21-2711

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE VALERIE E. CAPRONI

PLAINTIFFS-APPELLANTS' REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION

BARRY BLACK
Nelson Madden Black LLP
Attorneys for Plaintiffs-Appellants
475 Park Avenue South, Suite 2800
New York, New York 10016
(212) 382-4303

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PRELIMINARY STATEMENT[1]

In defending against claims that a vaccine mandate is blatantly unconstitutional, both facially and as applied to Plaintiffs, Defendants have asserted an array of defenses that are either illogical, turned on their own heads or are flatly inapplicable. But Defendants have glaringly failed to address or refute several key claims and points of law raised by Plaintiffs in their moving papers, including:

- Where First Amendment rights are at issue (as is the case here), the test for obtaining preliminary injunctive relief essentially reduces to a single prong: "the likelihood of success on the merits is the dominant, if not the dispositive, factor." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013);
- Plaintiffs' claims constitute both a facial and an as-applied challenge to the Mandate's constitutionality;
- The Mandate violates Plaintiffs' procedural due process rights because it is unconstitutionally vague;
- The requirement that an applicant for religious exemption provide a clergy letter is unconstitutional;[2]
- The requirement that requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine is unconstitutional;
- The requirement that "[e]xemption requests shall be considered only for recognized and established religious organizations ("*e.g.*, Christian Scientists")" is unconstitutional.

Accordingly, Plaintiffs respectfully request that this Court deem all the aforementioned points to have been conceded.

[1] Plaintiffs respectfully incorporate all definitions used in its opening submission.

[2] Defendants merely argue that "[t]o the extent plaintiffs complain about the arbitration awards' reference to submission of a letter from clergy in support of a religious exemption request, the criteria set forth in the award do not purport to be exclusive. To the contrary, the awards contemplate that statutory accommodation standards—such as the Title VII standards that plaintiffs concede are appropriate—continue to apply." Defendants make no attempt to justify the unconstitutionality of the clergy-letter requirement.

ARGUMENT

I. DEFENDANTS' ARGUMENTS CONCERNING DELAY ARE MERITLESS

Defendants' position concerning alleged delay on the part of Plaintiffs reflects how out-of-touch they are with the realities of life for municipal employees in New York City. While Mayor DeBlasio, Commissioner Chokshi and their comrades in government may have heaps of money to squander and teams of lawyers at their disposal, New York City school teachers and their colleagues in the Department of Education do not. Plaintiffs and their colleagues have committed their lives to the children of this great city not for glamour, power, or riches; they are hard-working urbanites, with families of their own to raise and bills to pay. The formidable choice they have been forced to make between their religious convictions and their lifelong commitment to New York City's children is not one they can make fleetingly.

A. Plaintiffs brought this action as soon as they reasonably could

The Mandate went into effect on September 15. On September 18, 2021, the NYC DOE formally informed its employees, including Plaintiffs, of the opportunity to apply for the exemption, with a deadline of two days later, September 20. After exemption application letters were filed, Plaintiffs received their denial letters several days later. Then Plaintiffs needed to file an appeal, receive a hearing date, appear remotely for the hearing, and await the arrival of the results by email. All of this took several weeks, with denials generally arriving between early and late October.

The following illustrates the relevant timelines concerning Plaintiffs herein:

Plaintiff	Applied	1st Denial	Appeal	2nd Denial	Citation
Keil	9/20/2021	9/22/2021	10/1/2021	10/4/2021	SDNY 21-cv-08773 ECF No. 27
De Luca	9/14/2021	9/17/2021	10/26/2021	10/26/2021	SDNY 21-cv-08773 ECF No. 30
Delgado	9/19/2021	9/22/2021	10/1/2021	10/4/2021	SDNY 21-cv-08773 ECF No. 28
Strk	9/17/2021	9/19/2021	9/24/2021	10/5/2021	SDNY 21-cv-08773 ECF No. 25
Buzaglo	9/20/2021	9/22/2021	10/5/2021	10/7/2021	SDNY 21-cv-08773 ECF No. 29

It is thus confounding that Defendants would argue that there was delay, when the action below was commenced on October 27, only several weeks after four of the plaintiffs received their denials and *one day* after Mr. De Luca's final denial.

Moreover, various plaintiffs and other DOE employees have not yet obtained their right-to-sue letters, which is a requirement before bringing a Title VII lawsuit in federal court (and, as such, no Title VII claims have yet been advanced by Plaintiffs in this case). Indeed, Plaintiff John De Luca submitted his claim to the Equal Employment Opportunity Commission ("EEOC") on September 18, 2021, and is not scheduled to talk with an EEOC representative about his claim until January 2022. New John De Luca Declaration ¶¶ 11-12; *see also* New Sasha Delgado Declaration ¶¶ 11-12.

Plaintiffs are NYC DOE employees. They are not lawyers, or even businesspeople who routinely engage lawyers and are familiar with the legal process. They are not wealthy individuals who can walk into a high-priced law firm and readily retain qualified counsel. Instead, it has taken large groups of individuals to help organize and fund a legal challenge. When considered against

that backdrop, Plaintiffs have actually moved rather quickly – but for an out-of-touch bureaucrat this might seem like delay.

B. Defendants misconstrue and misapply the law concerning delay

Plaintiffs cite *Citibank, N.A. v. Citytrust*, 756 F.2d 273 (2d Cir. 1985) for the premise that "[p]reliminary injunctions are generally granted under the theory that there is an urgent need to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Id.* at 276. However, Defendants' surgical excision of a quote from a judicial decision without providing context leads them to an incorrect conclusion. *Citibank* concerned trademark infringement *already in effect*, where the court pointed out that Citibank's delay of nine months after learning that competition intended to move into its home territory, and ten weeks after the competing branch was opened, undercut the "urgency" of its application that the court mandatorily enjoin City-trust from further using its name. If it was that urgent, reasoned the court, Citibank should have acted sooner. Indeed, the very next sentence following the one cited by Defendants reads: "Significant delay in applying for injunctive relief *in a trademark case* tends to neutralize any presumption that infringement alone will cause irreparable harm pending trial, and such delay alone may justify denial of a preliminary injunction for trademark infringement" *Id.* (citing *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984)) (emphasis added).

Poignantly, the court in *Citibank* noted that Citibank's vast resources further undercut its position, *Citibank, N.A.*, 756 F.2d at 277, something painfully absent with Plaintiffs in the instant case, who, as noted above, do not have the resources to promptly hire qualified counsel.

In establishing this principle, this Court in *Citibank* cited *Gillette Co. v. Ed Pinaud, Inc.*,

178 F. Supp. 618 (S.D.N.Y. 1959). That case, too, involved trademark infringement, leading that court to conclude that "[b]y sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . .." *Id.* at 622.

