

1 SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 35

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3 SHANNON CORWIN, UMANG DESAI, ERIC
4 SEVERSON, TAMDEKA HUGHES-CARROLL,
5 WANDA CAINE, on behalf of themselves
6 and all others similiary situated,

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-against-

Index No.
157166/2020

CITY OF NEW YORK; NEW YORK CITY
DEPARTMENT OF EDUCATION; RICHARD
CARRANZA, CHANCELLOR of NEW YORK
CITY DEPARTMENT OF EDUCATION,

Respondents.

PROCEEDING

September 23, 2020

Proceedings Held Via Microsoft Teams

B E F O R E:

HON. CAROL EDMEAD, Justice

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Senior Court Reporter

Proceedings

1 THE COURT: We're on the record.

2 COURT CLERK: My name is Sammer Osman.

3 Mr. Glass?

4 MR. GLASS: Yes.

5 COURT CLERK: You're signed in.

6 Bear with me a moment.

7 My name is Sammer Osman. I am the part clerk for
8 Part 35. In a moment, I'm going to ask you individually to
9 provide a full appearance for the court reporter. That
10 includes your name, your firm name, phone number and who you
11 represent.

12 Okay, if you could just lower the volume. I'm not
13 sure who's echoing at the moment. Make sure the volume on
14 your speaker is just low enough for you to hear, not for
15 everyone else.

16 And we will start with Ms. Croushore.

17 MS. CROUSHORE: Yes. My name is Amanda Croushore
18 and -- you said phone number? My phone number is
19 (646) 438-0177. And I represent respondent, BOE
20 respondents.

21 COURT CLERK: Firm name?

22 MS. CROUSHORE: I'm with the Law Department for the
23 City of New York.

24 COURT CLERK: Thank you.

25 Robin Pollina Finkelstein?

Proceedings

1 Mr. Glass, I cannot hear you. You're breaking up
2 profoundly.

3 MR. GLASS: Can you hear me now?

4 COURT CLERK: That's a little bit better.

5 MR. GLASS: Ms. Finkelstein is just a paralegal in
6 my law firm. She called in to listen. She won't be
7 speaking.

8 COURT CLERK: Please provide a full appearance.

9 MR. GLASS: My name is Bryan D. Glass. I'm at the
10 law firm of Glass Harlow and Hogrogian. Our phone number is
11 (212) 537-6859. And we represent the petitioners in the
12 original petition. There was an amended petition filed --

13 THE COURT: The appearance, the firm.

14 MR. GLASS: I was just saying who I represented.
15 I represent the petitioner.

16 THE COURT: Thank you.

17 COURT CLERK: Mr. Ernst.

18 MR. ERNST: Good morning.

19 My name is Leo Ernst. My number is (212) 356-2549.
20 I represent the respondents, along with Ms. Croushore, for
21 the Office of Corporation Counsel.

22 COURT CLERK: Thank you.

23 I'm going to ask that, while you're not speaking,
24 to please keep yourself muted in order not to produce any of
25 that feedback. 3 of 36

Proceedings

1 And, Counselors, are we waiting on anyone else?

2 MR. ERNST: No.

3 MR. GLASS: Nobody else for petitioner, no.

4 COURT CLERK: All yours, your Honor.

5 THE COURT: Mr. Osman, is one of my law secretaries
6 on?

7 COURT CLERK: Yes, your Honor.

8 THE COURT: Good morning, everyone.

9 Thank you for making yourselves available on
10 relatively short notice for, relatively, a brief
11 clarification. I just wanted to make sure that I was
12 proceeding properly.

13 Now, my understanding from reading the pleadings,
14 and particularly the decision of the concurrent judge,
15 Ramseur, there is no stay in place.

16 Yes, there is no stay in place?

17 Each one of you respond that that's accurate.

18 MR. ERNST: That's accurate.

19 THE COURT: Ma'am?

20 MS. CROUSHORE: That's accurate.

21 THE COURT: Mr. Glass?

22 MR. GLASS: Yes, that's my understanding.

23 THE COURT: Great.

24 Now, the next procedural issue, I just wanted to
25 make sure the landscape was clear, the Article 78 before

Proceedings

1 this Court is fully briefed and ready for decision.

2 Counselor from Corp Counsel?

3 MR. ERNST: Yes, that's accurate.

4 THE COURT: Ma'am from Corp Counsel?

5 MS. CROUSHORE: Yes, that's accurate.

6 THE COURT: Counsel for petitioners?

7 MR. GLASS: Well, it's our position we filed an
8 amended petition, so that might change things procedurally.

9 THE COURT: "Might" is nothing I deal with.

10 Do I have a fully submitted brief on an Article 78?

11 MR. GLASS: I would ask that we be -- I would ask
12 permission to have the amended petition replace the previous
13 petition. And if the City wants to respond, I would ask
14 that that be considered. And -- because I think we have
15 additional petitioners who are not intervenors anymore and I
16 think it would make sense procedurally to --

17 THE COURT: Let me stop you right there.

18 What I have before me has already had a ruling by a
19 judge of concurrent jurisdiction with respect to whether or
20 not parties, as you call them, either intervenors or new
21 petitioners, could be added. Now, the application -- the
22 Article 78 before me has a ruling on that.

