitted should have been accommodated; it reinstated him, with the condition that he be segregated from students. *Id.* ¶ 271. Yet the district court improperly held that because he was finally accommodated months after the initial improper denial, Castro's case should be dismissed. That ignores damages resulting from the three-month suspension, including severe health consequences resulting from the stress, and severe financial and emotional damages resulting from his inability to select appropriate health care coverage during his suspension, which meant that his pregnant wife could not get the care she otherwise would have been able to receive had the improper suspension never occurred. *Id.* ¶¶ 273–83.

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permit exemption from vaccination on medical and religious grounds. Thus COVID-19 is *not* a condition of employment for exemption-eligible employees.

- DOE representatives and the arbitrator harassed Margaret Chu, a Catholic, about her beliefs in the arbitration hearing, stating that she must be denied because the views of Pope Francis were more likely to be correct than Chu's moral conscience. *Kane*, ECF No. 102 ¶¶ 289–94; *Kane*, ECF No. 22 ¶ 12. Though the Citywide Panel found her beliefs sincere, they denied her application on the ground that following one's moral conscience is not "religious in nature" but a personal choice. *Kane*, ECF No. 102 ¶¶ 298–99.

- Heather Jo Clark's sincere religious objection to vaccines is 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 vaccines. *Kane*, ECF No. 102 ¶¶ 308–13. The DOE denied Clark's accommodation request because, in its view, she could not safely enter school buildings. But Clark worked remotely, and her job did not require her to enter *any* school building. *Id.* ¶¶ 314–16. The Citywide Panel also denied Clark's request, holding that beliefs derived from guidance from the Holy Spirit are not "religious in nature." *Id.* ¶ 319.

- Stephanie DiCapua's sincere religious objection to vaccines is long-standing and rooted in the teachings of her Christian church. *Kane*, ECF No. 102 ¶¶ 326–27. The DOE summarily denied her application, and after the Second Circuit ordered fresh consideration, DiCapua submitted a six-page letter detailing her sincere religious beliefs. *Id.* ¶¶ 335–37. But the Citywide Panel denied DiCapua's request, believing her opposition was solely due to political opposition to the Mandate. *Id.* ¶ 338. Nothing in her submissions articulated any such sentiment. *Ibid.*

- Robert Gladding taught 20 years in the City's public schools before he was denied a religious accommodation last fall. *Kane*, ECF No. 102 ¶¶ 354–55. His mother lived in Germany during World War II, where she witnessed the horrific effects of religious intolerance and official dogma, so she raised Gladding to find God personally. *Id.* ¶ 358. After prayer and fasting, Gladding declined the COVID-19 vaccine based on his sincere religious opposition. Yet the DOE and Citywide Panel denied his accommodation request because, in their view, guidance from prayer is a personal choice, not "religious in nature." *Id.* ¶ 368.

- Nwakaego Nwaifejokwu taught first grade in the New York City public school system for 12 years. *Kane*, ECF No. 102 ¶¶ 375–76. While the Citywide Panel acknowledged that Nwaifejokwu had sincere religious opposition to taking the COVID-19 vaccine, it denied her an accommodation based on undue hardship without explanation. *Id.* ¶ 382.

- Ingrid Romero taught for 18 years at the same Queens elementary school that she attended as a child. *Kane*, ECF No. 102 ¶ 396, 398. While she has long been a person of faith, within the last few years, her husband got cancer and she recommitted to God on a deep level. *Id.* ¶ 406. She sincerely opposed taking the COVID-19 vaccine because it was developed or tested from aborted fetal cells. But the Citywide Panel denied her accommodation because she took the flu shot years before she learned about the use of aborted fetal cells in vaccines and years before she re-committed to God. *Id.* ¶ 409.

- Trinidad Smith was a special education teacher for over 20 years. While she remains a devout Catholic, Smith left the Church due to scandals and now practices her faith through direct communion with God. *Kane*, ECF No. 102 ¶ 421. She sincerely opposes the COVID-19 vaccine on religious grounds and filed a lawsuit to protect her rights. The Second Circuit said she was likely to win and allowed her to submit her accommodation request to the Citywide Panel. Smith explained that her beliefs are grounded in guidance from God and that she has never taken any vaccine. As a child, Smith was adopted from an orphanage in Colombia by very religious people. They never once took her to the doctor but instead taught her to use prayer to heal. The Panel denied her request because she would not rule out the possibility of taking vaccines in the future, though she explained her guidance comes from prayer, and she has always thus far been guided to abstain. *Id.* ¶ 428.

- Natasha Solon is an Assistant Principal in the Bronx. She prays about all medical decisions and has declined life-saving treatments including blood transfusions before. *Kane*, ECF No. 102 ¶ 451. While Solon sincerely opposes taking the COVID-19 vaccine, she was denied accommodation, denied a hearing, and suspended without pay under the Stricken Standards. When given fresh consideration, the Citywide Panel declined to issue a decision, keeping her on leave without pay for months. And while she applied to over 60 jobs during that span, she received no offers because, as one interviewer told her, the DOE attached a problem code for her due to alleged "misconduct." While she waited for a decision, her home went into foreclosure, her son had to leave college, and she was forced to get vaccinated to feed her family.

