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**THE CITY OF NEW YORK
LAW DEPARTMENT**

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November 12, 2021

Clerk of the Court
U.S. Court of Appeals
for the Second Circuit
40 Foley Square
New York, New York 10007

Re: *Kane v. de Blasio*, No. 21-2678; *Keil v. City of New York*, No. 21-2711

To the Hon. Clerk of the Court:

Defendants-appellees submit this letter pursuant to the Court's order entered November 12, 2021. On the core question—the proper scope of any injunctive relief pending appeal—there is no basis for granting relief beyond the plaintiffs.

In proposing relief that would sweep far beyond themselves and impose substantial system-wide burdens on the Department of Education, plaintiffs ignore a foundational principle: injunctive relief “should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); accord *N.Y. Legal Assistance Grp. v. BIA*, 987 F.3d 207, 224 (2d Cir. 2021). Restraint is especially appropriate here, when the question is merely what relief is needed to bridge the gap until the merits panel can rule and decide the scope of appropriate relief while plaintiffs try to prove-up their claims below.

Yet plaintiffs offer no credible explanation why thousands of other employees must be afforded sweeping relief now to protect plaintiffs' rights pending appeal.

Plaintiffs' proposal ignores another foundational principle: "the usual rule is that litigation is conducted by and on behalf of the individual named parties only," and a party seeking an exception to that rule ordinarily does so via a class action. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 389 (2011). These are not class actions. Plaintiffs have not sought class certification, and in fact, their complaints include no class allegations (SDNY 21-cv-7863 ECF No. 1; SDNY 21-cv-8773 ECF No. 10). Any injunctive relief therefore must "be limited to apply only to named plaintiffs." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996).¹

Regarding the form of relief, we have no objection to relief following the terms of the proposed order attached to this letter. Our proposal avoids any further negative consequences arising from plaintiffs' noncompliance with the vaccination mandate while their accommodation requests are given fresh consideration under the standards established by Title VII and its state and local counterparts—without being governed by the arbitration award criteria challenged by plaintiffs. Because such review would be completed within two weeks from plaintiffs' submission of any information they wish to be considered, briefing for plaintiffs' appeals should be deferred until the process is complete so that the parties and the Court can speak to any narrowed dispute that remains.

¹ See, e.g., *Hollon v. Mathis Ind. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974) ("In this case, which is not a class action, the injunction against the School District from enforcing its regulation against anyone other than [plaintiff] reaches further than is necessary..."); *M.R. v. Dreyfus*, 697 F.3d 706, 738-39 (9th Cir. 2012) (limiting injunctive relief to plaintiffs even though case may implicate systemic issues, highlighting the absence of class certification).

The attached proposal incorporates use of a citywide panel—including representatives of the New York City Commission on Human Rights, Law Department, and Department of Citywide Administrative Services—that has been constituted as a means of reviewing requests for reasonable accommodations relating to the broader vaccination mandate for all city employees issued by the Health Commissioner on October 20, 2021. While the extent of court-ordered relief should go no further than the named plaintiffs, we note for the Court’s information that the City is working toward making an opportunity for reconsideration available more broadly to DOE employee who unsuccessfully sought religious exemptions pursuant to the arbitration award’s appeal process.

Regarding the factual inquiries posed by the panel during argument, to date 165 employees have been granted religious exemptions by the arbitration panels; 1,265 employees have been denied religious exemptions by such panels; and 11 exemption requests remain pending. The City’s vaccination mandate for public school employees is not unique. Vaccination is required for school staff not only in the City’s public district schools and charter schools, but also in many of the City’s independent schools through individual school-imposed mandates. There are also several other school districts across the country that similarly require vaccination,² including Los Angeles, Portland, St. Louis, and Seattle, to name a few.³

² See Education Week, *Where Teachers Are Required to Get Vaccinated Against COVID-19*, Updated October 15, 2021, <https://perma.cc/E6TY-Z39K>.

³ See LA Times, *97% of LAUSD teachers, administrators meet COVID-19 vaccination deadline*, Howard Blume, October 15, 2021, <https://perma.cc/LZQ4-9NQW>; the74million.org, *By the Numbers — How 100 School Systems Are (and Aren’t) Adapting to COVID: Vaccine Requirements, Testing*

Respectfully submitted,

GEORGIA M. PESTANA
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of the City of New York*

By: _____
Susan Paulson
Assistant Corporation Counsel

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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

PRESENT: Jose Cabranes
Denny Chin
Pierre Leval,
Circuit Judges

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

ORDER (PROPOSED)

Plaintiffs-Appellants,

against

Docket No. 21-2678

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

Defendants-Appellees.

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

Plaintiffs-Appellants,

against

Docket No 21-2711

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

Defendants-Appellees.

Appellants' motions for an injunction pending appeal having been heard at oral argument before a panel of this Court on November 10, 2021, it is:

ORDERED, that

1. Plaintiffs shall receive fresh consideration of their requests for a religious accommodation by a central citywide panel consisting of representatives of the Department of Citywide Administrative Services, the City Commission on Human Rights, and the Office of the Corporation Counsel.
2. Such consideration shall adhere to the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law. Such consideration shall not be governed by the challenged criteria set forth in Section IC of the arbitration award for United Federation of Teachers members. Accommodations will be considered for all sincerely held religious observances, practices, and beliefs.
3. Plaintiffs shall submit any materials or information they wish to be considered within two weeks of entry of this order. The citywide panel shall issue a determination on each request no later than two weeks after a plaintiff has submitted such information and materials. Within two business days of the entry of this order, defendants shall inform plaintiffs' counsel how such information and materials should be transmitted to the citywide panel.
4. While a plaintiff's request remains under review by the citywide panel—and for seven calendar days following any denial of the request—the deadline to opt-in to the extended leave program and execute any accompanying waiver shall be stayed, and no steps will be taken to terminate the plaintiff's employment for noncompliance with the vaccination requirement.
5. If a plaintiff's request is granted, the plaintiff will receive backpay running from the date they were placed on leave without pay.

FOR THE COURT

Catherine O'Hagan Wolfe
Clerk of the Court