23 Am I missing something on that point? Because I
24 read Judge Ramseur's decision and footnote 1 seems to have
25 addressed that issue of whether new petitioners could be

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1 added, whether they're called intervenors, as was before
 2 her, or -- and whether or not they're putting a new claim is
 3 a concern. Judge Ramseur ruled, as I read it, that you
 4 could not add any new petitioners, called intervenors, at
 5 the time of her decision.

6 So the Article 78 before me has a ruling with
 7 respect to who can be considered.

8 Mr. Glass or anybody, tell me what I'm missing.

9 MR. GLASS: Well, it's my understanding she issued
 10 the ruling on Friday.

11 THE COURT: The same day you wrote the letter,
 12 right.

13 MR. GLASS: Yes.

14 And under CPLR 3025 I'm entitled to make an amended
 15 petition under the law. And there has been no decision on
 16 the merits of this case at all. And it's our position, on
 17 the order to show cause, it was based on the TRO she denied
 18 on the basis that she thought the teachers were not
 19 reporting. So we were --

20 THE COURT: Sir, don't dance around. I'm very
 21 specific, very specific now.

22 On December -- on September 18th, there's a
 23 decision that addresses exactly the point of whether you
 24 could bring anyone else in and the answer by a judge of
 25 concurrent jurisdiction is no.

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1 Now, you have a right, of course, under the CPLR,
2 to amend as of right if you're within the 20 days. And I
3 believe no one would argue that you're not within the
4 20 days. Maybe they would, I don't know.

5 Is anyone arguing that he's not within the 20 days
6 to amend?

7 MR. ERNST: No, your Honor.

8 THE COURT: Good.

9 So you're within the 20 days to amend, but that,
10 then -- you don't just -- that is a new petition.

11 So, the petition as the Article 78 before me ready
12 for decision is essentially closed.

13 You want to now have an amended petition.

14 What are you all saying, Corp Counsel -- is it Corp
15 Counsel or another department?

16 MR. ERNST: It's Corp Counsel, your Honor.

17 THE COURT: What is your response to whether or not
18 an amended petition can be substituted in?

19 MR. ERNST: Well, your Honor said it perfectly
20 already. The Court has --

21 THE COURT: I've never said anything perfectly,
22 let's be clear.

23 But you keep going. Go ahead.

24 MR. ERNST: As your Honor said, the first petition
25 on 9/18 addressed this ^{7 of 36} under the same facts; considered

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1 multiple additional affidavits that now form the basis of
2 this amended petition. We have a fully briefed Article 78
3 petition. And, frankly, this case was brought as a summary
4 proceeding with an order to show cause with a temporary
5 restraining order and we went to incredible lengths to brief
6 that in just a period of days. And now that we have a
7 fully-submitted, awaiting-decision Article 78, we have a 400
8 plus paragraph amended petition.

9 So, from our point of view, this is a closed case.
10 It should be decided on the papers submitted.

11 And there would also be substantial prejudice to
12 respondents were there to be a contrary ruling, given the
13 expediency with which we already briefed this case.

14 THE COURT: My understanding also is that this
15 Article 78 that is before the Court, the fully-briefed
16 Article 78, would have impact with respect to what happens
17 on October 1st.

18 Would it not, Mr. Glass?

19 MR. GLASS: First of all, there's no prejudice to
20 the City at all if I amend the petition and we have further
21 briefing. There's been no decision on the merits of this
22 petition in any way. So their claim that there's prejudice
23 doesn't make any sense.

24 If your Honor would consider this fully submitted,
25 it seems to me that I would just file the same petitions or

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1 file a related on a new order to show cause. There's been
2 no decision on the merits of this. So just from the
3 standpoint --

4 COURT CLERK: Mr. Glass, I must ask you to slow
5 down for the reporter.

6 MR. GLASS: I apologize. I tend to do that.

7 I'm just arguing, just for a matter of judicial
8 economy and practice, how is the City -- if I file an
9 amended petition, they take a few days to respond and we
10 reply and then --

11 THE COURT: This is the concern the Court has.
12 This is the concern the Court has. Just adding further
13 submissions flies in the face of the judge of concurrent
14 jurisdiction who, based on the petition before me, said what
15 you're planning and wishing to do by amending the petition
16 is precluded from her footnote 1. In other words, I would
17 be -- I have no ability to override a judge of concurrent
18 jurisdiction. She has in her footnote addressed and said
19 you could not -- she would not allow or consider the
20 additional petitioners with the further substantiated
21 argument of secondary accommodation.

22 So, no, it's not that we just add -- "Let me just
23 do further briefing". That flies directly -- "Let me do
24 further briefing on a petition that's before the Court"
25 flies directly in the face of a judge of concurrent

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1 jurisdiction. That's the big issue from the judicial point
2 of view.

