22-1801(L)

22-1876 (CON)

United States Court of Appeals
for the Second Circuit

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

Plaintiffs-Appellants,

(caption continued on inside cover)

On Appeal from the United States District Courts
for the Eastern and Southern Districts of New York

BRIEF FOR APPELLEES

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November 21, 2022

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

Consolidated Plaintiffs-Appellants,

against

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

Defendants-Appellees,

ROBERTA REARDON,

Defendant.

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PRELIMINARY STATEMENT

In these consolidated appeals, plaintiffs challenge two district court rulings denying their motions for preliminary injunctions: one from the Eastern District of New York (Gujarati, J.) in *New Yorkers for Religious Liberty, Inc. v. City of New York* (*NYFRL*) and the second from the Southern District of New York (Buchwald, J.) in *Kane v. de Blasio* and *Keil v. City of New York* (together the "*Kane/Keil* litigation"). The *Kane/Keil* plaintiffs also challenge the dismissal of their complaint on the merits.

This Court should affirm. Plaintiffs have not shown that the district courts abused their discretion in denying preliminary injunctions. Plaintiffs are 29 individual City employees seeking an injunction restoring them to their jobs and barring the City from enforcing its COVID-19 vaccination requirements against them pending a determination on the merits of their claims. At this time, however, all the plaintiffs have been either terminated, accommodated, or vaccinated. Plaintiffs' remedy, if any, lies in the traditional retrospective relief for employment disputes.

Plaintiffs argue they would be irreparably harmed absent a preliminary injunction because they are under constant coercion to choose between their faith and vaccination. But plaintiffs' suggestion that they can

all choose to get vaccinated and return to work whenever they want is simply false. The deadlines to get vaccinated and return to work are all in the past, and with them any pressure plaintiffs purportedly felt to violate their faith to return to work. All that remains are routine employment disputes that can be remedied, if necessary, with money damages and other retrospective relief.

Nor have plaintiffs shown a clear or substantial likelihood of success on the merits. In reviewing the City's vaccination requirement for New York City public-school employees, this Court has already held that the requirement itself did "not violate the First Amendment on its face." And plaintiffs' disagreements with how their religious accommodation requests were decided present no constitutional concerns. After all, plaintiffs purport to challenge a religious accommodation process that this Court explicitly endorsed when confronting a First Amendment challenge to the accommodation process provided to the City's public-school employees at an earlier stage of the *Kane/Keil* case. The district court properly denied plaintiffs' request for preliminary injunctive relief.

The district court also properly dismissed the *Kane/Keil* plaintiffs' complaint. Plaintiffs don't challenge the dismissal of most of their claims

and those they do challenge are unsupported by the allegations in their complaint. Instead of identifying factual allegations in their complaint that support their claims, they rely largely on discovery their attorneys obtained in their later-filed suit on behalf of other City employees. Their own allegations fail to state a claim.

QUESTIONS PRESENTED

1. Did the district courts providently exercise their discretion in denying plaintiffs' preliminary injunction motions, where they established neither that they would suffer irreparable harm absent injunctive relief nor a clear or substantial likelihood of success on the merits of their claims?

2. Did the district court properly dismiss the *Kane/Keil* plaintiffs' complaint where the factual allegations in the complaint failed to support an inference of the constitutional violations they alleged?

STATEMENT OF THE CASE

A. The vaccination requirement for City employees

Over two years into the pandemic, COVID-19 remains a highly infectious and potentially deadly disease that "has caused widespread suffering in the State, country, and world." *We the Patriots USA, Inc. v.*

Hochul, 17 F.4th 266, 272 (2d Cir. 2021). New York City has been hit hard, with nearly three million cases and over 42,000 deaths.[1]

As schools considered fully reopening in the fall of 2021, the CDC called vaccination "the most critical strategy to help schools safely resume full operations," thus recommending educators and other staff to be "vaccinated as soon as possible" (SDNY 21-7863 ECF No. 113-4). Consistent with this guidance, shortly after a vaccine for people aged 16 or older received full regulatory approval, the Commissioner of the New York City Department of Health and Mental Hygiene ("Health Commissioner") required New York City Department of Education (DOE) employees to receive one dose of vaccination by September 27, 2021, later extended to October 1 (SDNY 21-7863 ECF Nos. 113-2, 113-3). Not long

[1] NYC Health, *COVID-19 Data: Trends and Totals*, https://perma.cc/PXZ8-SFE7 (captured Nov. 15, 2022).

thereafter, the Health Commissioner ordered all other City employees to be vaccinated by November 1, 2021 (EDNY 22-752 ECF No. 8-4).[2, 3]

The City's employee vaccination requirements have been challenged on multiple fronts, and courts have repeatedly found them to be legally sound and enforceable.[4] For example, in ruling on plaintiffs' first of three preliminary injunction motions in the *Kane/Keil* litigation, this Court held that the vaccination requirement for DOE employees did "not violate the First Amendment on its face." *Kane v. de Blasio,* 19 F.4th 152, 158 (2d Cir. 2021). But as explained below, citing flaws in an arbitration accommodation process, the Court directed the City to follow a different

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[2] Later, the City also ordered local private employers to verify that employees who regularly interacted in-person with co-workers or members of the public were vaccinated (EDNY 22-752 ECF No. 8-6), but has since rescinded this requirement. *See* NYC 311, *Coronavirus (COVID-19) Vaccine Mandates*, https://perma.cc/T2NT-N3BC (captured Nov. 15, 2022).

[3] To be clear, there are two basic employee vaccination requirements: one for DOE employees (school districts have generally been subject to separate pandemic-related guidance and requirements) and the other for all other City employees. The 150 executive orders that plaintiffs refer to capture a wide range of responses to the pandemic generally, not all of which are vaccination requirements (*compare* App. Br. 37, *with* SDNY 21-7863 ECF No. 120-1).

[4] *See, e.g., Kane v. de Blasio,* 19 F.4th 152 (2d Cir. 2021); *Keil v. City of New York*, 2022 U.S. App. LEXIS 5791 (2d Cir. Mar. 3, 2022); *Maniscalco v. New York City Dep't of Educ.*, 2021 U.S. App. LEXIS 30967 (2d Cir. Oct. 15, 2021); *Kane v. de Blasio*, 2022 U.S. Dist. LEXIS 154260 (S.D.N.Y. Aug. 26, 2022); *Marciano v. de Blasio*, 2022 U.S. Dist. LEXIS 41151 (S.D.N.Y. Mar. 8, 2022); *Broecker v. New York City Dep't of Educ.*, 585 F. Supp. 3d 299 (E.D.N.Y. Feb. 11, 2022).

process—the one plaintiffs now purport to challenge—for DOE employees whose appeals were denied by an independent arbitrator.

B. The process for seeking religious accommodations from the vaccination requirement

1. The accommodation review process resulting from arbitrations initiated by employees' union representatives

The Health Commissioner's original order requiring vaccination for DOE employees did not expressly contemplate any exemptions (SDNY 21-7863 ECF No. 1-1). After negotiations between DOE and union representatives reached an impasse, an independent labor arbitrator established certain procedures for requesting and evaluating expedited requests for religious and medical exemptions (SDNY 21-7863 ECF Nos. 1-2, 1-3).