- Amaryllis Ruiz-Toro has been an Assistant Principal for almost 20 years. She was denied accommodation because her Christian beliefs conflicted with those of Pope Francis. But Ruiz-Toro is not Catholic. On appeal, the arbitrator reversed, saying while many colleagues were following DOE protocol and denying applicants who belong to minority churches, he saw there were important differences between faiths. *Kane*, ECF No. 102 ¶¶ 482–87. Yet Ruiz-Toro still faces segregation and

discrimination while she remains on the payroll—some of which threaten her career-advancement opportunities. *Id.* ¶¶ 490–94.

- Matthew Keil worked at the DOE over 20 years. He is also an ordained deacon in the Russian Orthodox Church, has spent many summers living in a Monastery, and has made many religious pilgrimages. *Kane*, ECF No. 102 ¶¶ 495–97. Geronda Ephraim, Keil's spiritual leader and the head of many North American Orthodox monasteries, enjoined monks from getting vaccinated. And after studying the Scriptures, prayer, and engaging other spiritual disciplines, Keil agreed and has not taken any vaccinations. Yet he was denied accommodation under the Stricken Standards because he has taken Advil or Tylenol not knowing that they were developed or tested using aborted fetal cells. Then, after fresh consideration, the Citywide Panel also denied him accommodation, citing undue hardship without evidence.

- John De Luca was a teacher who worked remotely from 2020 to 2021. He's a devout Catholic and opposed COVID-19 vaccines because they are tested or developed using aborted fetal cell lines. *Kane*, ECF No. 102 ¶¶ 516–21. After submitting a supportive letter from his spiritual leader, De Luca was denied accommodation because, according to the DOE, his beliefs differed from the Pope. *Id.* ¶¶ 525–30. The arbitrator said research "proves" the vaccines were not produced using aborted fetal cell lines (this is not so) and told De Luca, "when you find out I'm right, you'll understand." *Id.* ¶ 526. On fresh consideration, the Citywide Panel denied accommodation based on undue hardship.

- Sasha Delgado worked 15 years as an Individualized Education Program teacher. She worked remotely from 2020 to 2021. Delgado sincerely opposes the COVID-19 vaccines because, in her view, they are defiled and were developed or tested using aborted fetal cell lines. *Kane*, ECF No. 102 ¶¶ 550–51. She takes her faith so seriously that she does not eat pork, drink alcohol, or consume anything that could pollute her mind and body, as she understands from Scripture and prayer. While Delgado submitted a pastoral support letter, the DOE denied her accommodation, saying most Christian denominations do not object to the vaccine and disputing Delgado's belief that the vaccines were tested or developed using aborted fetal cell lines. *Id.* ¶¶ 557–63. The Citywide Panel also denied Delgado accommodation because she appeared unaware if Tylenol or other drugs were tested or developed using aborted fetal cell lines. *Id.* ¶ 569.

- Dennis Strk taught social studies in Queens for 13 years. He declines vaccines, including the COVID-19 vaccines, based on his religious conviction that taking them would defile his blood and that they were

tested or developed using aborted fetal cell lines. The DOE denied him accommodation, saying his beliefs were "wrong." The Citywide Panel also denied Strk accommodation, holding that he "rel[ied] on incorrect facts . . ., such as that all COVID vaccines contain fetal cells." *Kane*, ECF No. 102 ¶ 592.

- Sarah Buzaglo has taught children since 2017. She is an Orthodox Jew who sincerely opposes the COVID-19 vaccines. While she submitted a support letter from her Rabbi, detailing a scriptural basis for her belief and affirming she shared the congregation's view, the DOE denied her accommodation under the Stricken Standards—citing another Jewish leader that disagreed with Buzaglo's Rabbi. *Kane*, ECF No. 102 ¶¶ 599–619. On fresh consideration, the Citywide Panel denied her accommodation because, at one point, she suggested the Mandate was unconstitutional, and it believed her beliefs were wrong. *Id.* ¶ 626.

- Eli Weber taught children for 20 years. He is a devout Chassidic Jew who, consistent with his Rabbi's teaching, sincerely opposes the COVID-19 vaccines. *Kane*, ECF No. 102 ¶¶ 633–53. Under Jewish law, Weber is bound by his Rabbi's authority. *Id.* ¶¶ 639–40. The DOE denied him accommodation and placed him on leave without pay. Weber did not appeal, believing it was futile in part because City officials announced that Jews who oppose the vaccine hold wrong beliefs. Once the Second Circuit declared the DOE practices unconstitutional, Weber immediately sought fresh consideration but that was denied.