3 MR. GLASS: Well --

4 THE COURT: Whether the Law Department and the
5 respondents have prejudice is an independent issue and the
6 issues are very distinct.

7 Mr. Glass?

8 MR. GLASS: Yes. What if I withdraw this petition,
9 the original petition, without prejudice and they file a new
10 petition today with a new order to show cause with a new
11 petitioner, so there's no question --

12 THE COURT: I think, Mr. Glass, it would be good if
13 you stayed still, essentially, and were slower, please.

14 Start again.

15 MR. GLASS: One possible solution, to get everybody
16 in front of the Court and to make sure this is fully
17 briefed, would be to withdraw this petition in front of your
18 Honor, just re-file today with the amended petition with a
19 new TRO. Then all 28 people will be in front of the Court.

20 The circumstances have also changed because, at the
21 time that the Friday happened, the City announced that they
22 were moving the date of reopening the schools.

23 So I think what -- one procedural way to handle
24 this might be to have us re-file the petition, have no
25 decision on the first case, just have it re-filed with a new

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1 TRO and just deal with the merits.

2 The merits have not been adjudicated on either
3 issue at this point, really, because we have a new change of
4 circumstances.

5 I think Judge Ramseur may have misapprehended. She
6 was thinking that the teachers weren't back --

7 THE COURT: Don't tell me what another judge was
8 thinking. You're going down a bad road.

9 MR. GLASS: I apologize.

10 I think we would argue that the imminent harm is
11 still there, because the teachers are reporting.

12 So I think one possible solution, for judicial
13 economy's sake, would be simply to replace this petition.
14 If the Court desires a new index number, I'm happy to file
15 it as a new case with a new TRO and explain the reasons why
16 I think a TRO is applicable.

17 I think -- we do want to deal with the merits of
18 the proceeding, not with these procedural things that the
19 City is raising. I want to be heard on the merits.

20 THE COURT: The issue is this. The issue that
21 comes back to this Court is this. This is a 78. This is an
22 Article 78. This is a question of whether the actions of
23 the respondents were -- the actions were arbitrary,
24 capricious, contrary to law.

25 So, adding in new parties, based on what the

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1 respondents have submitted, is not really changing the
2 dynamics of the 78 with respect to whether -- whether the
3 guidelines created and put in place that determined who and
4 who may not be excused, let me just say generically, is
5 essentially the same.

6 So, I'm sorry, you were almost jumping out of your
7 chair, respondents' counsel for the Law Department. Yes?

8 MR. ERNST: Thank you, your Honor.

9 Just two points.

10 First, your Honor is correct. This does not change
11 the underlying Article 78 to simply add more petitioners.
12 We have a challenge to a policy, the challenge to the policy
13 is made quite clear, and our response is quite clear.

14 Simply by adding petitioners, in addition to the
15 other reasons the Court had mentioned, would also just be
16 duplicative and would be unnecessary.

17 But to counsel's point that he could simply
18 withdraw the case to somehow circumvent Judge Ramseur's
19 order, that's not true. Under CPLR 3217, a party can only
20 voluntarily withdraw a petition before an answer. He is not
21 entitled to withdraw --

22 THE COURT: Hold on one second.

23 Mr. Glass, 3217, how do you overcome 3217? You
24 can't just voluntarily withdraw.

25 MR. GLASS: One minute.

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1 THE COURT: Pull out the C and the P and the L and
2 the R.

3 MR. ERNST: It's 3217(a)(1).

4 THE COURT: Mr. Glass?

5 MR. GLASS: I believe it could be done with
6 permission of the Court.

7 THE COURT: Let's not guess. It's too easy to look
8 it up.

9 Okay. What section, Law Department, are you
10 referring to, 3217 what?

11 MR. ERNST: (a)(1).

12 THE COURT: Yes.

13 "A. Without an order, any party asserting a claim
14 may discontinue it without an order by serving upon all
15 parties to the action a notice of discontinuance at any time
16 before a responsive pleading is served or if no responsive
17 pleading is required within 20 days after service of the
18 pleadings asserting the claim and filing a notice with proof
19 of service with the clerk of the court."

20 I read the whole thing.

21 So, if -- Counsel, I apologize, I didn't write down
22 your last name.

23 Counsel for the respondents is correct. If the
24 responsive pleading has been filed, you cannot voluntarily
25 withdraw.

Proceedings

1 MR. GLASS: But I do -- 3217(b) provides that the
2 Court -- actually, shall not be discontinued by a party,
3 except upon order --

4 THE COURT: Slow down and you're breaking up again.
5 3217(b)?

6 MR. GLASS: Please read that, your Honor.

7 THE COURT: It says "By order of the Court, except
8 as provided in subdivision A." It says "Except as provided
9 in subdivision A, an action shall not be discontinued by the
10 party asserting the claim, except upon an order of the
11 Court."

12 You're saying you want the Court to exercise
13 discretion and allow you to circumvent subdivision (a)(1)?
14 Is that what you're saying?