Defendants also cite *Tom Doherty Assocs. v. Saban Ent., Inc.*, 60 F.3d 27 (2d Cir. 1995) for the same proposition. That case, too, involved intellectual property rights, and this Court noted there that:

> [t]he cases in which we have found that a delay rebutted the presumption of irreparable harm are trademark and copyright cases in which the fair inference was drawn that the owner of the mark or right had concluded that there was no infringement but later brought an action because of the strength of the commercial competition. . .. *Citibank*, 756 F.2d at 276 (plaintiff waited more than ten weeks after learning directly, and nine months after learning through the press, of defendant bank's plans to open a branch in its territory). In these cases, it appeared indisputable that the trademark or copyright owners were well aware of their rights and had concluded that they were not violated.

Id. at 39 (emphasis added).

In contrast with the cases cited by Defendants involving applications for mandatory injunctions, here Plaintiffs seek a prohibitory injunction, and ask the Court to maintain the status quo and prohibit Defendants from engaging in *future* conduct that would cause irreparable harm. Even if there were unreasonable delay—and there was not—such delay clearly would not have shown that Plaintiffs "were well aware of their rights and had concluded that they were not violated." Defendants' claims concerning Plaintiffs' alleged delay are therefore wholly without merit.

II. THERE IS UNQUESTIONABLY IRREPARABLE HARM

It is hard to comprehend Defendants' argument concerning irreparable harm as a legal standard which Plaintiffs must demonstrate. As noted above, where First Amendment rights are

at issue, the standard for obtaining preliminary injunctive relief is limited to demonstrating the likelihood of success on the merits. *N.Y. Progress & Prot. PAC*, 733 F.3d at 488. This is so because the deprivation of rights itself "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In opposition to this plain rule of law, Defendants state: "But that argument goes nowhere because plaintiffs have not shown that they are likely to succeed in establishing a constitutional violation." A legal standard sets forth what a litigant must demonstrate, irrespective of whether the argument to follow is meritorious. Plaintiffs have shown, and Defendants have not refuted, that it is unnecessary for Plaintiffs to prove irreparable harm since their claims involve the deprivation of rights. The fact that Defendants do not agree with Plaintiffs' arguments does not alter the legal standard.

Defendants next propose a novel legal principle: "it makes no sense to presume irreparable harm when the potential injuries are susceptible to make-whole relief, even when a constitutional claim is in play." 2d Cir., 21-2711, ECF No. 34 at 14-15. Defendants support this proposition, which would appear to undermine the abovementioned legal standard, by citing to *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484-85 (1st Cir. 2009). But, yet again, Defendants cite an out-of-context snippet which, when read in connection with the surrounding sentences, states quite *the opposite* proposition:

> While certain constitutional violations are more likely to bring about irreparable harm, we have generally reserved this status for infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief. . . . So, it cannot be said that violations of plaintiffs' rights to due process and equal protection automatically result in irreparable harm.

Id. at 484-85 (internal quotation marks omitted). Indeed, in that case the due process challenge arose "out of their assertion that the regulatory structure of the Puerto Rican milk industry was beholden to the whims of the Administrator." *Id.* at 483. Here, in contrast, Plaintiffs' claims involve the free exercise of their faith, clearly evincing "qualitative importance as to be irremediable by any subsequent relief." *Id.*

Finally, Defendants argue that courts have "found no irreparable harm where 'reinstatement and money damages could make [plaintiffs] whole for any loss suffered' during any loss of employment, even when a First Amendment violation is alleged," citing *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988). But there, this Court found no irreparable harm because the irreparable harm was unrelated to the constitutional violation:

> The precise question thus becomes whether appellees' discharge pending the outcome of their case before the district court would have a chilling effect on appellees' First Amendment rights sufficient to constitute irreparable harm. Since the source of the 'chill' is the permanent loss of appellees' jobs, retaining those positions pending resolution of the case will do nothing to abate that effect.

Id. at 67-68. Here, in contrast, Plaintiffs ask the court to enjoin Defendants from enforcing an executive order that could force many to violate their religious principles.

While the threat of termination, loss of tenure and removal of all benefits including health insurance and pension are very real and shockingly heavy-handed, Plaintiffs object to being forced to choose between their faith and their jobs. No repayment of lost wages can make whole again the faithful who have been forced to violate their own religious convictions, nor should anyone protected by the United States Constitution be placed in the position of having to choose between faith and job. "[A] society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job." *TWA v.*

Hardison, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting).

III. PLAINTIFFS HAVE STANDING

Plaintiffs may challenge the Exemption Standards' constitutionality directly in this Court and need not attack it via a CPLR Article 75 proceeding in state court or in a plenary action naming the union as a defendant for violating its duty of fair representation. Indeed, this Court "has expressly held that collective bargaining agreement mandatory arbitration provisions cannot bar union members from bringing federal claims to court." *Fowler v. Transit Supervisors Org*., 2000 U.S. LEXIS 23217, *3 (S.D.N.Y. 2000). That is because statutory and constitutional rights "devolve on [employees] as individual workers, not as members of a collective organization" and are "not waivable." *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 745 (1981).

Defendants suggest that Plaintiffs' standing argument is undermined by *14 Penn Plaza LLC v. Pyett*, but *Pyett* only strengthens Plaintiff's case.

In *Pyett*, the Court found that plaintiffs' arbitration of their ADEA claims precluded them from later bringing those claims in a federal forum. That was because the collective-bargaining agreement at issue "clearly and unmistakably require[d] union members" to arbitrate their statutory rights, and the Supreme Court has permitted such claims to be arbitrated as long as "an agreement to arbitrate statutory antidiscrimination claims be explicitly stated in the collective-bargaining agreement[.]"*14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258, 274 (2009).

The CBA at issue there stated the following:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the

> New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."

Ultimately, "*Pyett* does not plainly apply to cases in which the CBA does not explicitly reference the statutory rights subject to arbitration—that is, CBAs whose arbitration provision is not a clear and unmistakable waiver of statutory rights." *Fernandez v. Windmill Distrib. Co.*, 159 F. Supp. 3d 351, 360 (S.D.N.Y. 2016).

Plaintiffs' collective bargaining agreement contains no such provision, or other explicit statement that statutory or constitutional rights are subject to arbitration. In fact, Article 22, D(2) of its collective bargaining agreement states that, "[n]othing contained in this Article or elsewhere in this Agreement shall be construed to permit the Union to present or process a grievance not involving the application of interpretation of the terms of this Agreement in behalf of any employee without his/her consent."

Further, neither *Barrentine* nor *Alexander v. Gardner-Denver Co*. lose their persuasiveness, as the Court in *Pyett* clarified that their holdings were limited to the situation where, as here, "[t]he employee's collective-bargaining agreement did not mandate arbitration of statutory antidiscrimination claims." *Pyett*, 556 U.S. at 262 (citing *Gardner-Denver*, 415. U.S. at 49-50).

Plaintiffs may thus bring their claims in this Court.