- Carolyn Grimando worked for the DOE 18 years. She had COVID-19 when the Mandate was issued. The SOLAS system would not accept both a medical and religious exemption. So Grimando applied for a medical exemption, believing she would automatically qualify for 90 days. Without explanation, she was denied twice. On her third try, the DOE granted her exemption for a shorter span than the rules required. *Kane*, ECF No. 102 ¶¶ 658–66. When that exemption expired, she requested a religious one. Grimando is a devout Catholic who believes she must follow Christ over any earthly authority. She also believes taking vaccines would defile her blood and that the COVID-19 vaccines were tested or developed using aborted fetal cell lines. The DOE denied her accommodation without adequate justification and refused to give her an opportunity to appeal. *Id.* ¶¶ 680–81.

- Amoura Bryan worked as a special education teacher 13 years. And she was working remotely when the Mandate issued. *Kane*, ECF No. 102 ¶¶ 690–91, 697. Bryan is a Seventh Day Adventist who firmly believes if she keeps God's commands and gets sick, that God will heal her—for Exodus 15:26 says God is "the Lord that heal[s]." Yet she also believes

healing may only come in the next life. The DOE denied Bryan accommodation citing "undue hardship" because she could not enter a school building. *Id.* ¶¶ 694–95. Yet Bryan worked remotely. On appeal, the DOE changed tack, saying her Church does not oppose the vaccine. The Citywide Panel denied Bryan accommodation, saying she did not sincerely oppose vaccines and citing "undue hardship given the need for a safe environment for in-person learning." *Kane*, ECF No. 123 ¶ 21.

- Joan Giamarrino worked for the DOE almost 15 years. She is a devout Catholic who opposes the COVID-19 vaccines because they were tested or developed using aborted fetal cell lines. *Kane*, ECF No. 102 ¶¶ 732–40. Indeed, she has not taken any vaccine in 20 years for this reason. *Id.* ¶ 740. The DOE denied Giamarrino an accommodation under the Stricken Standards because her view differed from the Pope's. She did not appeal, believing that would be futile. After the Second Circuit declared the Stricken Standards unconstitutional, Giamarrino tried to apply for accommodation under the new process, but the DOE never responded. *Id.* ¶¶ 743–48. Nor did the Citywide Panel review her case.

- Benedict LoParrino taught elementary school for 17 years. He is a devout Catholic who originally did not apply for accommodation because the Stricken Standards precluded relief for Catholics who did not share the Pope's views. *Kane*, ECF No. 102 ¶¶ 757–68. But he struggled with this decision, so later he applied for accommodation via certified mail and received no response. After the Second Circuit declared the Stricken Standards unconstitutional, LoParrino was notified he should reapply using the SOLAS system. But when he tried this, the system forbade it. *Id.* ¶¶ 773–75. LoParrino emailed the DOE for help, but he was denied any decision or review by the Citywide Panel.

II. Respondents failed to satisfy strict scrutiny.

A law will only pass strict scrutiny against a religious burden if the government proves the burden is necessary to achieve an "interest[ ] of the highest order." *Fulton*, 141 S. Ct. at 1881. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Ibid.* "[B]roadly formulated interests" likely do not suffice; they must be "properly narrowed" to "the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.*

Here, the City offers no sufficient evidence showing why it needs to selectively punish religion—or any of the individual Applicants. Indeed, targeting religious minority groups, including those who hold personal religious objections rather than orthodox ones, in response to real or perceived threats, no matter how well-intentioned the reason, is forbidden under our laws and cannot withstand strict scrutiny review as a matter of law. *Trump*, 138 S. Ct. at 2423 (overruling *Korematsu* v. *United States*, 323 U.S. 214 (1944)). Because the City cannot justify preferring some religions over others—or exercising broad discretion to allow unvaccinated athletes, performers, and strippers to work but not unvaccinated religious officers, firefighters, teachers, and other public servants—the City cannot "deny[ ]" Applicants "an exception." *Fulton*, 141 S. Ct. at 1881. Accordingly, the City cannot apply its Mandates to Applicants or any other religious objectors.

III. Applicants meet all the requirements for an injunction.

Because the City's Mandates provide for individualized exemptions, play denominational favorites, grant the government substantial discretion, and treat religious objectors less favorably than secular (e.g., economic) objectors, the Mandates violate Applicants' free-exercise rights. And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury." *Elrod*, 427 U.S. at 373.

Applicants have also alleged continuing substantial harms from the City's bad conduct that go beyond the loss of their constitutional rights, harms that will be difficult to compensate with mere economic damages. For example, Applicant Sarah Buzaglo could not afford to treat a worsening cough once she lost her health insurance

and developed a severe case of asthma. *Kane*, ECF No. 163 ¶¶ 5–8. She was forced to accept charity to afford an inhaler and almost required hospitalization. *Id.* ¶¶ 8–9. Unable to pay her rent, Ms. Buzaglo had no choice but to decide whether to go to a homeless shelter or leave the country. *Id.* ¶¶ 16–17. She was forced to move to Israel after she lost her home, leaving behind the life and career she built here.