15 MR. GLASS: It allows the Court, as a matter of
16 practicality -- given that I would have filed the petition
17 anyway, I was going to appear before a judge, it would seem
18 more practical for the Court to address the 28 petitioners
19 on the merits.

20 And I'd also like to point out --

21 THE COURT: No. Don't skip and go "also".

22 Let me go just to the point you're making. The
23 point you're making is that it would be better for the
24 Court, actually. By this Court following 3217(b), the Court
25 would, in fact, be doing, in fact, exactly what I started

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1 out saying, which is to say, overriding a judge of
2 concurrent jurisdiction because I would be giving an order
3 that says "Just go ahead and add these people,
4 notwithstanding the fact that under 3217(a) -- (a)(1), you
5 would be precluded." I would basically be acting as an
6 appellate court over Judge Ramseur by taking -- by
7 responding and acting in accordance with 3217 -- and it's
8 actually (b).

9 Do you follow what I'm saying?

10 A voluntary withdrawal, one, is not permitted as of
11 right and, two, would require the Court to take action that
12 would, in fact, constitute appellate review.

13 MR. GLASS: May I respond?

14 THE COURT: Of course.

15 MR. GLASS: One, nothing in the note of Judge
16 Ramseur says anything about amending the petition. She just
17 had a question about intervention and so she said I had to
18 make a cross-motion to intervene --

19 THE COURT: Let's read her footnote.

20 She says something more specific than that. She
21 says "To the extent that approximately three proposed
22 intervenor affidavits mention the secondary accommodation
23 policy, the Court does not consider them. The Court does
24 not consider them. At neither oral argument did
25 petitioners' counsel, again, despite the Court's numerous

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1 attempts to solicit precedential or statutory support, raise
2 the standards of or even identify" -- I'm waiting for the
3 close quote -- and then she goes to the CPLR and she has a
4 cite.

5 But, you see, basically, it's not just that --
6 she's saying "You can't bring these intervenors in with
7 whatever they're now going to claim at this point in the
8 proceeding, because you had the opportunity and didn't do
9 it." That's what she said. Now, that's clear from the
10 footnote.

11 Now, again, to circumvent that by saying "Well, I'm
12 just going to amend," you cannot -- "Well, I'm just going to
13 withdraw," you can't withdraw, clearly, without a court
14 order, which -- I'm not going to beat that dead horse.

15 But you have the right, of course, to amend. But I
16 have a fully-submitted -- I have a fully-submitted Article
17 78 to be decided, so I don't see where your amended petition
18 can go.

19 MR. GLASS: Can I just respond?

20 First of all, the City did not accurately state
21 that -- this is for the facial and as-applied challenge. To
22 the extent the City keeps trying to pitch this as just a
23 challenge to the policy, if you read the petition carefully
24 and read the amended petition --

25 THE COURT: I don't think you read the petition,

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1 no.

2 MR. GLASS: Well, even the petition suggests this
3 is not just a policy challenge, it's also on an
4 individualized basis and that's what Article 78 is about.

5 So, with me adding petitioners, I am simply -- it's
6 not just the policy, it's the petitioners subject to
7 arbitrary decision making.

8 THE COURT: That's right, but it's the petitioners
9 subject to the policy and that's why it's a 78 and not a
10 hybrid. If you had made a hybrid complaint, that would be
11 different. But this is a 78 complaint, not a hybrid.

12 MR. GLASS: But --

13 THE COURT: Sir, a hybrid would have brought in
14 something other than a challenge to the policy. But this is
15 not a hybrid. This is, in fact, a straight 78. So I don't
16 get to go down a road other than is the policy arbitrary,
17 capricious. That's 78. 78 is, is the policy, is the
18 directive, is the thing that is controlling the behavior of
19 the agency as to the people to whom it's directed, is that
20 arbitrary, capricious and contrary to law. If it had been a
21 hybrid, that would be different, but that's not the
22 complaint before the Court. I don't have a hybrid.

23 MR. GLASS: They're not claiming it to be a hybrid.
24 I'm saying that it's the policy itself and the application
25 of the --

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1 THE COURT: That's right.

2 MR. GLASS: -- policy, which is not a hybrid. It's
3 a different cause of action under an Article 78. You apply
4 it to one individual, Mr. Desai, both the policy and the
5 application of the policy --

6 THE COURT: Wait, wait, wait.

7 (Discussion held off the record)

8 MR. GLASS: We learned for the first time from the
9 City in their answer that there was a new policy. No one
10 even knew about that policy until it was brought up in the
11 City's answer. The petition challenges both the first
12 policy and the second policy and the application of the
13 policies. It's not a hybrid --

14 THE COURT: Let me stop you.

15 You had the opportunity to reply. After they put
16 in their answer and dismissal, I have two submissions that
17 say "reply". So this is not something that you didn't have
18 the ability to address and that is not before the Court.