Under this process, DOE made initial eligibility determinations, while appeals of such determinations were heard by independent arbitrators (SDNY 21-7863 ECF Nos. 1-2, 1-3). DOE's initial eligibility determinations were based on Title VII standards and DOE denied most requests because allowing unvaccinated employees to work in a school building would pose a direct threat to health and safety and creating a

remote position as an accommodation, while hiring another employee to perform necessary in-person duties, would impose an undue hardship (*see, e.g.*, SDNY 21-8773 ECF Nos. 22-1, 28-2).

Appeals from the denial of accommodation requests were heard by independent arbitrators who were directed to consider various criteria developed by a different independent arbitrator, including whether an employee had a letter from clergy, whether an employee was a member of a recognized and established religious organization, and whether a religious leader representing the employee's faith had spoken publicly in favor of vaccination (SDNY 21-7863 ECF Nos. 1-2, 1-3). Sometimes the arbitrators applied these criteria and sometimes they did not. *See Kane*, 19 F.4th at 169.

The arbitrators granted religious exemptions to employees of more than 20 different faiths, including employees identifying as Roman Catholic, Jewish, Buddhist, Baptist, Muslim, Christian, Evangelical Christian, Orthodox Christian, "Jew following Christ," Sabbath Day Adventist, Esin Orisa Ibile, Greek Orthodox, Church of God (Seventh Day), Universal Life Church, Krishna, Apostolic Pentecostal, and Kemetic, as well as Christian Scientists, Seventh Day Adventists, and individuals whose

specific religion is not identifiable (2d Cir. 21-2678 ECF No. 66 at 758-59). Though plaintiffs suggest the arbitrators did not consider undue hardship, DOE repeatedly urged the arbitrators to deny accommodation requests on undue hardship grounds (*see* 2d Cir. 22-1801 Appendix ("A") 159 ¶ 503, A164-65 ¶ 531, A176 ¶ 589). And plaintiffs themselves submitted the affidavit of a teacher who stated that his religious accommodation request was denied by the arbitrator and that the only reason given for the denial of his request was that it would be an undue hardship (SDNY 21-7863 ECF No. 23).

2. The Citywide Panel accommodation review process ordered by this Court

In November 2021, in an earlier appeal in the *Kane/Keil* litigation, this Court found the criteria established by the union-initiated arbitration process were likely constitutionally suspect. *Kane*, 19 F.4th at 176-77. To speak to any First Amendment problem, this Court ordered DOE to adhere to a different process that the City had recently developed for other City employees: an extra layer of review by the City of New York Reasonable Accommodation Appeals Panel (the "Citywide Panel"). *Id.* While the Citywide Panel became the ultimate administrative appeal

process for DOE employees, several other public-employee unions elected to negotiate to maintain an arbitration review process as an alternative avenue to consider appeals of denials of religious and medical accommodation requests.[5]

The Citywide Panel offers employees who have been denied a vaccination-related accommodation by their agencies a form of administrative appellate review (Supplemental Appendix ("SA") 4-5). The Panel helps ensure that appeals are considered in a uniform manner across the City's workforce and are resolved in accordance with the well-established standards of Title VII and its state and local counterparts (*id.* at 5). And in applying these standards, the Panel consults the EEOC's guidance for vaccination-related accommodations (*id.* at 5, 9-10).[6]

Thus, in determining whether employees have a sincere religious objection to COVID-19 vaccination, the Citywide Panel examines each specific case to ascertain whether an articulated objection is based on a

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[5] *See* N.Y.C. Office of the Mayor, Nov. 4, 2021, *City Reaches Agreements With Four Labor Unions on Vaccination Mandate Policies*, https://perma.cc/XVP4-3CB3 (captured Aug. 24, 2022).

[6] *See* EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://perma.cc/M3Y6-XSLU (captured Aug. 25, 2022).

religious belief, and whether the employee has acted consistent with the professed belief (SA9-10). And the Panel considers whether the underlying agency has identified an undue hardship presented by the accommodation (*id.*). In the end, the Panel makes an employee-specific determination as to whether an agency's denial of the particular accommodation request was correct (*id.* at 10).

C. These lawsuits and the denial of plaintiffs' preliminary injunction motions

1. The *Kane/Keil* litigation and the denial of plaintiffs' serial preliminary injunction motions

The *Kane/Keil* plaintiffs are 19 largely former DOE teachers and administrators who claim that the City has violated their First Amendment rights by denying them religious accommodations to the COVID-19 vaccination requirement. Two of the plaintiffs have, in fact, been granted religious accommodations; Amaryllis Ruiz-Toro was granted an accommodation by an independent arbitrator (A154 ¶ 488) and William Castro was granted an accommodation by the Citywide Panel (A129 ¶ 271).

Plaintiffs are now back before this Court—for the third time—requesting preliminary injunctive relief. As in their two prior requests,

they again claim that the vaccination requirement is facially unconstitutional, and that the denial of their religious accommodation requests violates the First Amendment (2d Cir. 22-1801 ECF No. 114).

The history of this case has been one of plaintiffs' delay and procedural missteps followed by repeated requests for emergency injunctive relief. The plaintiffs in *Kane v. de Blasio* waited nearly a month after the vaccination requirement was announced to file their lawsuit (SDNY 21-7683 ECF No. 1); then let the initial vaccination deadline pass before seeking injunctive relief (SDNY 21-7683 ECF No. 12). In ruling on their eventual motion for a preliminary injunction, the district court noted that it was "absolutely baffled by plaintiffs' delay" (SDNY 21-7683 ECF No. 65 at 59). The *Kane* plaintiffs then sat on their hands for weeks after the district court had ruled against them before moving for an injunction pending appeal (2d Cir. 21-2678 ECF No. 16).

The plaintiffs in *Keil v. City of New York* delayed over two months after the vaccination requirement had been announced and almost four weeks after the initial vaccination deadline had passed before filing suit and moving for preliminary relief (SDNY 21-8773 ECF No. 10). The district court denied the motion for the same reasons as in *Kane* (SDNY 21-

8773, Minute Order dated October 28, 2021). The *Keil* plaintiffs then noticed an appeal and moved for an injunction pending appeal (2d Cir. 21-2711 ECF No. 17). It was in these appeals that this Court held that the DOE vaccination requirement was facially constitutional, but that the criteria contemplated by the union-initiated arbitration process were likely constitutionally suspect and ordered fresh consideration of plaintiffs' religious accommodation requests by the Citywide Panel. *Kane*, 19 F.4th at 158, 177.

The *Kane/Keil* plaintiffs' second preliminary injunction motion was characterized not by delay, but rather by a staggering series of procedural missteps. Immediately upon receipt of the Citywide Panel's decisions, plaintiffs filed a premature and wholly underdeveloped letter motion for a preliminary injunction (SDNY 21-7863 ECF No. 90). As the court observed, the motion cited no case law and presented no facts to support plaintiffs' claim that the Citywide Panel's procedures were unconstitutional (*id.* at 4, 8-9). In addition, as the court noted, "neither of the operative complaints … contain[ed] any factual allegations regarding the Citywide Panel" (*id.* at 11). Indeed, even when plaintiffs proposed amending their complaints, they offered little or no information about the

Panel's process (*see* SDNY 21-7863 ECF No. 83; SDNY 21-8773 ECF Nos. 41, 45, 56).