Or consider Applicant Curtis Cutler. As a result of being placed on leave without pay, he had no health insurance to support his son when he suffered a collapsed lung earlier this year. *NYFRL*, ECF No. 48 ¶ 47. He and his wife were later forced to sell their first home and move out of state, leaving his son behind to finish high school. *Id.* ¶ 45. He was deeply distressed at splitting his family up, as well as leaving behind his beloved church community, of which he was the sole deacon. *Ibid.*

Applicant Frank Schimenti was forced to apply for Medicaid and had to obtain a forbearance on his mortgage to keep from losing his home. *NYFRL,* ECF No. 58 ¶ 76. The stress of losing his job has caused him to have high blood pressure and cardiac issues—both of which he has never experienced before. *Id.* ¶ 77.

Applicant Heather Jo Clark lost her rent-controlled apartment due to her suspension and termination, and she had to move out of state to live with family. *Kane*, ECF No. 102 ¶¶ 322–24. She is deeply depressed and suffering adverse health consequences from the lack of health insurance. *Id.* ¶ 324.

And Applicant Matthew Keil, a Deacon in the Russian Orthodox Church, was forced to go on food stamps to feed his family of seven, including his child with Downs Syndrome. *Kane*, ECF No. 133 ¶¶ 9–10, 23.

These are just a few of the many specific examples of harm the City is causing Applicants that warrants an injunction pending appeal. When Applicants first moved for preliminary relief, most were still employed and allowed to work unvaccinated as they had done throughout the pandemic. Now, after being denied an exemption through the City's discriminatory scheme, nearly all have been terminated or forced to violate their religious beliefs. The City also continues to offer new "last chances" for terminated employees to be reinstated if they take the vaccine. This is a coercive condition that presents ongoing, irreparable harm.

Moreover, the balance of equities weighs heavily in Applicants' favor. If it is worth allowing strippers to work unvaccinated in small, enclosed venues, it is worth allowing a small number of people—some of whom work outside and have no contact with members of the public at all—to work unvaccinated while taking proper precautions. Applicants ask for no special favors; they just "want to be treated equally." *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).

The public interest also strongly favors an injunction pending appeal. It is undisputed that New York City is suffering massive workforce shortages, creating dangerous understaffing of fire departments, police stations, and schools. At a time when the CDC has revised its guidance to stop differentiating between vaccinated and unvaccinated persons due to the overwhelming scientific consensus that COVID-19 vaccines cannot stop infection and transmission,[7] it is nothing short of ludicrous

[7] Massetti GM, Jackson BR, Brooks JT, et al., *Summary of Guidance of Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care*

that the City would strain to maintain its power to persecute people of faith at the expense of New York City citizens being victimized by violent crime or watching their homes burn down because of a lack of City public employees. So the public interest also weighs strongly in Applicants' favor.

One note about timing. As explained in footnote 5, above, a New York trial court in *Garvey* invalidated the City's Mandates under state law, which might allow Applicants to return to their City positions (though they are not parties). That decision was automatically stayed, and a New York intermediate appeals court has ordered the plaintiffs to show cause by November 7, 2022, why the trial-court order should not continue to be stayed pending appeal. *Garvey*, Index No. 85163-2022, Order to Show Cause (Oct. 31, 2022). If that court lifts the stay, and Applicants can return to their City posts, then they will withdraw this Emergency Application. If the Court continues the stay, then the Application will be ripe for this Court to grant.

Each day that goes by, as Applicants' situation becomes more desperate, they must choose whether to violate their faith to return to work. The fact that the City lifted its private-employer mandate is small comfort. The DOE has attached a problem code for alleged "misconduct" to many of the Applicants' employment files, preventing employment elsewhere in the City—as with Natasha Solon, discussed above. Newly hired employees often also wait before they are eligible for healthcare benefits. And all Applicants are being penalized for their religious exercise, an

Systems – United States, August 2022, CDC Morbidity & Mortality Wkly. Rep. (Aug. 11, 2022), DOI: http://dx.doi.org/10/15585/mmwr.mm7133e1.

ongoing, irreparable harm. This Court should reverse the decisions below denying injunctive relief, as it did in *Elrod*, and grant an injunction while the Second Circuit proceedings take their course.

CONCLUSION

President Biden's pronouncement that the pandemic is over has done little to reverse the ongoing constitutional nightmare in New York City. Moreover, it has been widely reported that a "tripandemic" may loom ahead this winter,[8] greatly increasing the likelihood that the Mandates will remain in place or new ones will replace them.

Applicants ask this Court to enter a preliminary injunction on appeal, partially restoring the status quo ante by enjoining the enforcement of any City Mandate against any Applicant—including reinstatement and the removal of any negative personnel file notations resulting from a Mandate—while the Second Circuit proceeds on the merits. Such an injunction would not harm the City's interests an iota but would merely place Applicants on par with New York City's nearly four million private sector employees, who were just freed from the City's mandates on November 1, 2022, and thousands of other unvaccinated municipal employees who the City has not yet enforced the Mandate against due to staffing issues, administrative delay, and other secular reasons. Grant of the Application is warranted.

[8] See Apoorva Mandavilli, *A 'Tripledemic'? Flu, R.S.V. and Covid May Collide This Winter, Experts Say,* The New York Times (Oct. 27, 2022), (https://www.nytimes.com/2022/10/23/health/flu-covid-risk.html).

Respectfully submitted.