IV. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS BECAUSE THE MANDATE IS NOT NEUTRAL

A. Defendants knew that revision of the Mandate to permit religious exemption requests would subject applicants to the Exemption Standards

The timing of the Mandate's issuance on September 15 irrefutably shows that it was issued

with the Exemption Standards in mind. When the Original Mandate was issued earlier in the summer, the DOE's labor unions challenged it in state court. *See Matter of The New York City Municipal Labor Committee, et al., v. The City of New York,* Index no. 158368/2021, NYSCEF Doc. No. 1 (N.Y. Co. Sept. 9, 2021) ("New York State Litigation"). The court issued a temporary restraining order against enforcement of the Original Mandate on September 14, 2021, because it failed to authorize any religious exemptions. *See* Declaration of Jonathan R. Nelson at ¶ 11. Meanwhile, on September 10, 2021, the unions' "implementation" arbitrations produced a set of awards (the Exemption Standards) that provided religious exemptions under some circumstances.[3] Knowing that the DOE had agreed to grant at least *some* religious exemptions pursuant to those awards, Commissioner Chokshi rescinded the Original Mandate and substituted the current Mandate on September 15, 2021, adding *inter alia* the following proviso: "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law." By that time, the DOE had committed itself to providing "reasonable accommodation" under the Exemption Standards. The Mandate set forth no other terms for the granting of accommodations. Informed of this development, the state court judge terminated the TRO, refused to issue a preliminary injunction, and dismissed the lawsuit as mooted by the amendment to the Original Mandate. *See* Declaration of Jonathan R. Nelson at ¶ 11.

[3] On September 1, 2021, the United Federation of Teachers ("UFT") local filed a "declaration of impasse" challenging the "implementation" of the Original Mandate with the Public Employment Relations Board, which referred the matter to Martin F. Scheinman for mediation. The mediation was subsequently converted to a mediation, in which Mr. Scheinman issued the UFT Award. Mr. Scheinman recognized that his "jurisdiction is limited to the issues raised during impact bargaining and not with regard to the decision to issue the underlying 'Vaccine Only' order." Separately, the UFT joined other unions in challenging the Original Mandate in the New York State Litigation.

Under these circumstances, it is inconceivable that Commissioner Chokshi did not have the Exemption Standards firmly in mind when he issued the Mandate to replace the Original (no-exemption) Mandate and, indeed, that he did not intend "reasonable accommodations otherwise required by law" to refer specifically to the standards and procedures set forth in the Exemption Standards. The Mandate's reference to "reasonable accommodations otherwise required by law" implicitly incorporated those standards and procedures. Because the Exemption Standards are not facially neutral, neither is the Mandate.

1. The way the Defendants implement the Mandate shows that it is not neutral

Defendants oppose Plaintiffs' facial challenge to the Mandate and the Exemption Standards, contending for the first time on this motion *inter* alia that there are multiple ways in which DOE employees may apply for a reasonable accommodation of their religious exemption requests. While such a contention is irrelevant, it is also false. Under Defendants' own standards and procedures, all applicants for accommodation from the Mandate must apply through the Exemption Standards process. Because the Exemption Standards violate Plaintiffs' First Amendment rights, they, and therefore the Mandate as well, are invalid on their face and must be struck down.

2. Challenges to the general implementation of a law are "facial" challenges

Laws which appear to be neutral on their face, but which are regularly implemented in an unconstitutional manner, are not neutral under Constitutional analysis. Thus, in *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (invalidating law based on First Amendment right to free speech), the United States Supreme Court looked to the way in which a county applied its parade-licensing law to decide that the law was unconstitutional on its face:

> In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it. *See Ward v. Rock Against Racism*, 491 U.S. 781, 795-796, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 770, n.11, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988); *Gooding v. Wilson*, 405 U.S. 518, 524-528, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972). In the present litigation, the county has made clear how it interprets and implements the ordinance.

See also Ward v. Rock Against Racism, 491 U.S. 781, 793-95 (1989) (reasonable guidelines protect city ordinance against facial attack); *MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000) ("When evaluating a First Amendment challenge of this sort, we may examine not only the text of the ordinance, but also any binding judicial or administrative construction of it. And we are permitted — indeed, required — to consider the well-established practice of the authority enforcing the ordinance"); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir. 2006) ("Administrative interpretation and implementation of a regulation are . . . highly relevant to [facial constitutional] analysis").

Because the issue of "permitting" raises the possibility that ostensibly neutral regulatory language might be intended to empower violations of free speech, courts consider "the [government's] authoritative constructions of the [law], including its own implementation and interpretation of it," *See Forsyth Cnty.*, 505 U.S. 123, in deciding whether a law is facially invalid. If the government has developed rules or practices that limit the application of an otherwise broad or vague law in ways that preclude unconstitutional application of the law, it survives judicial review.

As in *Forsyth County* and *MacDonald, supra*, where the governments claimed that their laws were content-neutral toward speech, the defenders of the Mandate and Exemption Standards

in the case at bar claim that they are neutral toward religion. However, the Mandate's language – not exactly permitting, but creating an undefined option for, exemptions to the Vaccine Mandate – is so vague that it vests the adjudicator with unrestricted discretion to grant exemptions. To withstand a facial constitutional challenge to the Mandate, the Defendants must show that its discretion is constrained by interpretation, regulation or practice in ways that preclude its application in unconstitutional ways.

In the instant case, the precise opposite result is demonstrated by the materials submitted by Plaintiffs in support of their application for preliminary injunction. The Mandate is expressly and exclusively implemented through application of the Exemption Standards for certain DOE employees during the 2021-2022 school year. *See infra;* Exemption Standards at 6-7, Section I, and at 13, Section I.L. 13, Declaration of Jonathan R. Nelson ¶ 8. Since the Exemption Standards provide the exclusive way in which administrative religious accommodation is given to covered DOE employees under the Mandate, the Mandate itself must be read *in pari materia* with the Exemption Standards. The defendants' application of the Exemption Standards to religious exemption requests explicitly and clearly violates the religious freedom rights of each person whose exemption request is adjudicated under them. Since the Exemption Standards fall under constitutional analysis, the Mandate must also fall.

3. The Exemption Standards exclusively implement the DOE's religious exemption process

The Exemption Standards acknowledge that they arise out of a need to provide rules and procedures for the "implementation of the Vaccine Only mandate." *See* Exemption Standards at 4, Declaration of Jonathan R. Nelson ¶ 8. They also contain the following statement:

> L. The process set forth, herein, shall constitute the ***exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy*** and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision.

Id. at 13, Section I.L (emphasis added).

The plaintiffs in the New York State Litigation also represented to the court in that matter that the UFT arbitration which generated the Exemption Standards arose from an "expedited arbitration between Petitioner UFT and DOE regarding the [Original Mandate]'s *implementation*." *See Matter of The New York City Municipal Labor Committee, et al., v. The City of New York,* Index no. 158368/2021, NYSCEF Doc. No. 1 at 4, n.2 (Sup. Ct. N.Y. Cnty. Sept. 9, 2021).