Rather than addressing these issues in the district court, plaintiffs again appealed to this Court and requested a stay pending appeal (SDNY 21-7863 ECF No. 92; SDNY 21-8773 ECF No. 57). Meanwhile, the district court advised plaintiffs that the way forward was for them to file a consolidated amended complaint incorporating allegations concerning the Citywide Panel and making any class allegations (SDNY 21-7863 ECF No. 93; SDNY 21-8773 ECF No. 58).[7] Plaintiffs instead made their second request for emergency relief to this Court (2d Cir. 21-3043 ECF No. 16-1; 2d Cir. 21-3047 ECF No. 10). A motions panel denied emergency relief, concluding that, in filing a conclusory page-and-a-half letter motion, plaintiffs "simply failed to carry their burden before the district court" (2d Cir. 21-3043 ECF No. 85). In February 2022, within two weeks of this ruling, the plaintiffs who had not already received accommodations—or opted for an extended leave arrangement under which they released all

[7] By order dated December 14, 2021, the district court consolidated the *Kane* and *Keil* cases (SDNY 21-7863 ECF No. 90).

claims—were terminated for non-compliance with the vaccination requirement.

A merits panel of this Court later agreed with the motions panel that plaintiffs failed to carry their burden before the district court (2d Cir. 21-3043 ECF No. 162-1). In denying injunctive relief, this Court concluded that plaintiffs had no likelihood of success on the merits of their facial challenge to the vaccination requirement itself, given that a full merits panel had already held that plaintiffs were unlikely to succeed on that challenge (*id.* at 4). And to the extent plaintiffs challenged the constitutionality of the Citywide Panel's procedure for assessing religious accommodations, the Court found that in their "hastily drafted one-and-a-half page letter," plaintiffs "advanced virtually no legal arguments before the district court that concern the Citywide Panel process" (*id.* at 4).

The Court rejected plaintiffs' suggestion that any constitutional infirmities in the procedure established by the independent labor arbitrator indicated that the procedures provided by the Citywide Panel adhering to entirely separate standards were similarly infirm (*id.* at 4). And the Court noted that plaintiffs provided almost no information about the process before the Panel or the standards it used to assess their

accommodation requests (*id.* at 5). The Court observed that after receiving "highly pertinent evidence" describing the Panel's decisions, plaintiffs deprived the district court of an opportunity to consider it by appealing instead of presenting the evidence to the district court (*id*. at 8). Although plaintiffs' claimed urgency was unfounded, rather than developing the record below, they elected to appeal on an inadequate record (*id.* at 8). The district court thus properly determined that there were "no facts before it on which it could conclude that the Citywide Panel's process was irrational in any way or infected with hostility to religion" (*id.*).

Instead of returning to district court to litigate their case, plaintiffs sought a writ of injunction from the United States Supreme Court. Justice Sotomayor denied the writ, and after plaintiffs renewed their application to Justice Gorsuch, the full Court denied it (Supreme Court Docket No. 21A398). Meanwhile, the City filed a motion to dismiss the amended complaint (SDNY 21-7863 ECF No. 111), and plaintiffs filed their opposition (ECF No. 120).

Two weeks later, in April 2022, plaintiffs filed their third motion for a preliminary injunction (SDNY 21-7863 ECF No. 121).[8] In this motion—the one that is the subject of this appeal—the *Kane/Keil* plaintiffs reprised their prior arguments about the facial unconstitutionality of the vaccination requirement (SDNY ECF No. 121 at 18-22), arguing that this Court's prior decision was not law of the case (*id.* at 18-19). And they argued that the Citywide Panel's process was unconstitutional as applied to them (*id.* at 8-18).

While the motion was pending, DOE offered employees terminated for non-compliance with the vaccination requirement—regardless of the employee's reason for not getting vaccinated—an opportunity to return to work by getting a first dose by September 6, 2022 (SDNY 21-7863 ECF No. 183-2). Plaintiffs requested an immediate ruling on their pending motion and the district court issued its ruling that same day (2d Cir. 22-1801 Special Appendix ("SPA") 1-42).

[8] The district court refers to this as the fourth preliminary injunction motion because the *Kane/Keil* plaintiffs filed separate motions before the cases were consolidated on the trial level and then two more following consolidation (2d Cir. 22-1801 Special Appendix ("SPA") 2-3 n.4).

The district court denied the preliminary injunction, finding that plaintiffs had failed to establish a likelihood of success on the merits, that they would suffer irreparable harm absent relief, or that the balance of the equities tipped in their favor (SPA17-30, 41-42). In the same ruling, the court granted the City's motion to dismiss (*id.* at 17-41), finding that plaintiffs' federal constitutional claims were meritless and declining to exercise supplemental jurisdiction over their state-law discrimination claims. (Plaintiffs did not assert any claims under Title VII or any other federal anti-discrimination statute.)

Plaintiffs requested emergency relief from this Court, seeking immediate reinstatement or a stay of any deadline to get vaccinated (2d Cir. 22-1876 ECF No. 7).[9] A single judge of this Court denied the requested relief (2d Cir. 22-1876 ECF No. 23) and, after consolidating the appeal with the *NYFRL* appeal, the Court denied plaintiffs' request for an injunction pending appeal (2d Cir. 22-1876 ECF No. 79).

[9] Employees who elected to remain on leave without pay, with health insurance, for the 2021-2022 school year waived all claims and could get vaccinated by September 5, 2022, and return to work for the 2022-2023 school year. *See Kane*, 19 F.4th at161.

Plaintiffs in the consolidated appeals sought a writ of injunction from the United States Supreme Court, which Justice Sotomayor denied on November 10, 2022 (Supreme Court Docket No. 22A389).

2. The *NYFRL* litigation and the denial of plaintiffs' preliminary injunction motion

Represented by the same attorneys representing plaintiffs in the *Kane/Keil* litigation, an organizational plaintiff, New Yorkers for Religious Liberty, Inc., and 13 individuals—10 of whom are current or former City employees—challenged the Citywide employee vaccination requirement roughly four months after it was announced (A53; EDNY 22-752 ECF No 1). Claiming the denial of their religious accommodation requests violated the First Amendment and challenging the Citywide Panel appellate review process (among other things), plaintiffs sought a TRO and a preliminary injunction (EDNY 22-752 ECF No. 7).

The district court denied the TRO (EDNY 22-752 ECF No. 34). Later, plaintiffs elected to amend their complaint, prompting the district court to issue an order concluding that there was "no pending motion for either a temporary restraining order or a preliminary injunction with respect to the now-operative Amended Complaint" (A64-65, Minute Order

dated June 24, 2022). If plaintiffs intended to seek either, they were instructed to "file a proper motion" (*id.*).

Plaintiffs did not appeal from that order. Instead, on June 27, 2022, plaintiffs filed a new motion seeking a TRO and a preliminary injunction (EDNY 22-752 ECF No. 85). Plaintiffs' motion, made after the parties had engaged in limited discovery, demanded an injunction by June 30, 2022, claiming that the City had offered "one last shot" to any City employee to return to work by getting vaccinated by then (EDNY 22-752 ECF No. 88 at 1).