19 Your two replies -- let me just close it up. I
20 believe I read -- I think there are two replies. So let me
21 just scroll back up. One second. Exhibits -- right -- one
22 second. Let me -- one second, folks.

23 (Pause in proceedings)

24 THE COURT: Affidavit and reply in NYSCEF
25 Document 22 and then another reply.

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1 Where is this other reply? I was sure I read two.

2 MR. ERNST: 22 and 26.

3 THE COURT: So you had two opportunities. If
4 you're saying they're saying something for the first time,
5 you had two opportunities in your reply. So you had two
6 opportunities, if you believe they raised something for the
7 first time, to address it. Two. And at no point did you.
8 And, in fact, you know -- so you can't argue today "The
9 amended petition is warranted because I have to address
10 something that was not in -- I had no ability to answer."
11 You had that. That doesn't answer the question.

12 So I'm still at the point that you cannot
13 voluntarily withdraw it.

14 The Court is -- Grace?

15 MS. LAZARO: Yes, Judge.

16 THE COURT: Grace Lazaro is one of my law clerks.
17 You cannot voluntarily withdraw it in accordance
18 with the CPLR.

19 The Court is disinclined to take the invitation to
20 order -- to put into an order, you know, based on
21 3217(3)(b).

22 So where are you?

23 MR. GLASS: Well, I believe we addressed the policy
24 in our original reply papers. We did --

25 COURT CLERK: Mr. Ernst, can you make sure you're

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1 muted?

2 Thank you.

3 MR. GLASS: We did address in our reply papers to
4 the original Article 78 about this policy. We brought up
5 the issue about the second policy. I'm not disputing that
6 it hasn't been somewhat addressed in our papers. But we
7 have, in fact, the as-applied challenge on an individual
8 basis that has not been addressed. And I have not been
9 responded to by the City in any substance as to why these
10 individuals are not being accommodated under equal policy.
11 So that challenge still needs to be fleshed out. Given my
12 right to amend the petition, I believe we need an answer, a
13 verified answer from the City about -- I'm not representing
14 a class anymore, I am simply representing the people named
15 in a petition. So I believe, from a judicial economy
16 perspective, whether it's done in this case or a separate
17 case, the City will need to address why these particular
18 petitioners are not being accommodated, why their policies
19 provided a rational basis --

20 THE COURT: Stop.

21 Who is making all this noise?

22 Everybody stop talking.

23 Is your paralegal doing something with papers or
24 something that's moving around?

25 No, okay.

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1 Then, Counselor, Mr. Glass, what am I hearing?

2 COURT CLERK: Everybody, if you see the court
3 reporter raise her hand, stop speaking.

4 THE COURT: So, Counselor, Mr. Glass, if what
5 you're saying is -- what is being -- what you're proposing
6 in the amended complaint is, in fact, not the challenge
7 that's raised in the petition -- I'm sorry -- petition, not
8 complaint. If what you're saying you're raising in the
9 amended petition is not what is in the petition, because
10 this is now not about a global application of the DOE policy
11 and that that policy is arbitrary and capricious, but now
12 the amended complaint is, in fact, representing individual
13 parties, because the petition says "and those similarly
14 situated" -- in other words, the petition says "on behalf of
15 themselves and all others similarly situated". So if you're
16 saying now the amended petition is only the claims of
17 individuals and how the individuals are being treated, not
18 necessarily that the policy is arbitrary and capricious --
19 but they're being treated how? What's the claim in the
20 amended petition as to the individuals?

21 MR. GLASS: As applied, the policies being applied
22 to individuals who made the request or were told they can
23 make a request, they're being denied arbitrarily. I am not
24 representing a class. I am representing 28 people who
25 signed up with me, ^{21 of 36} who said they are not getting the

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1 accomodation policy, as stated in the amended petition at
2 some length.

3 And to explain, and this was in response to Judge
4 Ramseur's question at oral argument --

5 THE COURT: Don't get off the track.

6 MR. GLASS: All I'm saying is that this is -- and
7 now I only represented -- I asked them all to have a
8 retainer with me, so they are retained by me. I've been
9 retained to represent their individual interests in getting
10 accommodation. I don't understand why these policies are
11 not being applied to them. So that's what this challenge
12 would be at this point. The City has never really
13 responded. Even the original petitioners, they did not
14 really explain why these people were being denied.

15 Rather than having 28 individual cases before the
16 Court, which would be quite expensive for these individuals,
17 we decided we --

18 THE COURT: Stop speaking.

19 The reporter raised her hand.

20 COURT CLERK: You're breaking up.

21 MR. GLASS: We decided that people would have to be
22 retained by this law firm that wanted to challenge the way
23 they applied these policies, under both the first policy of
24 July 15th and the second policy of August 7th. And if you
25 read the fact pattern, you will see that they're arbitrarily

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1 being denied without any rational basis. That would be the
2 challenge.

3 THE COURT: I got this. I understand.

4 So now the claim is -- each one of these
5 individuals is claiming that they made an application and
6 that they were denied and the denial of that specific
7 application was arbitrary and capricious, yes?