While the Exemption Standards refer to themselves as "an alternative to any statutory reasonable accommodation process," the context of this statement shows that going through the Exemption Standards process is not an *optional* alternative. The full paragraph reads as follows:

> I. Exemption and Accommodation Requests & Appea1 Process
>
> As an alternative to *any* statutory reasonable accommodation process, the City, the Board of Education of the City School District for the City of New York (the "DOE"), and the United Federation of Teachers, Local 2, AFT, AFL-CIO (the "UFT), (collectively the "Parties") *shall be subject to the following Expedited Review Process to be implemented immediately for full-time staff*, H Bank and nonpedagogical employees who work a regular schedule of twenty (20) hours per week or more inclusive of lunch, including but not limited to Occupational Therapists and Physical Therapists, and Adult Education teachers who work a regular schedule of twenty (20) or more hours per week. *This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy*, and (b) medical accommodation requests where an employee is unable to mount an immune response to COVID-19 due to preexisting immune conditions and the requested accommodation is that the employee not appear at school. *This process shall be in place for the 2021-2022 school year* and shall only be extended by mutual agreement of the Parties. (Emphasis supplied.)

See Exemption Standards at 6-7, Declaration of Jonathan R. Nelson ¶ 8.

While the Defendants cannot insulate themselves from judicial review under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and other "statutory" provisions requiring "reasonable accommodation," the Exemption Standards make it clear that they "constitute the *exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy*" for "full-time staff" during the 2021-2022 school year. In order to sue the Defendants for violation of statutory rights in individual cases, DOE employees *must first submit an administrative request for exemption* under the deeply unconstitutional rules and procedures set forth in the Exemption Standards.

Since the Exemption Standards are binding obligations of the parties to the arbitration, the DOE has bound itself *not to offer any alternative administrative process* for the adjudication or resolution of religious accommodation requests.

4. The Exemption Standards are not "neutral" toward religion

The Exemption Standards are, on their face, not "neutral" with respect to religion. They could not possibly be "neutral" toward religion, because they explicitly refer to religion, and they set forth standards and procedures by which the religious opinions of DOE employees toward the vaccine mandate are to be considered by DOE adjudicators. Since the Exemption Standards (and by implication, the Mandate itself) explicitly concern the manner in which religious matters are to be treated by government employees, they are subject to strict scrutiny. *See Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some

or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.")

a) The Exemption Standards are non-neutral because they purport to authorize some religious claims and to forbid others

Even if the fact that the Exemption Standards are *all about* religious claims were not dispositive on its own, the non-neutral way in which those Standards treat different religions on their face shows that the Exemption Standards, and by implication, the Mandate, are not "neutral" toward religion. Section 1(C) of the Exemption Standards, for example, contains the following statement:

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

Id. at 9, Section I.C.

The Exemption Standards' most glaring breach of neutrality is set forth in the final sentence quoted above. If an applicant belongs to a "recognized and established religious organization [ ] (e.g., Christian Scientists)," his or her exemption request "shall be considered" by the adjudicators. However, the Exemption Standards impose no explicit obligation upon adjudicators to consider the requests of persons who do not belong to "recognized and established religious organizations." Aside from the reference to Christian Scientists, adjudicators are given no guidance as to how to distinguish "recognized and established religious organizations" from other groups, but the distinction is clearly intended to cause them to do so.

The Exemption Standards explicitly require adjudicators to *deny* applications "where the

leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an on line source), or where the objection is personal, political, or philosophical in nature." This provision is non-neutral toward individual religious beliefs that vary from the beliefs of any "leader" of the individual's religious organization who supports vaccination – no matter how strongly and sincerely such beliefs may be held. It is non-neutral toward any religious beliefs that are "personal … in nature." It is also non-neutral toward any religion or religious organization that has posted information about vaccines "on line."

The Exemption Standards' requirement that exemption requests "be documented in writing by a religious official (e.g., clergy)" is also non-neutral toward religions that do not have established religious officials or clergy. It is also non-neutral toward the applications of persons with sincerely held religious beliefs toward vaccination who are unable to obtain such a letter, perhaps (again) because their beliefs vary from the officials' beliefs or because the official was unavailable to provide such a letter on short notice.

Because the Exemption Standards are not neutral between different religious groups in their express terms, and the Mandate implicitly incorporates their standards and procedures, the Mandate and Exemption Standards are subject to strict scrutiny.

V. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS BECAUSE THE MANDATE IS NOT GENERALLY APPLICABLE

The Mandate is quite clearly not a rule of general applicability, whether it is viewed on its face or as applied to the Plaintiffs. Defendants' cursory dismissal of *Fulton*—which sets forth the standard for determining whether a rule is one of general application—reflects a grave misunderstanding of the critical implications of that case.

Defendants argue that the reasoning in *Fulton* only applies to situations in which "an agency ha[s] unfettered discretion to grant exemptions . . . but refuse[s] to consider religious accommodations . . . ." 2d Cir., 21-2711, ECF No. 34 at 18. This is entirely incorrect. The existence of unfettered discretion to grant exemptions by itself makes the scheme not generally applicable. This is the case regardless of whether that unfettered discretion is then used to categorically deny a specific type of exemption.

Fulton makes this point explicitly, asserting that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude, . . . " *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) (citing *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990) (emphasis added)). *Fulton* continues, "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877.

Everything about the DOE's scheme for granting exemptions—including counsel for the City's own descriptions of it—demonstrates that it is not generally applicable. It is, in the words of *Fulton*, a "formal mechanism for granting exceptions"—be they medical, religious, or any of the myriad exceptions also listed on the face of the Mandate—that "invites the government to consider the particular reasons for a person's conduct[.]" *Fulton*, 141 S.Ct. at 1877, 1879. Its inconsistent application to Plaintiffs also indicates a lack of general applicability. As a result, strict scrutiny applies.

A. The text of the Mandate itself sets forth exceptions to its coverage

The text of the Mandate itself demonstrates that it is not generally applicable on its very face. While it requires "all visitors to a DOE school building" to be vaccinated, it carves out the following exceptions from the definition of visitor:

> a. Students attending school or school-related activities in a DOE school setting;
> b. Parents or guardians of students who are conducting student registration or for other purposes identified by DOE as essential to student education and unable to be completed remotely;
> c. Individuals entering a DOE school building for the limited purpose to deliver or pickup items;
> d. Individuals present in a DOE school building to make repairs at times when students are not present in the building;
> e. Individuals responding to an emergency, including police, fire, emergency medical services personnel, and others who need to enter the building to respond to or pick up a student experiencing an emergency;
> f. Individuals entering for the purpose of COVID-19 vaccination;
> g. Individuals who are not eligible to receive a COVID-19 vaccine because of their age; or
> h. Individuals entering for the purposes of voting or, pursuant to law, assisting or accompanying a voter or observing the election.

The sheer number of exemptions on the face of the Mandate itself belies any notion that this rule is of general application, and warrants a deeper dive into the case that established this standard more than three decades ago.

In 1990, the United States Supreme Court decided *Employment Division v. Smith*, 494 U.S 872 (1990) in connection with its controlled substance statute which provided in part that "it is unlawful for any person to manufacture or deliver a controlled substance." 1987 ORS § 475.992.[4]

[4] It is noteworthy that the 1991 version of the statute, in apparent response to *Smith*, included an express exemption for religious use: "In any prosecution under this section for manufacture, possession or delivery of that plant of the genus Lophophora commonly known as peyote, it is an affirmative defense that the peyote is being used or is intended for use: (a) In connection with the

Alfred L. Smith, a recovered alcoholic, worked as a substance abuse counsellor for the municipal Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"), whose written employment policies contained the following language:

> In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and the associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:
>
> **1.** Use of an illegal drug or use of prescription drugs in a non-prescribed manner is grounds for immediate termination from employment.