The district court denied the motion (A70; Minute Order dated June 29, 2022; EDNY 22-752 ECF No. 107). The court noted that the relief sought was "not entirely clear" and that plaintiffs had "injected unnecessary confusion into the record and had caused delay" (EDNY 22-752 ECF No. 107 at 8, 31-32). And the court limited its ruling to the individual plaintiffs, noting that no class certification had been sought or granted and plaintiffs had not made an adequate record regarding the organizational plaintiff (*id.* at 32-33). The court then went on to find that plaintiffs had failed to establish a likelihood of success on the merits or that they would suffer irreparable harm absent relief (*id.* at 33-41).

After waiting eight days to notice an appeal (EDNY 22-752 ECF No. 109), plaintiffs moved this Court for an order enjoining enforcement of the City's employee vaccination requirements pending appeal (2d Cir. 22-1801 ECF No. 13 at 22). Plaintiffs claimed that their motion presented an "emergency" (*id.*, Motion Information Statement). But by the time plaintiffs sought relief from this Court, seven of the City-employee plaintiffs were no longer employed by the City (*see* EDNY 22-752 ECF No. 60-1; ECF No. 78 at 125, 141), and the three remaining City-employee plaintiffs were in compliance with the vaccination requirements (EDNY 22-752 ECF No. 78 at 123; 2d Cir. 22-1801 ECF No. 13 at 22).

A single judge of this Court denied emergency relief (2d Cir. 22-1801 ECF No. 25) and, after consolidating this appeal with the latest appeal in *Kane/Keil*, a motions panel denied plaintiffs' request for an injunction pending appeal (2d Cir. 22-1801 ECF No. 75). The motions panel also found plaintiffs' challenge to the private-sector employee vaccination requirement moot and dismissed the appeal of the private-sector plaintiffs (*id.*).

As noted above, plaintiffs in the consolidated cases sought a writ of injunction from the United States Supreme Court, which Justice Sotomayor denied (Supreme Court Docket No. 22A389).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

The district courts providently exercised their discretion in denying plaintiffs' preliminary injunction motions. By the time plaintiffs sought provisional relief below, the vaccination requirement had already become effective and had been implemented across the City workforce. Because plaintiffs seek (again) to "disrupt the status quo," they have to "meet a heightened legal standard"—one even more stringent than the already demanding standard for obtaining preliminary injunctive relief. *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (cleaned up). Specifically, plaintiffs bear the burden of establishing (1) a "clear or substantial likelihood" of success on the merits; (2) a "strong showing" of irreparable harm; (3) no substantial injury to the non-moving parties; and (4) furtherance of the public interest. *See A.H. v. French*, 985 F.3d 165, 176 (2d Cir. 2021); *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). Because the

government is the defendant here, the third and fourth factors effectively merge into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

This standard applies with added force when a party seeks part of the final relief through a preliminary injunction motion, as plaintiffs do here in seeking reinstatement. *See Demirayak v. City of N.Y.*, 746 F. App'x 49, 51 (2d Cir. 2018) ("A heightened standard applies when a movant seeks … the ultimate relief sought in the underlying action."). And plaintiffs did not approach such a showing below—or even now. Indeed, their arguments on appeal are largely a rehash of arguments that were raised and rejected in prior applications to this Court.

Plaintiffs have failed to make a "strong showing" of irreparable harm. At this point, plaintiffs no longer confront the First Amendment harm they allege; any pressure to violate their religious beliefs and get vaccinated to keep their jobs has disappeared. Plaintiffs are either (a) no longer in City service, (b) in receipt of a religious accommodation, or (c) in compliance with the vaccination requirement.[10] And, the economic harms they allege are reparable through monetary damages.

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[10] Plaintiff Matthew Keil is on childcare leave for the 2022-2023 school year and, thus, does not fall into any of these categories. Indeed, even setting aside that his claims

(cont'd on next page)

As to the likelihood of success on the merits, in reviewing the DOE employee vaccination requirement, this Court held that the requirement itself was a neutral regulation of general applicability that easily satisfied rational basis review. Plaintiffs present no argument as to why this holding would not apply to the non-DOE City-employee vaccination requirement as well. And to the extent that the plaintiffs allege that the religious accommodation appeals process violates the First Amendment, in the *Kane/Keil* litigation this Court ordered the City to use the precise process that was used here for each plaintiff in that litigation whose appeal of their employer's denial of their religious accommodation request was denied by an arbitrator. This Court-ordered process violates neither the Free Exercise Clause nor the Establishment Clause.

Finally, the balance of the equities favors denying an injunction. Plaintiffs do not face any imminent or irreparable harm where they are no longer subject to any pressure to get vaccinated and can pursue all the usual post-termination remedies available to any discharged employee.

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were properly dismissed, Keil opted for an extended leave arrangement for the 2021-2022 school year under which he released all claims.

The public's interest in safely maintaining City services with minimal disruptions far outweighs plaintiffs' individual objections to vaccination.

The district court also properly dismissed the *Kane/Keil* plaintiffs' complaint. The allegations in the complaint fail to raise a plausible inference of the constitutional violations alleged. In seeming recognition of this fact, plaintiffs rely heavily on materials from the later-filed *NYFRL* case instead of allegations in their own complaint. And their own allegations undercut their constitutional claims.

ARGUMENT

POINT I

PLAINTIFFS FAILED TO PREPARE AN APPENDIX ADEQUATE TO ENABLE APPELLATE REVIEW

This Court can affirm on the threshold ground that plaintiffs have utterly failed to discharge their basic obligation to prepare an appendix adequate to enable this Court's review. As the appellants, plaintiffs were required to prepare an appendix that includes, among other things, the "parts of the record to which the parties wish to direct the court's attention." Fed. R. App. P. 30(a)(1)(D). This requirement, though procedural, "goes to the heart of this court's decision-making process," by ensuring that the court has all necessary documents before it as it considers the

parties' arguments and renders its decision. *Hill v. Porter Mem'l Hosp.*, 90 F.3d 220, 225-26 (7th Cir. 1996). After all, "judges are not like pigs, hunting for truffles buried in the record." *United States v. Morton*, 993 F.3d 198, 204 n.10 (3d Cir. 2021); *see also Rios v. Bigler*, 67 F.3d 1543, 1553 (10th Cir. 1995) (noting that it is appellant's responsibility to provide proper record on appeal, not the court's burden to hunt down the pertinent materials).

Plaintiffs cannot pretend to be surprised by this requirement. They consulted with defendants on the contents of the appendix—albeit belatedly—and the parties agreed to include roughly 88 docket entries relevant to the issues on appeal. But plaintiffs later reversed course, citing the costs (though they could be recouped if plaintiffs were to prevail), and instead proposed including only the docket sheets, the operative complaints, and the relevant opinions. After defendants informed plaintiffs that they objected to an appendix that would exclude a wide swath of materials required to enable meaningful appellate review, plaintiffs submitted an appendix that corresponded to neither of their proposals, tendering a one-sided appendix offering a small selection of exhibits.