/s/ John J. Bursch

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CERTIFICATE OF SERVICE

A copy of this application was served by email and U.S. mail to the counsel listed below in accordance with Supreme Court Rule 22.2 and 29.3:

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, et al.,

Plaintiffs,

- against -

BILL DE BLASIO, et al.,

Defendants.

MATTHEW KIEL, et al.,

Plaintiffs,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

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 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

[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.

[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.

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

[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.

[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.

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

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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 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-

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

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

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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.

[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).

vaccinated" to mean "at least two weeks have passed 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

[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

eligible for health insurance through September 5, 2022, unless they were eligible for health insurance from a different source. Id.

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:

Cumulative Absence Reserve (CAR), United Federation of Teachers, https://www.uft.org/your-rights/know-your-rights/cumulative-absence-reserve-car.

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 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,

[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.

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 requested leave to file a motion for class certification, ECF No. 83. Judge Caproni denied these

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

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

[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.

program and ordered that no further steps be taken to terminate 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.

[14] Although the Second Circuit's opinions regarding the plaintiffs' prior motions for preliminary injunctions span 53 pages and deliver carefully

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 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

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.

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 non-neutral . . . ."). 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

[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, 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

[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.").

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 claims.") (internal

[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.

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 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

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

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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.

[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

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 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

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.").

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

[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.

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 ("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

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

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 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]

[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

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-

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-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 notice is provided and the 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

[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.

any decision terminating their employment through their collective bargaining agreement, or 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

[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.

contradicted by the fact 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 Citywide Panel's reasoning regarding each

[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.

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

[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.

jurisdiction doctrine — judicial economy, convenience, fairness, and comity — will point toward declining to exercise jurisdiction over the remaining 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]

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

[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 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.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Conference
Minute Order

Before: Diane Gujarati
U.S. District Judge

Date: 8/11/2022
Time: 3:00 p.m.

Court Deputy: Kelly Almonte
Court Reporter/Tape No: Stacy Mace

New Yorkers For Religious Liberty, Inc. et al v. The City Of New York et al
22-CV-0752 (DG)(VMS)

Type of Conference: Oral Argument

Appearances: Plaintiff Barry Black, Sarah Child

Defendants Lora Minicucci

Summary Minute Order for proceedings held before Judge Diane Gujarati: Oral argument on Plaintiffs' [85] Motion for a Preliminary Injunction held before Judge Diane Gujarati on August 11, 2022. Barry Black and Sarah Elizabeth Child appeared on behalf of Plaintiffs. Lora Minicucci appeared on behalf of the City Defendants. The parties were heard on the motion. For the reasons stated on the record, Plaintiffs' [85] Motion for a Preliminary Injunction was denied. The parties were directed to Magistrate Judge Vera M. Scanlon for discovery management.

SO ORDERED.

/s/ Diane Gujarati
DIANE GUJARATI
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - X

NEW YORKERS FOR RELIGIOUS LIBERTY, INC. et al.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, et al,

Defendants.

- - - - - - - - - - - - - - - - - X

22-CV-00752 (DG)

United States Courthouse
Brooklyn, New York

Thursday, August 11, 2022
3:30 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE DIANE GUJARATI
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs: NELSON MADDEN BLACK, LLP
475 Park Avenue South
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BY: BARRY BLACK, ESQ.
SARAH E. CHILD, ESQ.

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BY: LORA MINICUCCI, ESQ.

Court Reporter: Stacy A. Mace, RMR, CRR
Official Court Reporter
E-mail: SMaceRPR@gmail.com

Proceedings recorded by computerized stenography. Transcript produced by Computer-aided Transcription.

covered general applicability in our papers already.

THE COURT: Thank you. I am going to ask you to hold, the parties to hold for just one moment.

(Pause in the proceedings.)

THE COURT: Thank you, resuming now.

Thank you for your arguments today. I did find them helpful.

Let me make sure that I have everybody back on the line.

Do I have the court reporter?

THE COURT REPORTER: Yes, Your Honor.

THE COURT: Thank you.

And do I have Mr. Black?

MR. BLACK: Yes, Your Honor.

THE COURT: Thank you.

And do I have Ms. Child?

MS. CHILD: Yes, Your Honor.

THE COURT: Thank you.

And do I have Ms. Minicucci?

MS. MINICUCCI: Yes, Your Honor.

THE COURT: Thank you.

I want to make sure everybody is there.

Thank you, as I was saying, for your arguments. I found them helpful. I am prepared to give the parties a ruling on plaintiffs' pending motion for a preliminary

injunction, ECF Number 85, and I will do that now.

By way of their motion, relying on their First Amendment claim, plaintiffs seek an order, one, "Enjoining enforcement of the City's vaccine mandate against plaintiffs and any other employees who have applied for religious accommodation pending the resolution of this matter."

And two, "Ordering the City to offer municipal employees reinstatement of pay and benefits pending resolution of this matter on the merits. "

Or, in the alternative, three, "For such further or different relief as this Court deems just."

I have considered the record before me at this time, including the operative pleading, the parties' submissions, and the parties' arguments, and have considered the applicable legal framework.