8 MR. GLASS: Yes, your Honor.

9 THE COURT: That's a different complaint. That's a
10 different petition. That is a different petition. It is --
11 do you see what I'm saying? And that is -- that petition,
12 by the way, can proceed individually, but it's different
13 from the petition that says the policy of DOE is arbitrary
14 and capricious. And the way you all wrote and fleshed it
15 out is about the policy. It's about whether this policy is
16 arbitrary and capricious and it will talk about things like
17 just following the CDC is not enough and whether that's all
18 they did. Again, the petition before the Court is about the
19 policy of the DOE.

20 What you're now articulating with respect to the
21 amended petition is, in fact, a -- you said a claim -- a new
22 claimed argument, which is "I applied, I was denied and my
23 denial was arbitrary and capricious." Do you see how that's
24 different? "My denial was arbitrary and capricious" versus
25 "The policy that has been put in place by DOE is arbitrary

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1 and capricious."

2 Nobody understood that. I did.

3 MR. GLASS: Well, I --

4 THE COURT: Why don't you tell me something.

5 MR. ERNST: Well, your Honor is correct.

6 And the petitioner filed during the briefing on the
7 original petition before any amended petition was filed.
8 Petitioner filed something along the lines of 20 plus
9 affidavits from individual petitioners or, at that time,
10 proposed intervenors, who had latched on to the idea that
11 the policy, as your Honor said, is arbitrary and capricious
12 and had told their stories as to whether or not that policy
13 was arbitrary and capricious as applied to them.

14 And the Court, Judge Ramseur, in her decision,
15 essentially echoed what you're saying now, your Honor. She
16 said petitioners' counsel was unable, despite numerous court
17 queries and hundreds of pages of submissions, to discuss the
18 policy as it applied to petitioners. And the Court also hit
19 on this at oral argument that -- and we mentioned it in our
20 argument -- that petitioners' counsel was providing somewhat
21 of a moving target, that he was challenging the policy and
22 then, when we got time for argument, he was arguing that it
23 was arbitrary as applied to these individual petitioners.

24 So the dichotomy that your Honor is focusing on is
25 something that we've been struggling with this entire case.

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1 This is a challenge to the policy, that's what the petition
2 is doing. And to the extent that these individual
3 petitioners are challenging that policy as applied to them,
4 we would argue that that challenge is subsumed in the
5 challenge to the policy.

6 If the policy is not arbitrary, then the
7 petitioners have no claims.

8 To the extent that Mr. -- that petitioner is now
9 making an entirely new set of claims that maybe the policy
10 isn't irrational, but as it's being applied is not -- is
11 arbitrary and capricious, that is a different petition, as
12 your Honor said.

13 THE COURT: It is a different petition.

14 Now -- and, by the way, it is not the petition
15 that's before the Court, that is fully submitted and which
16 really just warrants, Mr. Glass, to be decided. It warrants
17 a decision.

18 And what you're proposing is a -- I don't want to
19 say -- it's a -- I don't want to even characterize it in a
20 way that then they say "Judge Edmead characterized it as
21 sustainable." I don't want to say anything.

22 But your new proposed petition -- amended petition
23 should go forward maybe as its own new petition, but not as
24 replacing what's ready for decision before the Court.

25 MR. GLASS: Your Honor --

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1 THE COURT: It was clear in my head.

2 MR. GLASS: First of all, I'd just like to point
3 out, number one, that if you read the initial petition, if
4 you look at the wherefore clauses asking for relief, it
5 says: "Respectfully requested, that this Court declare
6 respondents' guidelines promulgated July 15th, 2020, as it
7 applies to petitioners and those who are similarly situated,
8 arbitrary, capricious and irrational" --

9 THE COURT: Sir, the court reporter is waving her
10 hand.

11 MR. GLASS: Wanda Caine, was a petitioner in the
12 original petition. She claimed that the medical
13 accommodation policy was denied her three times. That was
14 part of what was originally pled in the original petition
15 and as it applies to the policy. It didn't --

16 THE COURT: You're breaking up. Nobody hears you.

17 MR. GLASS: We did say in the original petition the
18 policy was too narrow and should be broadened, but we also
19 claimed they were arbitrarily applying the policy that sunk
20 the petitioners. So that is clearly within the original
21 petition.

22 Maybe the Court is reading it differently and maybe
23 the City is reading it differently, but it is squarely
24 ensconced if you read the wherefore clause of the original
25 petition.

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1 If the Court would like us to file a new challenge,
2 we can do that as a related case or a separate case. It
3 just doesn't solve the issue before your Honor, which is how
4 we're going to get these adjudicated on the merits.

5 THE COURT: No, Counselor. It gives you, in fact,
6 possibly, I don't know, it may give you two different bites
7 at a related apple. I don't know.

8 But what I know is that what's before this Court is
9 clear, unambiguous and ready for decision.

10 And what you're arguing -- and, by the way, you
11 have been -- you've been molding the argument a little bit
12 as you moved through and that is, in fact, yet another
13 reason not to glom what you're proposing as an amended
14 petition on to the petition.