Indeed, plaintiffs' appendix omits the lion's share of the record below. It includes only five of the exhibits they submitted in district court, one of which is incomplete (*compare* A272-77, 283-99, 426-76, *with* EDNY 22-752 ECF Nos. 8-23, 40.1-40.25, 46.1-46.4, 47-60, 64.1-64.3, 81.1-81.33; SDNY 21-7863 ECF Nos. 120.1-120.3, 122.1-122.9, 123-144, 162, 163, 168.1-168.3). Notably, plaintiffs have not seen fit to include their own declarations setting forth the basis for their claims and the harms they allege, the vaccination requirements and arbitration award standards they challenge; the complete deposition transcript of the witness whose testimony they argue demonstrates the flaws in the Citywide Panel's process; or any of the evidence they claim demonstrates that the vaccination requirements favor secular over religious conduct.

Ultimately, this Court should not be tasked with searching out which, if any, of plaintiffs' exhibits may provide support for their claims. While "parts of the record may be relied on by the court or the parties even though not included in the appendix," Fed. R. App. P. 30(a)(2), that does not relieve the appellants of their responsibility for preparing an appendix with all the parts of the record to which the parties wish to direct the court's attention, nor does it justify anything of the magnitude

plaintiffs are trying here. Plaintiffs could have sought leave to proceed on the original record but did not. Fed. R. App. P. 30(f). Plaintiffs' flagrant violation of Rule 30 has deprived the Court of an appendix sufficient for meaningful appellate review. The Court could affirm on this ground alone.

POINT II

THE DISTRICT COURTS PROVIDENTLY EXERCISED THEIR DISCRETION IN DENYING PRELIMINARY INJUNCTIVE RELIEF

A. Plaintiffs failed to show they would suffer irreparable injury absent a preliminary injunction.

Plaintiffs fare no better on the merits of their appeals. Plaintiffs have not established that they would suffer irreparable harm unless they are granted preliminary relief pending appeal, which is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). As an initial matter, in the *Kane/Keil* litigation, this Court rejected plaintiffs' contention that the vaccination requirement for DOE employees itself violated the First Amendment, holding that the vaccination requirement does not require employees to "perform or abstain from

any action that violates their religious beliefs." *Kane*, 19 F.4th at 172. That reasoning applies equally to the other City-employee vaccination requirements at issue in this case.

Perhaps for that reason, the main irreparable harm argument plaintiffs make in their motions is that they are being "coerced" to choose between their faith and vaccination (SDNY 21-7863 ECF No. 121 at 23-24; 2d Cir. 22-1876 ECF No. 7 at 24-25; EDNY 22-752 ECF Nos. 88 at 21-22, 98 at 12-14; 2d Cir. 22-1801 ECF No. 13 at 21-22). But the *NYFRL* plaintiffs' argument below—the only one they preserved for appeal—was specific and narrow because it was the only one the facts even arguably allowed: that they were being "coerced" to get vaccinated by June 30, 2022, because the City had offered all non-DOE employees one last opportunity to come into compliance with vaccination requirements by then (EDNY 22-752 ECF No. 88 at 1). The *Kane/Keil* plaintiffs made a similar argument to this Court—though not in district court—citing the opportunity given for non-compliant DOE employees to come into compliance by September 6, 2022 (2d Cir. 22-1876 ECF No. 7).

But these dates all passed long ago, and with it any pressure plaintiffs purportedly felt to violate their faith to return to work. *Cf. Aladdin*

Capital Holdings LLC v. Donoyan, 438 F. App'x 14, 16 (2d Cir. 2011) (denying injunction where it was no longer possible to enjoin harms alleged). And the *Kane/Keil* plaintiffs' argument that they are suffering ongoing coercion to violate their faith is belied by the fact that, in their declarations, none of them stated that they were considering getting vaccinated if this Court does not grant injunctive relief (SDNY 21-7863 ECF Nos. 123-143).

Although plaintiffs argue that the coercion is "substantial" and ongoing because the City continues to offer new "last chances" for terminated employees to be reinstated if they take the vaccine, this contention is completely unsupported[11] (Brief for Plaintiffs-Appellants ("App. Br.") 18-19, 96). The City offered only one opportunity for terminated employees to get vaccinated and return to work—by June 30 for non-DOE employees and by September 6 for DOE employees. There is no record

[11] *See* EDNY 22-752 ECF No. 70 at 8 (explaining that in general, terminated employees can get vaccinated and reapply for their jobs but are not entitled to reinstatement upon vaccination).

support—none—for plaintiffs' assertion that "[t]hese last-chance offers will likely continue" (App. Br. 19).[12]

And while plaintiffs evidently see the opportunity to get vaccinated and return to work as intended to coerce them into violating their faith, the reality is that many employees did not get vaccinated for reasons that had nothing to do with their religious beliefs. The mere fact that the City offered employees an opportunity to come into compliance with a condition of employment is hardly indicative of bad faith.

Apart from their "coercion" argument, plaintiffs assert that the City's vaccination requirements preclude them from finding employment "with *any* public or private employer in the City" (App. Br. 96, 98 (asking this Court to "free them to be employed somewhere—*anywhere*—in New York City")). But that argument—a cornerstone of their presentation below—falls apart considering that the private-sector requirement is no longer in effect (App. Br. 96). Moreover, even when it was in effect, the private-sector requirement was narrower than plaintiffs suggest; it did

[12] Nor is there any record support for plaintiffs' argument that even vaccinated individuals live under constant threat that booster shots will be imposed (App. Br. 73). The City has neither imposed nor threatened to impose such a requirement and plaintiffs cite no evidence to suggest that it has.

not apply to employees who did not regularly interact with the public or co-workers, including employees who work remotely, and it was of course subject to statutory accommodation standards administered by private actors (EDNY 22-752 ECF No. 8-6). And plaintiffs' argument is hard to reconcile with their own claims that every other school district in the state allows testing in lieu of vaccination (2d Cir. 22-1678 ECF No. 7 at 22) and that the private-sector requirement was rarely enforced (EDNY 22-752 ECF No. 88 at 9; EDNY 22-752 ECF No. 98 at 2).

None of the plaintiffs has offered any evidence of having sought a position that would have been covered by the private-sector requirement and having been unlawfully denied an accommodation by a private employer. Nor have plaintiffs offered any evidence that they are unable to find employment outside New York City, and indeed at least one of the *NYFRL* plaintiffs admittedly has (2d Cir. 22-1801 ECF No. 21 at 5). At least one of the *Kane/Keil* plaintiffs has also found a new job, though it is unclear whether that position is inside or outside New York City (SDNY 21-7863 ECF No. 128 at 5). Plaintiffs' unsubstantiated assertion that they cannot find any other employment does not come close to satisfying the rigorous standard for irreparable harm in this context. *See*

Grant River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007).

To the extent plaintiffs suggest that *Elrod v. Burns*, 427 U.S. 347 (1976), mandates a finding of irreparable harm, this Court already found that case inapplicable at an earlier stage of the *Kane/Keil* litigation, and plaintiffs do not explain why a different outcome is warranted here (2d Cir. 22-1876 ECF No. 7 at 24). *Kane*, 19 F.4th at 171-72. In any case, *Elrod* merely found that the lower court did not err under the circumstances by examining irreparable harm at the time relief was sought. 427 U.S. at 374. *Elrod* hardly announced a categorical rule that courts are compelled to wind back the clock when evaluating irreparable harm. Nor would such a rule make sense in a case like this where plaintiffs seek to upend what has been the state of affairs for months. *Cf. Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1242 (D.C. Cir. 1980) (observing how developments infected case with staleness making equitable relief inappropriate). After all, "[a] preliminary injunction is an equitable remedy and an act of discretion by the court," *ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015); it "must, by its very nature, be tailored to the facts of

a particular dispute," *Joseph Scott Co. v. Scott Swimming Pools, Inc.*, 764 F.2d 62, 63 (2d Cir. 1985).