Smith v Empl. Div., 301 Or 209, 211-212, 721 P2d 445, 446 (1986).

Smith was fired for his religiously inspired use of peyote and then denied unemployment benefits. He sued, and his matter first came to the United States Supreme Court in 1986, *id.*, as a challenge to the constitutionality of ADAPT's policy for its lack of a religious exemption. But the court found it necessary to first determine whether the peyote use in question also violated Oregon's criminal statute, and remanded. The state's Supreme Court determined that the use *did* violate Oregon's criminal statute, but determined the lack of a religious exemption to be unconstitutional. Then, and only then, did the United States Supreme Court reverse.

Justice Scalia, writing for the majority, explained that "if prohibiting the exercise of religion . . . [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Empl. Div. v. Smith*, 494 US at 878. It is important to note *Smith*'s procedural history, which demonstrates that the determination that the ADAPT

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good faith practice of a religious belief; (b) As directly associated with a religious practice; and (c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user." 1991 ORS § 475.992.

policy alone might not have been deemed *generally applicable*, but the criminal statute, which prohibited *everyone*, *everywhere*, and *at all times* from the knowing or intentional possession of an unprescribed[5] "controlled substance."

In explaining why the strict scrutiny standard of *Sherbert* and its progeny did not apply, Justice Scalia noted that "the conduct at issue in those cases was not prohibited by law," *id*. at 876, and that

> [e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.

Id. at 884 (emphasis added). It is the fact that there were individualized exemptions, such as criminal prohibitions, that rendered *Sherbert* not generally applicable.

Smith based its ruling on the notion that a religious exemption should not issue where no exemption is available "to those who use the drug for other reasons. *Id*. at 878. In arriving at this conclusion, the Court contrasted *Smith*'s facts with those at issue in its prior rulings involving neutral laws of general applicability:

- *Reynolds v. United States*, 98 U.S. 145 (1879), in which the Court "rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice." The laws against polygamy were generally applicable: they applied to *everyone*, *everywhere*, and *at all times*.

[5] It cannot properly be argued that the statue's application only to those who did not have a prescription constituted some sort of "medical exemption," because the very purpose of that *controlled* substance statute, like all such statutes, was to regulate the *uncontrolled* use of those substances. The individual who was properly administered such controlled substances by authorized personnel, or given a prescription to use the same, was not receiving a medical *exemption*; that person was simply outside the scope of the statute, much one who kills a fly cannot be classified as *exempt* from a murder statute.

- *Prince v. Massachusetts*, 321 U.S. 158 (1944), in which the Court "held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding." The court "found no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.'" (Emphasis added.) The child labor laws were generally applicable: they applied to *everyone*, *everywhere*, and *at all times*.

- *Braunfeld v. Brown*, 366 U.S. 599 (1961), in which the Court "upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days." The criminal law proscribing "the Sunday retail sale of certain enumerated commodities" was generally applicable: it applied to *everyone*, *everywhere*, and *at all times*.

- *Gillette v. United States*, 401 U.S. 437, 461 (1971), in which the Court "sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds." The Selective Service System was generally applicable: it applied to *everyone*, *everywhere*, and *at all times.*

- *United States v. Lee*, 455 U.S. 252, 258-261 (1982), in which an Amish employer "sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs." The court "rejected the claim that an exemption was constitutionally required," holding that there would be no way "to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes" and that [t]he tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." The tax system was generally applicable: it applied to *everyone*, *everywhere*, and *at all times.*

Of critical importance to this case, is *Smith*'s clear exception to individualized exemptions, based upon language which grants discretion:

> The statutory conditions [in Sherbert and Thomas] provided that a person was not eligible for unemployment compensation benefits if, '**without good cause**,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen v. Roy*, supra, at 708 (opinion of Burger, C. J., joined by Powell and Rehnquist, JJ.). See also *Sherbert*, supra, at 401, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that

> where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Emp't Div. v. Smith, 494 US at 884. The inclusion of "without good cause" in the statutory scheme rendered the laws examined in *Sherbert* and *Thomas* not generally applicable as subject to individualized exemptions. Here, both the Mandate and the Exemption Standards contain just the type of language to which *Smith* took exception. The fact that the Mandate on its face provides for "*reasonable* accommodations" and creates "a mechanism for individualized exemptions" renders it not generally applicable. Likewise, the Exemption Standards Award state "[t]he City/DOE demonstrated recognition of the importance of these issues, particularly with regard to employees' *legitimate* medical or religious claims." Exemption Standards at. at 13, Section I.L, Declaration of Jonathan R. Nelson ¶ 8. (emphasis supplied) Needless to note the obvious, the Mandate and the Exemption Standards go beyond mere discretionary individualized exemptions by providing all sorts of blatant, express carveouts and exceptions.

Recent Supreme Court decisions have unequivocally endorsed the principle that religious exercise may not be curtailed in the face of

> myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. And historically, strict scrutiny requires the State to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (internal quotation marks omitted). That standard "is not watered down"; it "really means what it says."

Tandon v. Newsom, ___US___ , ___, 141 S. Ct. 1294, 1298 (2021).

There can be no honest question about it: the Mandate and the Exemption Standards, on their face and as applied, are *not* generally applicable and therefore subject to strict scrutiny.

B. As implemented through the Exemption Standards, the Mandate provides exceptions

for medical reasons

The Mandate, as implemented through the Exemption Standards, also provides exemptions for medical reasons, giving the DOE further discretion for evaluating whether to excuse an individual from the policy as a whole. Indeed, the Exemption Standards state that where employees have "a documented contraindication such that an employee cannot receive any of the three (3) authorized vaccines . . . with contraindications delineated in CDC clinical considerations for COVID-19 vaccination." This too indicates that it is a system of individualized assessments that is subject to strict scrutiny. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 493 F. Supp. 3d 168, 170 (E.D.N.Y. October 9, 2020) ("[w]hen the government makes a value judgment in favor of secular motivations but not religious motivations, the government's actions must survive heightened scrutiny") (citing *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) (no-beard policy subject to strict scrutiny when it allowed medical but not religious exemptions); *Dahl v. Bd. of Trs. of Western Mich. Univ.*, 2021 U.S. App. LEXIS 30153, *10 (finding that University's vaccine mandate that allowed both medical and religious exemptions and under which "the University retains discretion to extend exemptions in whole or in part" was not generally applicable and thus the denial of an individual religious exemption was subject to strict scrutiny).

C. As implemented through the Exemption Standards, the Mandate purports to provide exceptions for some, but not all, persons with sincere religious objections to vaccination

1. On their face, the exemption standards are not generally applicable

The Exemption Standards give the DOE discretion to determine which religious reasons for not being vaccinated are worthy of having an exemption granted. Indeed, DOE officials and

arbitrators were given an unconstitutional framework for making these individualized assessments. Such framework, which was set forth in the Exemption Standards, is not generally applicable on its face and includes the following provisions:

- Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy).