On the record before me at this time, and for the reasons I will set forth momentarily, I conclude that plaintiffs have not met their burden of demonstrating their entitlement to the extraordinary remedy of a preliminary injunction. Plaintiffs' motion for a preliminary injunction, ECF Number 85, therefore, is denied.

To the extent that plaintiffs seek an evidentiary hearing regarding COVID transmission, the request is denied, as such a hearing is not warranted on the record before the Court and not necessary to resolution of the instant motion.

As an initial matter, I note that this decision is solely a decision on the motion for a preliminary injunction and is rendered upon application of the legal standards governing motions for preliminary injunction. This is not a final decision on the merits. This action is still at an early stage.

I also note that at the start of today's proceeding I set forth some of the pertinent procedural history of this matter, including with respect to plaintiffs' filings and the confusion plaintiffs had injected into the record. I incorporate that history into my ruling.

I also assume familiarity with the record as a whole in this action, including with respect to the conferences held on February 11th, 2022; March 25th, 2022; and June 29th, 2022. And with respect to the discovery that took place from April to June of 2022.

I further note that plaintiffs' filings in connection with the instant motion are not entirely clear as to the relief plaintiffs seek. This is a problem when seeking injunctive relief. Plaintiffs use the terms mandate and mandates interchangeably and have not clearly or consistently identified the precise mandate or universe of mandates at issue, referencing different numbers of mandates at different times, filing only a small number of mandates, and failing to file the appendix of the relevant mandates that is referenced

in both the complaint, ECF Number 1, and amended complaint, ECF Number 77, even after the omission was brought to counsel's attention by the Court.

In any event, plaintiffs appear to be using the terms mandate and mandates to generally refer to the City's requirement embodied in various orders issued on various dates that City employees be vaccinated against COVID-19 unless they are granted an accommodation. It appears that the heart of plaintiffs' challenge at this stage is to the way that the City is adjudicating requests for religious accommodation in connection with the requirement that City employees be vaccinated against COVID-19 pursuant to the mandates that have been issued. But plaintiffs also persist in their argument that they are likely to succeed on their claim that the mandates, themselves, are constitutionally infirm under the First Amendment, an issue the Second Circuit has previously addressed in the context of the Kane and Keil cases, which plaintiffs' counsel here also are involved in.

This action is not a class action. Indeed, plaintiffs have not moved for class certification. This action is an action by thirteen individual plaintiffs and one organization. With respect to the organization, New Yorkers for Religious Liberty, Inc., plaintiffs indicate that the organization is a "membership organization that includes plaintiffs and many others impacted by or concerned about the

impact the mandates." That's at ECF Number 88, at 3.

Plaintiffs have not provided a sufficient record regarding the organization's members, such that the Court could evaluate the propriety of any relief with respect to any of those members, other than the individual plaintiffs. Based on the record before the Court, the Court has considered the requested relief regarding the mandates and the religious accommodation process with respect to the thirteen individual plaintiffs.

The Second Circuit has already spoken on many of the relevant issues here, particularly in the Kane and Keil and We The Patriots decision. I am, of course, bound by the decisions of the Second Circuit. I assume familiarity with the Second Circuit's relevant decisions with respect to the City's COVID vaccine mandates and related religious accommodation procedures, including decisions relating to the City of New York Reasonable Accommodation Appeals Panel, which I will refer to as the Citywide Panel, and to the Religious Accommodation Procedures that predated the formation of the Citywide Panel, which procedures I will refer to as the Arbitration Award Standard.

I will mention the Second Circuit precedent further shortly, but I mention one aspect of that precedent now as important context for the instant motion. As the parties are aware, in November 2021, the Second Circuit directed the City

in the context of the Kane and Keil cases to give "fresh consideration" to the requests by appellants in those cases for religious accommodation using the Citywide Panel rather than the Arbitration Award Standard. The Second Circuit directed that "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."

Notably, in the instant case plaintiffs have only alleged that one individual plaintiff, Ms. Kolenovic, went through the Arbitration Award Standards process, that was prior to the Second Circuit noting that the process was infirm.

Following the Second Circuit's decision, she was afforded review under the Citywide Panel Process. Because any injunctive relief regarding the Arbitration Award Standards process would not vitiate plaintiffs' alleged harm, the Court, as noted, limits its analysis to the mandates and the religious accommodation process with respect to the thirteen individual plaintiffs at this stage.

The Court notes, however, that plaintiffs make much in their briefing of the existence of the Arbitration Award Standards process. Plaintiffs appear to be attempting to demonstrate animus and non-neutrality with respect to the mandates and the Citywide Panel process by reference to the

Arbitration Award Standards process.

In the context of its analysis of the preliminary injunction motion in the Kane/Keil case in March of this year, the Second Circuit noted that because the Citywide Panel did not adopt the Arbitration Awards Exemption Standard, the arguments that the plaintiffs in Kane and Keil advanced to challenge those standards were largely irrelevant to consideration of the motion for preliminary injunction with respect to the Citywide Panel prong. See Keil versus City of New York, Number 21-3043-CV 2022 Westlaw 619694 at 2, Second Circuit, March 3rd, 2022.