In the end, plaintiffs are left with quintessential employment disputes. This Court need not assume that the City has been infallible in determining all the thousands upon thousands of accommodation requests to uphold the denial of preliminary injunctive relief here. The loss of employment, pay, and benefits can all be redressed, if necessary and appropriate, through damages and other retrospective relief. *See Savage v. Gorski*, 850 F.2d 64, 67-68 (2d Cir. 1988). And although plaintiffs claim that their alleged harms "go far beyond mere economic loss" in that they extend to the loss of homes, careers, and communities (App. Br. 97-98), this Court had held that "[e]xcept in a genuinely extraordinary situation, irreparable harm is not shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment however severely they may affect a particular individual." *Stewart v. INS*, 762 F.2d 193, 199 (2d Cir. 1985) (cleaned up). That is only more true in the government employment context, where the standard for irreparable harm is "particularly stringent." *Id.* But plaintiffs have never

attempted to make a record that might satisfy this stringent requirement.

B. Plaintiffs did not establish a clear or substantial likelihood of success on the merits.

To begin, plaintiffs' challenge to the facial validity of the vaccination requirements has already been squarely rejected by this Court in addressing the DOE vaccination requirement and plaintiffs do not argue that the facial validity of the vaccination requirement for other City employees should be subject to a different analysis (App. Br. 28-47). *Kane*, 19 F.4th at 158. And to the extent that plaintiffs argue in a footnote that this holding is not law of the case, they are mistaken in arguing that significant new facts require fresh consideration (App. Br. 36 n.3). They have identified no new facts that would call into question this Court's ruling on the facial validity of the vaccination requirements. *See Dilaura v. Power Auth. of N.Y.*, 982 F.2d 73, 76 (2d Cir. 1992).

In rejecting plaintiffs' facial challenge to the DOE vaccination requirement, this Court found the vaccination requirement neutral "on its face" because it did not single out employees who decline vaccination on religious grounds. *Kane*, 19 F.4th at 164-65. With no way around that

ruling, plaintiffs argue that the vaccination requirements are not neutral because their implementation has been infected with religious animus (App. Br. 42-47). And in support of this argument, they reprise their argument that constitutional infirmities in the arbitration standards demonstrate that the City's vaccination requirements themselves are infected with religious animus (App. Br. 43-44). But, in reviewing the DOE vaccination requirement, this Court has already rejected this claim. *Kane,* 19 F.4th at 164-67; *see also* 2d Cir. 21-3043 ECF No. 162-1 at 4. And plaintiffs fare no better with their argument that religious animus is demonstrated by the Citywide Panel's policy of denying religious accommodation requests to individuals who objected to the use of fetal cell lines (App. Br. 44-47). The Panel had no such policy: it examined each employee's objection to the use of fetal cell lines to determine whether it was based in religion (SA 249, 252-54). The EEOC guidelines permit precisely this sort of inquiry.[13] There simply is no evidence that the vaccination requirement is infected with religious animus.

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[13] *See* EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://perma.cc/M3Y6-XSLU (captured Aug. 25, 2022) (explicitly permitting employer to inquire as to religious nature of an employee's belief).

Plaintiffs also reprise their argument that the vaccination requirement is not generally applicable because it impermissibly allows for religious accommodation determinations that apply fixed standards to individuals' pertinent facts (App. Br. 32-36). Earlier in the *Kane/Keil* litigation, however, this Court endorsed the very process that plaintiffs challenge. *Kane,* 19 F.4th at 176-77. Plaintiffs themselves suggested that the use of Title VII standards would be appropriate (2d Cir. 21-2678 ECF No. 42 at 5 n.2, No. 68 at 29-30). And this Court has already considered and rejected plaintiffs' argument that the mere use of the standards imposed by Title VII and its state and local counterparts compel strict scrutiny (App. Br. 32-36). *See Kane*, 19 F.4th at 175-76. As this Court has recognized, "the mere existence of an exemption procedure, absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny." *We the Patriots USA*, 17 F.4th at 288-89 (cleaned up).[14]

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[14] Plaintiffs also misread *Employment Division v. Smith*, 494 U.S. 872 (1990). *Smith* held that a scheme that included a medical exemption of a sort—by not criminalizing the use of controlled substances when prescribed by a medical practitioner—did not render the criminal prohibition not generally applicable. 494 U.S. at 874. Plaintiffs

(cont'd on next page)

And plaintiffs fundamentally misunderstand the Supreme Court's ruling in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). As *Fulton* explains, where the government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Id.* at 1877 (cleaned up). But the exemption framework plaintiffs challenge *does* extend to cases of religious hardship. And in any case, "individual exemptions" in the *Fulton* sense are those that are wholly discretionary or are provided under an equivalently generalized and contentless standard such as "good cause." *See id.* at 1877-88. Neither applies to the Citywide Panel process.[15]

misread *Smith* again in relying on the passage where the Court noted that constitutional difficulties might arise if the underlying state criminal prohibition against peyote use contained a religious-use exception (App. Br. 33-34). The Court did not suggest that inclusion of a religious exemption from a requirement itself leads to strict scrutiny under the Free Exercise Clause—that is plaintiffs' idiosyncratic and topsy-turvy invention (*id.*). The Court's point was that if the underlying state criminal prohibition exempted religious use of peyote—but the worker's compensation scheme nonetheless deemed off-duty religious use to be fireable "misconduct"—the scheme may be constitutionally suspect, as it would appear to target off-duty religious use of a non-prohibited substance. *See Smith*, 494 U.S. at 876, 878.

[15] Nor are plaintiffs correct in suggesting the City's authority to extend, modify, or repeal vaccination requirements demonstrates that the vaccination requirements are wholly discretionary and subject to the Mayor's whim (App. Br. 37-38). To the contrary, this merely reflects the fact that the City is authorized to make decisions regarding the adoption of vaccination measures to protect the health of the public. *See Garcia v. New York City Dep't of Health & Mental Hygiene*, 31 N.Y.3d 601, 611 (2018).

The Panel certainly makes employee-specific determinations, but they are not, as plaintiffs contend, without governing standards (App. Br. 32). And in order to support this contention, plaintiffs rely on the deposition testimony of Eric Eichenholtz—which they excerpted in the record instead of including in its entirety in an effort to mask the extent to which they rely on mischaracterizations of his testimony (*id.*).[16] As the district court properly found, and as the City's witness repeatedly testified, they are made within the bounds of the well-worn standards established by Title VII and its state and local counterparts (SPA 25; SA123, 173-75, 266, 355). Applying these standards—just as this Court contemplated when resolving the *Kane/Keil* appeal— the Panel reviews the employees' submissions describing their religious objections to vaccination and the agencies' submissions describing any undue hardship and determines whether the agency properly denied the religious accommodation request (SA281, 343).