- Religious Exemptions shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature.

- Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists).

Determining whether applicants satisfy each of these criteria requires DOE officials and arbitrators to engage in individualized assessments which unquestionably makes the policy—on its face alone—not one of general application.

2. The exemption standards were not generally applied in their implementation

The DOE itself admitted that in applying the Exemption Standards, the determination of whether to grant a religious exemption was done on an individual basis. 2d Cir., 21-2711, ECF No. 34 at 9 (describing the process as a "case-by-case application of the accommodation process"); *id*. at 10 (explaining that "different requests have led to different outcomes, as one would expect for a case-specific inquiry"); *id*. at 27 ("[a]t best, plaintiffs can show that the process is unfolding on a case-by-case basis"); *id*. at 30 (describing the process a "case-specific applications of the accommodation frameworks"); *Kane v. de Blasio*, 1:2021-cv-07863, ECF. No. 65 (S.D.N.Y. October 12, 2021) (Transcript of Conference), at 50 (explaining that each exemption request is "evaluated by the arbitrator based on the individual's belief, which are personal" and that "each

person's personal religious belief would require different kinds of evidence and different kinds of statements. And it's up to the arbitrator, in the first instance, to determine whether that belief is sincerely held . . . ."). Such statements demonstrate that the mandate was not generally applicable in its application.

Furthermore, a law is not generally applicable when it has been enforced in a discriminatory manner—which the Mandate has, as discussed *supra*. And, even if this Court was to somehow find that the Mandate is facially neutral, the lack of consistent application by DOE officials subjects it to strict scrutiny. *Litzman v. New York City Police Dep't*, 2013 U.S. Dist. LEXIS 162968, *8 (S.D.N.Y. 2013) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("'[f]acial neutrality is not determinative' when the record shows that Plaintiff was terminated pursuant to a policy that is not uniformly enforced"); *id*. at *9 ("because there is evidence that the NYPD exercises discretion with respect to a facially neutral rule in a discriminatory fashion, strict scrutiny is appropriate").

For example, Orthodox Jews—all of whom were told by various DOE officials that their sincerely held religious beliefs were questionable since a rabbi they had never met and who lived in a different country supported the vaccine—received different determinations by the arbitrator, even though they possessed substantially similar beliefs. SDNY, 21-08773, ECF No. 22 ¶¶ 27-29, 31, 33-35. A Christian employee who attends Church at the Rock in Brooklyn and submitted a clergy letter from her pastor was denied while another parishioner at Church at the Rock who submitted a clergy letter from the very same pastor, was granted his exemption. SDNY, 21-08773, ECF No. 23 ¶ 22. And, a devout Catholic DOE employee did not submit a clergy letter and was granted an exemption in her appeal, while another devout Catholic with substantially the same

beliefs as the first Catholic employee was denied her appeal, despite her submission of a clergy letter. SDNY, 21-08773, ECF. No. 22 ¶¶ 37-39.

Such disparate and arbitrary applications of the same standards show the unfettered discretion exercised by the DOE and arbitrators, which subjects the Mandate and the Exemption Standards to the highest level of scrutiny.

VI. DEFENDANTS' CLAIM THAT A SEPARATE TITLE VII RELIGIOUS ACCOMMODATIONS PROCESS EXISTS IS A SHAM

As a preliminary matter, Defendants argue that Plaintiffs have conceded that a Title VII accommodation would be sufficient here. 2d Cir., 21-2711, ECF No. 34 at 26. Plaintiffs in this case have made no such concession. Indeed, Plaintiffs have not even brought a Title VII claim at this juncture, but have based their claims in the First Amendment, which is even more protective of religion than Title VII. Indeed, the First Amendment requires that if the DOE is to burden Plaintiffs' religious practice, it must do so in the least restrictive way possible. Notably, however, the standard for what constitutes a sincerely held religious belief under Title VII and the First Amendment is the same, *Equal Opportunity Emp't Comm'n v. United Health Programs of Am., Inc*., 213 F. Supp. 3d 377, 395 (N.D.N.Y. 2016), which is relevant to the forthcoming discussion.

A. No separate Title VII process exists, and even if it did, it could not be sufficient to protect applicants' rights to religious freedom

Defendants' brief is full of references to a separate statutory Title VII accommodation process. But this has no foundation in fact or in law. First, Defendants are contradicted by their own initial descriptions of the process, as well as the experience of the Plaintiffs and the facts on the record. Indeed, none of the Plaintiffs or declarants in either this case or Kane were given information about a separate statutory reasonable accommodation process. In fact, Plaintiffs and

declarants were told repeatedly that DOE officials' hands were tied and they could not make their decision in accordance with anything but the Exemption Standards in the arbitrator's award. Second, the idea that there could be an alternative to a statutory (or, as Plaintiffs seek here, a constitutional) accommodation process is completely improper; indeed, any religious exemption process, whether it's the "statutory" one or the "alternative" one, must still be compliant with all statutory and constitutional law.

1. A separate Title VII process does not in fact exist

Defendants' brief is chock full of assurances that, despite the existence of the arbitrator's award and the standards contained therein, "the protections of Title VII remain available[.]" 21-2711, ECF. No. 34 at 9; *see also id*. at 24-25 ("religious accommodations are available, under the criteria established by the arbitration awards and statutory schemes like Title VII"); *id.* at 26 ("employees still retain the protections afforded by Title VII and other laws"); *id*. (arguing that the DOE has granted "a broad range of religious exemptions consistent with Title VII"); *id*. at 27 ("the awards contemplate that statutory accommodation standards—such as . . . Title VII . . . –continue to apply"); *id*. ("the process is bounded by . . . Title VII standards").

Perhaps most persuasive is that the Exemption Standards themselves state the following:

> L. The process set forth, herein, shall constitute the *exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy* and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision.

Exemption Standards at. at 13, Section I.L, Declaration of Jonathan R. Nelson ¶ 8 (emphasis added).

Furthermore, not once in the oral argument before the Southern District in the *Kane* case did the attorney for the DOE state that there was a separate statutory Title VII process that was an alternative to arbitration by which employees could request or appeal their religious exemption requests. In fact, the attorney for the DOE admitted the opposite:

> THE COURT: . . . . walk me through it procedurally. Anyone who wants a religious exemption makes the request to the Department of Education. If the Department of Education denies it, they get an appeal pursuant to the collective bargaining agreement to an arbitrator. Right?
>
> MS. MINICUCCI: They get an appeal pursuant to the UFT award.
>
> THE COURT: Which is?
>
> MS. MINICUCCI: Pursuant to the collective bargaining agreement.
>
> THE COURT: Collective bargaining agreement.
>
> MS. MINICUCCI: Correct. So that's essentially the process.
>
> THE COURT: And if they don't like the answer of the arbitrator, then they can file an Article 75.
>
> MS. MINICUCCI: Correct, or bring a plenary challenge, as plaintiffs have in this case.
>
> THE COURT: Right.
>
> MS. MINICUCCI: So that is essentially the whole process.