The same holds true here.

Pausing for a moment.

(Pause.)

THE COURT: Thank you.

Turning now to the legal standards governing the instant motion.

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 irreparable harm absent injunctive relief, a likelihood of success on the merits, and public interest weighing in favor of granting the injunction. When the government is a party to the suit, the inquiries into the public interest and the balance of the equities merge.

In Kane versus De Blasio, 19 F.4th 152 at 163, Second Circuit 2021; and We The Patriots USA, Inc. versus Hochul, 17 F.4th 266 at 279 to 80, and 295, Second Circuit 2021; opinion clarified 17 F.4th 368, Second Circuit 2021, cert. denied sub nom, Dr. A versus Hochul, 142 Supreme Court 2569 (2022).

A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. See Faiveley Transport Malmo AB versus Wabtec Corporation, 559 F.3d 110 at 118, Second Circuit 2009. Under the free exercise clause, laws and government policies that are not neutral or that are not generally applicable are subject to strict scrutiny, meaning that they must be narrowly tailored to serve a compelling state interest. But laws and policies that are neutral and generally applicable are subject only to rational basis review, meaning that the government must have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal. See Kane versus De Blasio, 19 F.4th at 164 and 166.

The state fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. See We The Patriots, 17 F.4th at 281.

A law may not be generally applicable if it prohibits religious conduct while permitting secular conduct

that undermines the government's asserted interest in a similar way, or if it provides a mechanism for individualized exemption. See Kane versus De Blasio, 19 F.4th at 165.

Importantly, though, as the Second Circuit noted in We The Patriots and Kane versus De Blasio, an exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons; rather, there must be some showing that the exemption procedures allow secularly-motivated conduct to be favored over religiously-motivated conduct. See We The Patriots, 17 F.4th at 288 to 89 and Kane versus De Blasio, 19 F.4th at 165.

Accordingly, the mere existence of a religious exemption process is insufficient to trigger strict scrutiny. See, e.g. Ferrelli versus Unified Court System, number 22-CV-0068, 2022 Westlaw 673863 at 7, Northern District of New York, March 7th, 2022.

Turning to the instant case and starting with the issue of likelihood of success on the merits, the burden to establish likelihood of success on the merits is higher when a party seeks a mandatory preliminary injunction from when it seeks a prohibitory preliminary injunction. Here I need not resolve the disputed issue of which type of injunction is being sought by plaintiffs because I conclude that plaintiffs have failed to demonstrate likelihood of success on their First Amendment claim, even under the less burdensome

standard.

Plaintiffs have failed to establish that they are likely to succeed in showing that the mandates and/or Citywide Panel process are either not neutral or not generally applicable and, therefore, subject to strict scrutiny.

Plaintiffs have not demonstrated that the mandates and/or the Citywide Panel process were infected by religious animus.

Indeed, they raised arguments similar to those previously rejected by the Second Circuit in Kane versus De Blasio, including arguments about statements made by former Mayor Bill De Blasio. Here, the discovery the Court afforded plaintiffs, including the Eichenholtz deposition, does not support plaintiffs' claim of animus premised on statements by former Mayor Bill De Blasio and does not provide a basis for this Court to diverge from the Second Circuit's decision in Kane versus De Blasio regarding such statement. Nor does the record otherwise support a claim that the mandates and/or the Citywide Panel process were infected by religious animus.

Plaintiffs also have not demonstrated that the mandates and/or the Citywide Panel process were not generally applicable.

Plaintiffs have failed to demonstrate that the mandates and/or the Citywide Panel process for determining religious exemptions allows secularly-motivated conduct to be

favored over religiously-motivated conduct.

Based on the record before the Court at this time, including the limited discovery that took place in connection with plaintiffs' request for injunctive relief, it appears that the City adhered to the Second Circuit's directive in developing and utilizing the Citywide Panel process for reviewing requests for religious accommodation. See e.g. Deposition of Eric Eichenholtz at 58, lines 11 through 23. ECF Number 81-29.

Because plaintiffs have failed to establish that they are likely to succeed in showing that the mandates and/or the Citywide Panel process are not neutral or are not generally applicable and that strict scrutiny, therefore, applies, the Court considers whether plaintiffs have established that they are likely to succeed in showing that the mandates and/or the Citywide Panel process fail under rational basis review.

Plaintiffs have not demonstrated that the mandates and/or the Citywide Panel process are not means for addressing a legitimate goal that are rationally related to achieving that goal. The goal being the protection of the public health during a pandemic. This is particularly so in light of Second Circuit precedent addressing vaccine mandates. See We The Patriots, 17 F.4th at 290, and Kane versus De Blasio, 19 F.4th at 166.

Plaintiffs have not demonstrated that the mandates and/or Citywide Panel process fail under rational basis review.

In sum, plaintiffs have not demonstrated a likelihood of success on the merits of their First Amendment claim.

Pausing for a moment.

(Pause.)

THE COURT: Resuming.