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[16] Plaintiffs' fixation on Eichenholtz's description of the determinations as "individualized" amounts to word play. In context, Eichenholtz was expressing that the determinations, quite appropriately, apply categorical statutory standards to individual facts (SA213, 266, 292). In contrast, *Fulton*'s reference to "individual exemptions" denotes exemptions that are given in the exercise of standardless discretion or, what amounts to the same thing, under an essentially contentless standard such as "good cause." *Fulton*, 141 S. Ct. at 1877-88.

The mere fact that requests were made by specific employees and were resolved through employee-specific determinations does not trigger strict scrutiny. Nor does the existence of employee-specific findings that an objection was grounded in personal or philosophical, rather than religious, beliefs; or that accommodating a sincerely held religious belief would constitute an undue hardship (*see* A272-77). Employees have no constitutional right to a religious accommodation absent a sincerely held religious objection to vaccination, nor to one that cannot be provided without undue hardship. *See Kane*, 19 F.4th at 175.

To the extent plaintiffs rely on the scope of the private-sector vaccination requirement (App. Br. 37-41), it is hard to see how that requirement has any continuing relevance to these cases now that it has expired. Regardless, the two requirements cannot be compared. The government has greater leeway when setting rules for public employment than when regulating the public. *Fulton*, 141 S. Ct. at 1878; *see also Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 598 (2008). It is not a First Amendment violation for the City to maintain stricter protocols for public employees. The relevant inquiry is whether the vaccination requirements are generally applicable to similarly situated City employees, not generally

applicable to everyone everywhere. The scope of the expired-requirement for private-sector employees simply has no bearing on this inquiry.

When evaluating a categorical exemption, the courts examine whether the law "prohibits religious conduct while permitting *secular* conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (emphasis added and otherwise cleaned up). Categorical exceptions to the expired private-sector requirement do not demonstrate a preference for secular conduct over religious conduct. And plaintiffs' contention that, due to extreme staffing crises, the City intentionally paused reviewing appeals of unvaccinated public employees, thereby preferencing secular conduct by permitting those employees to continue working unvaccinated indefinitely, is unsupported by the record and incorrect (App. Br. 39-40).[17] In fact, the New York Post article plaintiffs cite as support for this proposition specifically notes that City Hall stated this was not the case (EDNY 22-752 ECF No. 81-21).

[17] Although plaintiffs appear to suggest that the City should have terminated employees more quickly (App. Br. 39-40), the City received thousands of COVID-19 accommodation requests and provided employees with robust process, including appellate view, and can hardly be faulted for not terminating employees before this process was complete.

Plaintiffs have had ample time to gather evidence—not news articles—for their motions and have come up empty.

Ultimately, it makes no sense for plaintiffs to assert that creating a religious accommodation process for employees somehow triggers strict scrutiny. To be sure, "in providing religious accommodations, a government employer must abide by the First Amendment." *Kane*, 19 F.4th at 175. But if the governing process comports with the First Amendment, so long as an employee-specific decision has been made consistent with that process, the only question is whether the decision rests on a factual error. Here, the district courts found that the Citywide Panel adhered to statutory standards and properly considered whether each plaintiff's belief was sincere and religious in nature, and if so, whether an accommodation could be provided without undue hardship (SPA25). Such determinations are not subject to strict scrutiny.

It's also worth noting the oddity of the framework that plaintiffs advocate. Under their conception, an across-the-board requirement that admits of no opportunity for religious accommodations is reviewed for rationality but adding an objective standard for religious accommodations

to it leads to strict scrutiny review. How that framework advances religious liberty is anyone's guess.

Plaintiffs are also incorrect in arguing that precedent holds that only "ministerial" exemptions for religious belief can avoid strict scrutiny (App. Br. 35-36). The caselaw instead discusses "categorical" exemptions for *secular* conduct—meaning those that apply to a category of eligible individuals—and holds that the key question is whether the secular conduct covered by the category poses risks to governmental objectives that are "comparable" to those posed by the religious plaintiffs. *See Fulton*, 141 S. Ct. at 1921; *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020). Plaintiffs cite no case that endorses the bizarre bootstrapping they propose, where the introduction of any standard for religious accommodations effectively kicks the door wide open to all applicants for such accommodations. Nor do plaintiffs acknowledge that their argument's upshot would seem to be that Title VII's long-established religious accommodation standards, for example, are unconstitutional as applied to public employment.

Finally, there is no merit to plaintiffs' claim that the City's vaccination requirements violate the Establishment Clause (App. Br. 47-51). The

requirements do not grant denominational preferences and to the extent plaintiffs argue that the arbitration review process negotiated by some of their unions was more favorable because it did not engage in an undue hardship analysis, their own record belies the claim. As an initial matter, the *Kane/Keil* plaintiffs did not even present this argument to the district court and thus, have not preserved it for this Court's review (SDNY 21-7863 ECF No. 121 at 23). *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (finding party waived this argument by failing to present it below). And, in any event, the *Kane/Keil* plaintiffs—the only ones who went through the arbitration appeals process—allege in their complaint that undue hardship arguments were routinely presented in the arbitration appeals (*see* A159 ¶ 503, A164-65 ¶ 531, A176 ¶ 589). They submitted the affidavit of a teacher who stated that his religious accommodation request was denied by the arbitrator and that the sincerity of his beliefs was never questioned: the only reason given for the denial of his religious accommodation request was that it would be an undue hardship (SDNY 21-7863 ECF No. 23).

In the end, the facts hardly demonstrate an unconstitutional advantage in the arbitration process. One of the *Kane/Keil* plaintiffs

received an accommodation through the arbitration award process and one received an accommodation through the Citywide Panel. And not even one of the *NYFRL* plaintiffs chose review by the arbitrator even though some, under their own unsupported view of the process, may have fared more favorably.[18] On this record, plaintiffs have not demonstrated a substantial likelihood of success on the merits of an Establishment Clause claim.

C. The equities continue to weigh in the City's favor.

The balance of the equities strongly favors the City. Plaintiffs do not face any imminent or irreparable harm, and they can be made whole if they prevail in the final analysis. The public interest, on the other hand, would be seriously undermined by enjoining the requirements.

The vaccination requirement represents a successful public health measure that helped the City safely resume full operations in its public schools and resume the provision of innumerable City services. And it

[18] For example, plaintiff James Schmitt identifies as a Protestant and submitted a letter from a reverend of his church in support of his accommodation request (EDNY 22-752 ECF No. 21 at 1-2, No. 21-1 at 5-6). Similarly, plaintiff Dennis Pillet belongs to the North Shore Fellowship, a Christian and Missionary Alliance, and submitted a letter from his pastor in support of his accommodation request (EDNY 22-752 ECF No. 17 at 2, No. 17-1 at 4).

continues to help prevent serious infections from disrupting City services. The vaccination requirement is founded on public health officials' expertise and supported by robust medical science. And it has been vigorously litigated and repeatedly found to be lawful by numerous courts.