Kane v. de Blasio, 1:2021-cv-07863, ECF. No. 65 (S.D.N.Y. October 12, 2021) (Transcript of Conference), at 29. Additionally, neither the DOE's website nor the UFT's website mention anything about a supplemental or alternative Title VII statutory accommodation process. *See COVID-19 Vaccination Mandate*, NYC Department of Education InfoHub, https://infohub.nyced.org/working-with-the-doe/covid-19-resources/covid-19-vaccination-

mandate (last visited Nov. 4, 2021); *Vaccine mandate and exemptions*, United Federation of Teachers, https://www.uft.org/your-rights/safety-health/environmental-health-and-safety/disease-information/coronavirus-hub/school-year-2021-22-faq/vaccine-mandate-exemptions (last visited Nov. 4, 2021).

As if this were not enough, none of the Plaintiffs in this case were told about this so-called separate Title VII appeal process, either when they made their initial request, at the appeal stage, or during the arbitration hearing. New Declaration of John De Luca ¶¶ 5-8; New Declaration of Sasha Delgado ¶¶ 5-8; New Declaration of Matthew Keil ¶¶ 5-8; New Declaration of Dennis Strk ¶¶ 5-8; New Declaration of Sarah Buzaglo ¶¶ 5-8. None of Attorney Christina Martinez's 15 clients whom she represented in arbitration hearings were told about this so-called separate Title VII appeal process, either. New Declaration of Christina Martinez, Esq. ("Martinez Dec.") ¶ 5. In fact, all of Ms. Martinez's clients informed her that they were told that the arbitration method was the only avenue by which they could request religious exemptions or appeal the denial of their religious exemption requests. *Id*. ¶ 6. Furthermore, during these hearings, the DOE attorneys zealously advocated for strict adherence to the requirements in the arbitration award and several times the arbitrators themselves stated that they were bound by those requirements. *Id*. ¶ 7. What's worse, these officials flouted Title VII standards during the hearings, despite being advised of them by Plaintiffs themselves or their attorneys.

For example, EEOC guidance on religious accommodations states that "[a]n employee's belief, observance, or practice can be 'religious' under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief, observance, or practice, or if few – or no – other people adhere to it." Section 12: Religious Discrimination, U.S.

Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_71848579934051610749830452 (last visited Nov. 4, 2021). This is completely consistent with the case law interpreting the First Amendment, from the Supreme Court to the courts of this State. *Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981) (disagreement among sect workers as to whether their religion made it sinful to work in an armaments factory irrelevant to whether belief was religious in nature because, "[t]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect"); *Widmar v. Vincent*, 454 U.S. 263, 270, n.6 (1981) (it is unconstitutional for courts "to inquire into the significance of words and practices . . . in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases"); *Bowles v. N.Y. City Transit Authority*, 2006 U.S. Dist. LEXIS 32914, *59 n.18 (S.D.N.Y. 2006) (emphasis added) ("[i]t is true that there is a conflict in the record as to what exactly [plaintiff's] Church teaches - whether members are forbidden to work at all on the Sabbath, as Bowles argues, or whether the prohibition is only 'from sun-up till sun-down,' as two of the letters from Pastor Gooding seem to indicate. But the question of whether Bowles's Church actually prohibits what he *believes* it prohibits is one that this court need not answer and indeed is uninterested in asking"); *see also Farina v. Bd. of Educ.*, 116 F. Supp. 2d 503 (E.D.N.Y. 2000), 116 F. Supp. 2d at 507-508 (finding that sincerely held beliefs "need not be consistent with the dogma of any organized religion, whether or not plaintiffs belong to any recognized religious organization," that individuals asserting religious objections to a public school vaccination "had no obligation to provide documentation from [their] church regarding their beliefs," and that requirement imposed by the school secretary that such individuals "obtain a letter from [their

church]" was "misplaced"); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987) (holding unconstitutional a statutory scheme that conditioned eligibility for a religious vaccination exemption on documentation from clergy).

Nevertheless, Plaintiff Strk was told by a DOE official during his arbitration hearing that his exemption was denied because he did not have a letter from clergy. SDNY, 21-08773, ECF No. 25, ¶ 18. Plaintiff De Luca was told by a DOE official during his arbitration hearing that his religious leaders have "clearly and publicly expressed support for the vaccine," and was berated for believing that he would be condemned for taking the vaccine when "the leader of the Catholic Church . . . says you have a moral obligation to be vaccinated." SDNY, 21-08773, ECF No. 25 ¶¶ 24, 28. Plaintiff Keil—a deacon in the Russian Orthodox Church—was told by a DOE official during his arbitration hearing that his beliefs seemed to be personal in nature because other Orthodox Christians choose to get vaccinated. SDNY, 21-08773, ECF No. 27 ¶ 38. Plaintiff Delgado, a born-again Christian, was told by a DOE official during her arbitration hearing that "there's no theological objection raised by many if not all the denominations in Christianity to the vaccine." SDNY, 21-08773, ECF No. 28 ¶ 31. Plaintiff Buzaglo—an Orthodox Jew who is bound by the authority of her own rabbi—was told by a DOE official during her arbitration hearing that a Sephardic Chief Rabbi in Israel whom she did not know supported the vaccine. SDNY, 21-08773, ECF No. 29 ¶ 41. DOE employee Amoura Bryan was told by a DOE official during her arbitration hearing that the Seventh Day Adventist Church—which she affiliates with but which does not control her views on vaccination—does not oppose the vaccine. SDNY, 21-08773. ECF No. 20 ¶ 30. DOE employee Ageliki Heliotis, a member of the Orthodox Christian Church, was told by a DOE official during her arbitration hearing that it was the DOE's position that since the

leader of her religion approved the vaccine, she would be automatically denied. SDNY, 21-08773, ECF No. 19 ¶ 16. DOE employee Eleni Gerasimou was told by a DOE official during her arbitration hearing that officials in the Greek Orthodox Church—of which she is a member—support the vaccine. SDNY, 21-08773, ECF No. 26 ¶ 14. The DOE official also noted that she did not have a clergy letter supporting her request. *Id.* Finally, DOE employee Inna Cohen was told by a DOE official at her arbitration hearing that because her congregation did not specifically say, "don't get vaccinated," her objection was personal and not religion-based. SDNY, 21-08773, ECF No. 24 ¶ 28.

The EEOC Guidance also states that, "[t]he Supreme Court has made it clear that it is not a court's role to determine the reasonableness of an individual's religious beliefs, and that 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" Section 12: Religious Discrimination, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_71848579934051610749830452 (last visited Nov. 4,2021) (quoting *Lukumi*, 508 U.S. at 531). Considering that such guidelines quote the seminal Free Exercise case of *Lukumi*, it is completely consistent with, and rooted in, First Amendment law.

Nevertheless, DOE officials and arbitrators questioned numerous Plaintiffs and other DOE employees regarding their objection to the vaccination's connection to abortion. They specifically read a letter from Commissioner Chokshi stating that no fetal cells are actually contained within any of the vaccines and insinuating that as a result, any objection rooted in the vaccine's connection to abortion is invalid.