Turning to the issue of irreparable harm. Because plaintiffs have failed to demonstrate a likelihood of success on the merits as to their First Amendment claim, plaintiffs' asserted harm is not of a constitutional dimension. See We The Patriots, 17 F.4th at 294.

Plaintiffs failed to meet the irreparable harm requirement for obtaining a preliminary injunction simply by alleging an impairment of their free exercise rights. See We The Patriots, 17 F.4th at 294.

I note that like Kane, this case is distinguishable from the pandemic-era cases that found irreparable harm when worshippers' rights to attend religious services were restricted. See Kane versus De Blasio, 19 F.4th at 172. Here, as in Kane, plaintiffs are not required to perform or abstain from any actions that violates their religious belief. See Kane versus De Blasio, 19 F.4th at 172.

With respect to the other harms alleged by plaintiffs, applying Second Circuit precedent, the Court concludes that plaintiffs have failed to establish that they will be irreparably harmed absent injunctive relief pending a decision on the merits. In the Second Circuit it is well settled that adverse employment consequences are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment action is typically compensable with money damages.

See We The Patriots, 17 F.4th at 294 to 95, citing inter alia Savage versus Gorski, 850 F.2d 64 at 68, Second Circuit 1988.

Accordingly, plaintiffs have not demonstrated that they will suffer irreparable harm in the absence of preliminary injunctive relief.

As I noted earlier, the Second Circuit has stated that a showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction.

The Court need not, and does not, reach the issue of whether the public interest weighs in favor of granting the injunction.

In light of the foregoing, plaintiffs' motion for a preliminary injunction, ECF Number 85, is denied.

And I am going to ask you to hold for one moment,

please.

(Pause.)

THE COURT: Resuming.

Let me turn now to next steps in this case.

And let me ask the City in the first instance, the City defendants, what is the status of mediation efforts?

I don't need to know details of anything that's discussed, just procedurally where in the process are you?

And then I can ask Mr. Black as well, but if you could start, Ms. Minicucci.

MS. MINICUCCI: Your Honor, we haven't really made much progress in terms of, you know, reaching settlement or discussing settlement. I think both -- both sides sort of agree that at this juncture we are not ready to really move forward with settlement.

THE COURT: Thank you.

Mr. Black, do you want to speak to that?

MR. BLACK: Your Honor, we -- I would have phrased that slightly differently. It's not that -- not for us to decide whether the City would be willing to settle.

We have engaged in good faith settlement negotiations and, without getting into details, we have followed the suggested lead of Judge Scanlon and proposed a way forward. There has not been a response, I believe, at all that we have heard as of now.

APPENDIX C

E.D.N.Y. – Bklyn
22-cv-752
Gujarati, J.
Scanlon, M.J.

S.D.N.Y. – N.Y.C.
21-cv-7863
21-cv-8773
Buchwald, J.

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 11th day of October, two thousand twenty-two.

Present:

Pierre N. Leval,
Denny Chin,
Eunice C. Lee,
Circuit Judges.

New Yorkers For Religious Liberty, Inc., et al.,

Plaintiffs-Appellants,

Matthew Keil, et al.,

Consolidated Plaintiffs-Appellants,

v.

22-1801 (L)
22-1876 (Con)

City of New York, et al.,

Defendants-Appellees,

Roberta Reardon,

Defendant.

In each appeal, Appellants move for an injunction pending appeal, for leave to file a late reply, and for leave to file an oversized principal brief. Appellants also move in 22-1801(L) for an

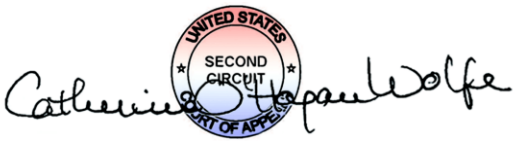
expedited briefing schedule. Upon due consideration, it is hereby ORDERED that the motions to file late replies and to file an oversized brief are GRANTED. Appellants shall file a single principal brief not to exceed 24,500 words.

Insofar as Appellants in the lead appeal challenge the private sector employee vaccine mandate, the appeal is moot. Therefore, it is further ORDERED that the lead appeal is DISMISSED solely as to Appellants Janine DeMartini, Matthew Rivera, and Laura Satira, but only to the extent that they challenge the private sector employee vaccine mandate, because they "lack a legally cognizable interest in the outcome" of the appeal. *Tann v. Bennett*, 807 F.3d 51, 52 (2d Cir. 2015) (per curiam) (internal quotations omitted).

It is further ORDERED that the motions for injunctions pending appeal are DENIED because Appellants have failed to satisfy the requisite standard for an injunction pending appeal. *See Agudath Isr. of Am. v. Cuomo*, 980 F.3d 222, 225–26 (2d Cir. 2020) (per curiam).

It is further ORDERED that the request for an expedited briefing schedule is GRANTED. Appellants' brief is due October 17, 2022. Appellees' brief is due no later than November 21, 2022, or 35 days from the date Appellants' brief is filed, whichever date is sooner. The Clerk of Court is directed to schedule this appeal for the first available panel after the appeal is fully briefed.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit