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November 11, 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 and Kiel v. City of New York No. 21-2711

To the Hon. Clerk of the Court:

During oral arguments yesterday, the Court asked Appellants to file proposed temporary injunctive orders and a letter setting forth the reasons why we believe the injunctive relief should be broader rather than apply only to the fifteen named Appellants in this suit.

The primary reason is the nature of these suits. This case is not about whether individual arbitrators discriminated against fifteen sincere employees. Though Appellants each have as-applied challenges, they primarily challenge the policies as *facially* unconstitutional and discriminatory and as facially violative of the Establishment Clause, which impacts everyone.

In evaluating a facial challenge, courts must consider the government's interpretation and implementation of the policy. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 131 (1992); *see also Food Not Bombs*, 450 F.3d at 1035 (a well-established practice can convert a constitutional challenge into a facial rather than as-applied question). For the reasons discussed in our briefing and oral arguments, it is likely that the policies adopted by New York City will be found facially unconstitutional. This will require broad injunctive and declaratory relief, relief that will not only stop the City from continuing to discriminate against these fifteen people, but will stop the City from continuing to violate the First Amendment, which impacts all of society.

The Court raised the valid question about the cost of putting these teachers back on the payroll if the City will not allow them to enter school buildings. However, if the City's policies

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are found to be facially unconstitutional, the City will ultimately have to provide retroactive pay to all of the teachers who are currently excluded under the unconstitutional policy. Thus, the cost will be incurred regardless of whether the relief is afforded now or later. It serves the public interest more to put the teachers back onto the payroll now, and allow them to at least teach remotely and help mitigate the devastating understaffing problem that currently exists in the New York City schools as a result of these policies, rather than exclude them entirely and then have to pay them back wages without having had the benefit of the help they could provide remotely during the weeks between now and the decision by the merits panel.

It is also important to note that at any time, the DOE can offer the option of weekly testing pending a determination of the underlying appeal on the merits, just as they recently offered as an option to other municipal workers pursuant to the agreement the City just made with DC 37 on November 4, 2021. Exhibit A. Pursuant to Section I (A)(4) to that new agreement, doubtless inspired by this lawsuit, unvaccinated DC 37 employees whose religious exemption applications were previously denied now have the option to appeal such denial subject to, *inter alia*, "weekly COVID testing, pending the initial determination of the Agency and/or the determination of the employee's appeal by the City panel," including a footnote specifying that "To the extent such employees filed after October 27 and were placed on leave without pay on November 1, they will be returned to payroll effective the day after execution of this agreement and will remain working and on payroll, subject to weekly COVID testing, pending the initial determination of the Agency and/or the determination of the employee's appeal by the City panel." Further, under Section I(B)(10), "An employee who is granted a medical or religious exemption or medical accommodation by SAMS shall be allowed to continue working and remain on payroll, subject to a weekly COVID testing requirement." There is no reason the same weekly testing option should

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not be made available here if the DOE finds that it is burdensome or costly to pay teachers to teach remotely.

Moreover, as a matter of judicial economy, it would be more efficient to grant the relief to Appellants and those similarly situated rather than have to entertain essentially the same suit by multiple other litigants once this relief is in effect.

Ultimately, principles of justice require that facially discriminatory policies, like the one at issue here, once identified by the Court as likely to be found unconstitutional, cannot continue to be applied against anyone, not just those named in a lawsuit. The public interest, and the interests of the named Appellants, are harmed by allowing the discrimination to continue against anyone as a matter of policy. Each day that it goes unaddressed, the public is further harmed.

Attached hereto is an order with our preferred proposed language (Exhibit B) and the alternative that only grants reinstatement to the fifteen Appellants with the more limited general relief (Exhibit C). We ask the Court to disregard the proposed order initially filed at 1pm and to excuse that we are a bit late with this letter. In our haste this afternoon, we had not had a chance to discuss our filing with the Appellants, and they reminded us about a key point. That is to point out that under the terms of the current policy, employees are forbidden to earn any income, even outside of the school system, while on unpaid leave. The proposed replacement order would allow those employees who are not reinstated to be able to at least earn income from outside sources while they are on unpaid leave and await a merits decision.

Respectfully Submitted,

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Cc: All counsel via ECF

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