15 But if it's a new argument, it will get decided and
16 considered on its own merit and if it's subsumed, it
17 shouldn't get a new choice -- a new opportunity, because if
18 it's deemed subsumed, it will be decided based on the one --
19 the petition before the Court. So, you don't lose either
20 way.

21 You were raising your hand, counselor from the Law
22 Department.

23 MR. ERNST: Yes, your Honor.

24 If I could just quickly jump in.

25 I just want to make perfectly clear that the 20 or

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1 so affidavits that were submitted with respect to the
2 original petition were before the Court. These are the same
3 -- essentially the same factual allegations that are
4 attempting to be added in an amended petition. So to the
5 extent that Mr. Glass is threatening to file another lawsuit
6 saying "I'll just file the same lawsuit with these extra
7 petitioners," this was -- these affidavits were before
8 Justice Ramseur. And Justice Ramseur decided that, even
9 with these additional affidavits, there wasn't enough to
10 permit these people to be added.

11 So we would take your Honor's point one step
12 further and say, not only should this petition not be
13 amended, but all of these factual allegations were already
14 before the Court and are, frankly, before the Court now, so
15 there shouldn't really be another action.

16 I can't stop Mr. Glass from filing a case --

17 THE COURT: Let's stop right there. Nobody can
18 stop anyone from filing a case.

19 But at the end of the day, what's before this Court
20 is whether or not the petitioners and Mr. Glass can amend
21 the current petition. And the Court's answer is no.

22 The current petition -- Grace?

23 MS. LAZARO: Yes, Judge?

24 THE COURT: Okay. You know, the petition -- the
25 current -- the Court is denying the application to amend the

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1 petition.

2 Now, Grace --

3 MS. LAZARO: Yes?

4 THE COURT: -- we'll talk.

5 I've said all of the reasons why, particularly
6 looking at 3217.

7 Grace is one of my law secretaries. She's remote.
8 I'm sitting at 60 Centre Street.

9 But the application to amend is, in accordance with
10 the so-ordered transcript, the application to amend is
11 denied.

12 And I will reference the things that the Court has
13 explained ad nauseam, I'm sure, to all of you in this
14 transcript, but particularly looking at 3217.

15 That's that.

16 The petition -- the application to amend is denied.
17 So, case ready for decision.

18 The Court will continue to work. Clearly, you see
19 I've read everything. So I can continue to work.

20 And I understand that it is the goal and the hope
21 of counsels for all parties concerned that this decision is
22 out before October 1st.

23 Is that the date, Mr. Glass? Is that the date for
24 the bigger group of people come back to work?

25 MR. GLASS: Everyone is at work presently.

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1 The problem is the students come back October 1st,
2 so it changes the dynamic a little bit. Some of these
3 students are back already.

4 THE COURT: You need this before October 1st, it's
5 clear to me.

6 Right?

7 MR. GLASS: Yes, I do agree, your Honor. I do --
8 just, am I understanding the motion to -- your Honor, I just
9 want to understand, if I do file a separate petition, as you
10 raised, there might be a separate claim, do you suggest we
11 file it as related or --

12 THE COURT: Sir, for me to answer that question
13 you'd have to pay me. I'd have to leave the bench, join
14 your illustrious firm and be on salary. Okay? It would be
15 a wonderful experience, I'm sure. But I tend to avoid,
16 thank God, giving advice. I like what I'm doing right now.
17 I don't want to have to step down, because they'd throw my
18 stuff out the door. I'm not going to respond. But --

19 MR. GLASS: You're the third judge on the case,
20 so --

21 THE COURT: Third time's the charm. There you go.
22 Third time is the charm.

23 So I'm going to -- I'm sorry. The reporter is
24 breathing deeply. She's like "I can't believe this."

25 I see you laughing at me. I'm all right with that.

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1 The order of the Court is the application to amend
2 is denied.

3 The Court will proceed with deciding this Article
4 78 as fully submitted without any intervenors as noted by
5 Judge Ramseur and without any consideration of anything that
6 might have been in the amended petition. There's no amended
7 petition.

8 MR. GLASS: Based on your order, I need to clarify
9 one thing. I will be filing a new petition, but the five
10 original petitioners, I think the Court should understand --

11 THE COURT: "The five original petitioners," what
12 does that mean?

13 MR. GLASS: There were five original petitioners in
14 the petition before your Honor.

15 THE COURT: Judge Ramseur?

16 MR. GLASS: Yes, that was transferred to you.

17 You should understand that two of them have been
18 mooted out now.

19 THE COURT: Who else was mooted out?

20 MR. GLASS: Ms. Corwin we found out -- Mr. Severson
21 was mooted out --

22 (Pause in proceedings)

23 THE COURT: I just want to be clear.

24 I knew Mr. Severson was mooted out.

25 Everyone was aware that Ms. Corwin was mooted out?

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1 MR. GLASS: It's stated in the amended petition.