POINT III

THE DISTRICT COURT PROPERLY DISMISSED THE *KANE/KEIL* COMPLAINT

The district court properly dismissed the *Kane/Keil* plaintiffs' federal claims that the DOE employee vaccination requirement is unconstitutional facially and as-applied, and appropriately declined to exercise supplemental jurisdiction over their state-law claims. On appeal, plaintiffs make no argument challenging the dismissal of their Substantive Due Process, Procedural Due Process, and Supremacy Clause claims, and address their New York City Human Rights Law and New York State Human Rights Law claims only in a footnote. Accordingly, they have abandoned any challenge to the dismissal of these claims. *See Jackler v. Byrne*, 658 F.3d 225, 233 (2d Cir. 2011) (claims for which brief on appeal contains no argument are deemed abandoned); *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) (finding argument mentioned only in a footnote not adequately raised or preserved for appellate review).

And while plaintiffs devote 37 pages of their brief to their arguments regarding the sufficiency of their individual as-applied claims (App. Br. 77-94), they presented virtually none of this in their memorandum to the district court (SA50-52). Thus, they have not preserved these arguments for this Court's review. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 132. There is no merit to plaintiffs' arguments as to the viability of the remaining claims.

Although this Court reviews the dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) de novo, *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008), and must accept as true the factual allegations of the complaint and draw all inferences in favor of the plaintiffs, *Lafaro v. New York Cardiothoracic Grp., PLLC,* 570 F.3d 471, 475 (2d Cir. 2009), a complaint must plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). And those facts must "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). No such inference will be drawn where, as here, the allegations in the complaint contradict the claims. *See Connecticut Nat'l Bank v. Fluor Corp.,* 808 F.2d 957, 962 (2d Cir. 1987).

While plaintiffs argue that they have plausibly alleged that the vaccination requirement violates the Free Exercise Clause, they fail to identify factual allegations in their complaint that support this claim (App. Br. 28-47). Instead, they rely on evidence and allegations adduced in the *NYFRL* case, which plaintiffs' counsel commenced after the January 2022 filing of the operative *Kane/Keil* complaint (*see* A53). Thus, in support of their argument that they adequately pleaded that the vaccination requirement is neither facially neutral nor generally applicable they cite not their complaint but rather: the May 2022 deposition transcript of Eric Eichenholtz, produced in discovery in the *NYFRL* case (App. Br. 32); allegations in the *NYFRL* complaint describing Mayor Adams's March 2022 order exempting certain categories of employees from the private-sector vaccination requirement (*id.* at 39); allegations in the *NYFRL* complaint describing a May 2022 New York Post article stating that City workers were being permitted to work unvaccinated (*id.* at 40); and emails produced in discovery in April 2022 in the *NYFRL* case (*id.* at 45). Plainly, the allegations in the complaint alone are insufficient to support an inference that the DOE vaccination requirement violates the Free Exercise Clause.

Nor have plaintiffs identified sufficient factual allegations to support an inference that the DOE vaccination requirement violates the Equal Protection Clause. Indeed, plaintiffs mention it only once in their brief and identify no allegations in their complaint that would support an inference that the vaccination requirement treats similarly situated persons differently, as required to state such a claim (App. Br. 48).

With respect to their Establishment Clause claim, this Court has already recognized the vaccination requirement is neutral on its face, expressing no denominational preference. *Kane*, 19 F.4th at 164. To the extent that plaintiffs allege that the arbitration review process negotiated by their unions expressed a denominational preference for Christian Scientists or orthodox religious beliefs, their own allegations undercut any such inference (A224). Indeed, plaintiffs allege that plaintiff Amaryllis Ruiz-Toro, who is not a Christian Scientist and appears to belong to a "minority church," was granted a religious exemption through this very process (A151-55). Far from supporting an inference of denominational preference or unequal treatment, the allegations in the complaint suggest the absence of any such constitutional violation. *See Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 250-251 (2d Cir. 1995)

(finding allegations in complaint undercut inference of notice of claimed violation).

Similarly, with respect to plaintiffs' due process claims, plaintiffs' own allegations demonstrated that DOE provided notice and opportunities to be heard that comported with due process before and after termination (A213-52). The plaintiffs were informed of the opportunity to apply for accommodations, the process for doing so, the opportunity to appeal, and the chance to have any appeal denials reconsidered by the Citywide Panel (*id.*). These procedural safeguards go well beyond what is typical for accommodation requests, which often do not involve any written determination or administrative appellate review.

For those plaintiffs who were terminated because their appeal was denied or they never properly applied for an accommodation, no further process was due. Notwithstanding plaintiffs' baffling argument to the contrary (App. Br. 56-57), their terminations were not disciplinary. They were terminated for failing to comply with a condition of employment. *See We the Patriots*, 17 F.4d at 294 (holding vaccination was a condition of employment for healthcare workers); *Garland v. N.Y. City Fire Dep't*, 574 F. Supp. 3d 120, 129 (E.D.N.Y. Dec. 6, 2021) (concluding that

vaccination was a condition of employment); *Broecker v. New York City Dep't of Educ.*, 585 F. Supp. 3d 299, 318 (E.D.N.Y. Feb. 11, 2022) (holding vaccination was a condition of employment for DOE employees); *O'Reilly v. Bd. of Educ.*, 2022 N.Y. Misc. LEXIS 246, 2022 WL 180957, at *3 (N.Y. Sup. Ct., N.Y. Cty. Jan. 20, 2022) (same).

Finally, even setting aside plaintiffs' failure to preserve any argument as to the Citywide Panel's denial of individual reasonable accommodation claims (*see supra* at 46), they argued that the district court erred in dismissing these claims on the ground that granting an accommodation would pose an undue hardship (SA52). But the court did not dismiss their claims on this ground (SPA1-42). The district court dismissed the claims because plaintiffs' own allegations undercut any inference that the denial of their religious accommodation appeals violated their constitutional rights. The court found plaintiffs' allegations that the Citywide Panel had violated their constitutional rights by "rubber-stamp[ing]" the previous denials of their religious accommodation requests in "bad faith" to be contradicted by the fact that the Panel reversed the arbitrator's denial of plaintiff William Castro's religious accommodation request (SPA37-38). And the court found that the fact that plaintiffs'

religious accommodation requests were ultimately denied on undue hardship grounds specifically undercut their claims that the denial of their requests was based upon an improper examination of their religious beliefs (*id.*).[19] *See Connecticut Nat'l Bank,* 808 F.2d at 962 (dismissal upheld where allegations undercut inference of fraudulent intent).

Ultimately, the district court properly dismissed the complaint because plaintiffs' own allegations failed to support any inference that the determination of their religious accommodation appeals violated their constitutional rights. Plaintiffs' brief to this Court—relying almost exclusively on material outside the operative complaint—certainly does not suggest that the district court erred.

[19] To the extent that the court further found that the denials satisfied the requirements of Title VII, it is of no moment as plaintiffs did not bring a Title VII claim (R213-52). And plaintiffs' arguments as to whether the undue hardship standard was properly applied is an issue to be resolved through individual employment discrimination or CPLR Article 78 claims, not First Amendment claims (App. Br. 54-56). As noted, the district court dismissed plaintiffs' state-law discrimination claims here for lack of subject matter jurisdiction.

CONCLUSION

Plaintiffs' request for an injunction pending appeal should be denied and the dismissal of the *Kane/Keil* complaint should be affirmed.

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November 21, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 10,193 words, not including the table of contents, table of authorities, this certificate, and the cover.

SUSAN PAULSON