But these Plaintiffs and DOE employees were aware that no fetal cells are in the vaccines themselves. Their objection is instead to the use of fetal cells in the vaccine's testing, research, or manufacturing. *See, e.g.*, SDNY, 21-08773, ECF No. 28 ¶¶ 36-38 (Plaintiff Delgado); SDNY, 21-08773, ECF No. 27 ¶¶ 22, 34-36 (Plaintiff Keil); SDNY, 21-08773, ECF No. 30 ¶¶ 8, 25 (Plaintiff De Luca); SDNY, 21-08773, ECF No. 25 ¶¶ 19-20 (Plaintiff Strk); SDNY, 21-08773, ECF No. 23 ¶¶16-17 (DOE employee Cindy Corchado). The implicit suggestion made by these DOE officials that any such tangential connection is not substantial enough to form the basis for a sincerely held religious belief is appalling and unconstitutional. Counsel for defendants' similar reiteration of such an "argument" is similarly shocking. 2d Cir., 21-2711, ECF No. 34 at 16 n.7. Such blatant misunderstanding of Plaintiffs' beliefs is precisely the reason that they need to be protected. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L (last visited Nov. 4, 2021) (explaining that "[t]he definition of 'religion' under Title VII protects nontraditional religious beliefs that may be unfamiliar to employers" and stating that an employer "should not assume that a request is invalid simply because it is based on unfamiliar religious beliefs").

These are only some of the myriad ways in which the DOE officials and arbitrators ignored and openly contradicted Title VII's guidance, as well as the constitutional rights of Plaintiffs and DOE employees.

2. A separate Title VII process would not be sufficient to protect applicants' rights to religious freedom

Defendants seems to suggest that it is possible, lawful, and even preferable to create and

offer an alternative, unconstitutional route to a statutory or constitutional accommodation process. Indeed, the arbitrator's award describes itself "[a]s an alternative to any statutory reasonable accommodation process." But this notion is untethered to any existing law. It is axiomatic that any religious exemption process implemented by an employer who is a state actor, be it "statutory," "constitutional," "alternative," "supplemental," "additional," etc., still needs to comply with the mandates of Constitution (as well as Title VII). Defendants' "alternative" and/or "supplemental" route does neither.

VII. THE BALANCE OF HARMS TEST IS SATISFIED BY PLAINTIFFS' MERITORIOUS CONSTITUTIONAL CLAIMS

A. Constitutional claims constitute irreparable harm

As noted above in Sections I and II of this brief, where First Amendment rights are at issue, the standard for obtaining preliminary injunctive relief is limited to demonstrating the likelihood of success on the merits. *Walsh*, 733 F.3d at 488. This is so because the deprivation of rights itself "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

B. Plaintiffs also demonstrate economic and survival harms, including termination and a proscription against gainful employment, that are serious, imminent and irreparable under the circumstances

Defendants' termination policy – which will go into effect against Plaintiffs on December 1 according to the Exemption Standards – applies to Plaintiffs because they refused either to resign their positions or to accept an unpaid leave – with – insurance offer that prohibited them from engaging in gainful employment before September 5, 2022. Termination will deprive Defendants of valuable economic rights – for example, the accrual of seniority, which affects the amount of

the pensions they receive based on services performed – in some instances, decades of selfless and dedicated service to the DOE's students. Teachers are notoriously underpaid as a profession. Depriving thousands of DOE employees of health insurance coverage for themselves and their families, at a time when they will be without income to pay for insurance, is a recipe for disaster. Diseases and accidents that go untreated for lack of medical insurance are by definition "irreparable." Thus, in addition to the violation of Plaintiffs' constitutional rights, Defendants' implementation and enforcement of the Mandate will impose terrible everyday consequences upon the Defendants' unvaccinated employees.

C. Defendants' claim of harm likely to occur through physical presence in schools of unvaccinated adults is simply irrelevant to Plaintiffs' claims, since Plaintiffs agreed to accept other forms of accommodation in applying for an exemption

As argued *supra*, because Defendants are violating Plaintiffs' constitutional rights, the only test that Plaintiffs must meet is to show a likelihood that they will prevail on the merits of their claims. The Court should not require Plaintiffs to pass a "balance of harms" test on the instant application. However, the Plaintiffs would clearly prevail in such a test, because the Defendants have not shown *any* harm that they would suffer from the issuance of an injunction as Plaintiffs request.

The Plaintiffs in *this* case are not asking the court necessarily to put them back into classrooms with unvaccinated schoolchildren, as much as they may wish the Defendants to revisit their former vax-and-test policy. The exemption applications that Plaintiffs submitted were available only to persons who were willing to be "in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect." *See* Exemption Standards

at 12, Section I.K., Declaration of Jonathan R. Nelson ¶ 8. Under the Exemption Standards, employees who are granted exemptions "may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/or accommodation is in place." *Id.*

The Defendants' argument that the "balance of the harms" favors a decision refusing a preliminary injunction rests entirely upon their assertions that "[e]njoining the mandate would threaten the continued safe operation of in-person schooling for the City's nearly one million students …." *Defendants' Memorandum of Law*, Dkt. # 34, at 25. In *this* case, that argument is a red herring. The Mandate itself bars *employment* of unvaccinated persons by the DOE, not simply *physical presence* in the schools. Yet the DOE *employed its entire staff remotely* during portions of the 2019-2020 and 202-2021 school years. Allowing employees to work remotely *poses no risk whatsoever* to schoolchildren or workers in fully vaccinated environments.

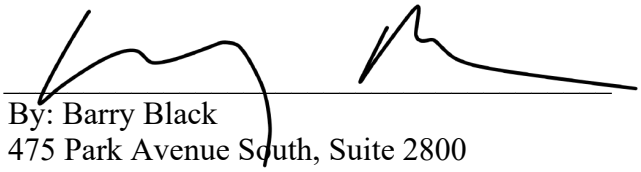
Notably, the Defendants make no effort to argue that the cost or inconvenience to them of permitting unvaccinated individuals to perform academic or administrative functions from remote locations outweighs the harm that Plaintiffs suffer from the violation of their constitutional rights due to the Defendants' misguided and unlawful implementation of the Mandate. Yet in reality, the promulgation and implementation of the Mandate violate Plaintiffs' rights to religious freedom in order to save money or effort, but not to save children. The Mandate must be replaced by a more narrowly drawn and unambiguous policy that respects the rights of religiously motivated employees to an adjudication of their exemption requests according to constitutional standards and fairly designed procedures.

CONCLUSION

For the reasons set forth above, Movants respectfully request that their motion by order to show cause for the entry of (1) a temporary restraining order pending the resolution of the motion for a preliminary injunction, and, after expedited discovery, (2) a preliminary injunction pending the resolution on the merits of the present action be granted.

Dated: New York, New York
November 5, 2021

NELSON MADDEN BLACK LLP
Attorneys for Plaintiffs-Appellants



By: Barry Black
475 Park Avenue South, Suite 2800
New York, NY 10016
(212) 382-4300

Jonathan R. Nelson
Sarah E. Child