2 THE COURT: Okay, so Ms. Corwin is mooted out,
3 Grace, and Mr. Severson has been mooted out.

4 So what's your point?

5 MR. GLASS: Well, my point is, the three remaining
6 petitioners, Ms. Caine, Mr. Desai and Ms. Hughes-Carroll,
7 will the Court be interpreting this as simply a facial
8 challenge? Because I will include them in the new petition
9 on an as-applied basis if the Court is not going to be
10 deciding the as-applied challenge. If the Court is reading
11 this as a policy challenge to the policy, I would like to
12 include them in the new petition. There are facts, if the
13 Court -- I think you could argue that it was raised as an
14 as-applied challenge in the original petition --

15 THE COURT: Slow down. You're breaking up.

16 MR. GLASS: If the Court is going to consider the
17 original petition as only a challenge to the policies, we
18 would ask -- we just ask if the Court will be addressing the
19 as-applied challenge in the decision or should we name those
20 three individuals in our new petition on a strictly
21 as-applied basis? Because they do have as-applied
22 challenges in addition to the policy challenge. And so --

23 THE COURT: Stop talking.

24 I'm going to the Law Department.

25 Is the as-applied argument, in your view, before

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1 the Court?

2 MR. ERNST: We believe the as-applied challenge is
3 subsumed in the instant Article 78 petition.

4 Mr. Glass styled this petition as one where he's
5 challenging the policy as arbitrary. And using a few
6 examples of the petitioners, he said he chose the
7 petitioners for their facts and brought it originally on
8 behalf of all others similarly situated.

9 So I think that this distinction doesn't really
10 matter. He's challenging the policy as to whether it's
11 arbitrary. And if the policy is arbitrary, that's what the
12 Court will decide. And if it's not arbitrary, that's what
13 the Court will decide. And there's really no need for a
14 secondary case with 22 individual as-applied challenges to a
15 policy if the Court is going to decide whether it's rational
16 or not.

17 THE COURT: Let me just say this, Mr. Glass.

18 And counsel -- quite honestly, as counsel for the
19 Law Department explained, if they were to prevail, it would
20 apply as-applied or not. So, you see what I'm saying? If
21 they were to prevail, it would apply as-applied or not
22 because it's the global policy. So it wouldn't make a
23 difference.

24 But -- I'm not going to say what you should then do
25 as a litigator with respect to any new pleading, but I will

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1 say you should anticipate that pre-answer motion to dismiss
2 coming down the road basically saying, you know, this is
3 subsumed. Unless you prevail and win -- and if you prevail
4 on the existing petition, you won't need the second -- you
5 would not need the second -- this case anyway because it
6 would be as-applied and you end it. So, if you prevail,
7 Mr. Glass, you've won on both levels already.

8 Nobody understood that? Did anybody understand
9 that? Could you raise your hand?

10 MR. ERNST: We understood that, your Honor.

11 THE COURT: Okay.

12 MR. ERNST: And we agree that -- and maybe it makes
13 the most sense for Mr. Glass, if he is inclined to commence
14 a separate action, to wait until this is decided, because
15 the outcome of this proceeding, the decision, will
16 invariably affect the rights of the parties to a secondary
17 action if Mr. Glass is going to bring one. So, I mean, just
18 for judicial economy --

19 THE COURT: Because a secondary action doesn't have
20 that limitation of -- it's not an amended pleading, it's a
21 new pleading, so it's not like you have to say, you know --
22 you know, it's not -- it says it's a new pleading, the
23 issues of -- of the initial pleading will not affect, you
24 know, your ability to commence a second proceeding. But how
25 they respond is quite differently.

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1 The only other fact -- let me stop talking because,
2 then again, I'm going down -- immediately I want to start
3 analyzing and I'm going too far.

4 So I've ruled.

5 Thank you.

6 The reporter said thank you. I saw that face. The
7 reporter is like "Thank God. Stop."

8 That's what you get with this camera, by the way.
9 I can see you very well.

10 So I ruled. The application to amend is denied.

11 The Court is going to proceed with decision and the
12 decision shall be rendered before October 1st.

13 Everyone, the transcript is so ordered.

14 Mr. Osman, this Teams thing, I don't know how to
15 log off. Hit the camera and mic, Mr. Osman?

16 COURT CLERK: Yes.

17 MR. ERNST: Could I just quickly get the reporter's
18 information in case we'd like to order the transcript?

19 THE COURT: Mr. Osman, I don't have to be on the
20 phone for this, do I?

21 COURT CLERK: You do not, your Honor.

22 THE COURT: Excellent.

23 Everyone stay safe and be well.

24 COURT CLERK: Your Honor, say the transcript is so
25 ordered.

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THE COURT: I did. Didn't I say that?

COURT CLERK: My apologies.

(Discussion held off the record)

(Proceedings adjourned)

Certified to be a true and accurate transcript of the foregoing proceedings

Anne Marie Scribano

 Anne Marie Scribano

AL A. ELL