No. 21A-

IN THE

Supreme Court of the United States

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO,

Applicants,

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, MEISHA PORTER, IN HER OFFICIAL CAPACITY AS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, ERIC ADAMS, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

ON EMERGENCY APPLICATION FOR WRIT OF INJUNCTION TO THE HONORABLE SONIA SOTOMAYOR, CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Kate, et al. Plaintiffs, vs. de Blasio, et al. Defendants.	**ORDER TO SHOW CAUSE** Civil Action No. 1:21-cv-07863

Upon consideration of the annexed (1) Plaintiff's Memorandum of Law in Support of Motion for a Temporary Restraining Order and Preliminary Injunction; (2) Declaration of Sujata Gibson, dated October 4, 2021, along with the exhibits attached thereto; and (3) Expert Declaration of Dr. JAYANTA BHATTACHARYA, M.D., PhD; (4) Expert Declaration of DR. MARTIN MAKARY, M.D., M.P.H. ; (5)*Declaration of Michael Kane*; (6) *Declaration of William Castro*; (7) *Declaration of Margaret Chu*; (8) *Declaration of Robert Dillon, IV*; (9) *Declaration of Robert Gladding*; (10) *Declaration of Anthony Block*; (11) *Declaration of Heather Jo Clark*; (12) *Declaration of Nwakaego Nwaifejokwu*; (13) *Declaration of Trinidad Smith; and* (14) Plaintiff's Complaint, filed September 21, 2021, and good cause having been shown, it is hereby

ORDERED that the above-named Defendants appear before this Court, at Room _____, United States District Court for the Southern District of New York, located at _____ on _____, 2021 at _____:_____o'clock in the [ ] forenoon [ ] afternoon thereof, or as soon thereafter as counsel may be heard, to show cause why preliminary injunctive relief not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure:

Granting a preliminary injunction staying the Order of Dave A Chokshi, M.D., Commissioner of the New York City Department of Health and Mental Hygiene entitled "Order of the Commissioner of Health and Mental Hygiene to require Covid-19 Vaccination for Department of Education Employees, Contractors, and Others" (DOE Vaccine Mandate) and reinstating anyone terminated or suspended for noncompliance with the DOE Vaccine Mandate pending resolution of these proceedings; and it is further

ORDERED that sufficient cause having been shown, pending a hearing of the Plaintiff's application for preliminary injunction, but in no event more than fourteen days beyond the issuance of this order unless extended by the Court, a temporary restraining order is GRANTED, the DOE Vaccine Mandate is stayed, and any adverse employment action taken in reliance on the regulation is retroactively enjoined, such that implementing employers must reinstate suspended or terminated employees and restore any benefits or other terms of employment that were withheld on the basis of lack of compliance with the mandate; and it is further

ORDERED that no security should be required of the Plaintiff because Defendants would incur no additional expenses from the relief requested herein; and it is further

ORDERED that a copy of this order, together with the papers upon which it is granted, be personally served upon the Defendants or via email on their attorneys on or before _____, _____ at _____:_____o'clock in the [ ] forenoon [ ] afternoon and that such service be deemed good and sufficient; and it is further

ORDERED that opposing papers, if any, shall be served by email on Sujata Gibson, Esq. Gibson Law Firm, PLLC, attorneys for the Plaintiff, received on or before _____, 2021 at _____ a.m./p.m.

Dated: , New York

United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, et al.,

Plaintiff,

-v.-

BILL DE BLASIO, et al.,

Defendants.

21 Civ. 7863 (MKV)

AMENDED ORDER

MARY KAY VYSKOCIL, United States District Judge:

Plaintiffs filed this action on September 21, 2021. Today, Plaintiffs filed an application for a temporary restraining order and preliminary injunction [ECF No. 12]. The motion was referred to me as the Part One judge.

The Court will hold a hearing on the application for a temporary restraining order tomorrow, October 5, 2021, at 9:00AM in Courtroom 18C of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York. The proceeding is open to the public, but members of the public and media may attend telephonically by dialing 888-278-0296 and entering access code 5195844#. Defendants may file any opposition to the motion seeking a temporary restraining order by 8:00PM today.

The parties must be prepared to address the impact of noncompliance with the mandate on Plaintiffs. Specifically, the parties should address when, if, and how Plaintiffs' employment with the Department of Education could be terminated under the relevant orders and agreements if Plaintiffs are not able to secure an exemption to the vaccination mandate.

Plaintiffs are directed to serve a copy of this order by email on Defendants and their counsel by no later than 2:45PM today.

This Order supersedes in all respects the Order entered earlier today at ECF No. 29.

SO ORDERED.

Date: October 4, 2021
New York, NY

MARY KAY VYSKOCIL
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO, Plaintiffs, -against- 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.	:	21-CV-7863 (VEC) ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on October 12, 2021, the parties appeared for a hearing on Plaintiffs' application for a preliminary injunction;

IT IS HEREBY ORDERED that for the reasons stated on the record, Plaintiffs' application for a preliminary injunction is DENIED.

IT IS FURTHER ORDERED that the parties must submit supplemental briefing on the question of whether Plaintiffs have standing to bring as-applied challenges to the DOE Vaccine Mandate as applied by the Arbitration Awards. Supplemental briefing must address, at a minimum, whether, when there is no claim that the union breached its duty of fair representation, an individual employee represented by a union has standing to challenge a process dictated by an arbitrator following an arbitration proceeding to which the union and the employer were the only parties. The briefing must also address whether Plaintiffs' as-applied challenges are ripe for

judicial review, including whether Plaintiffs are required to bring proceedings pursuant to Article 75 of the New York Civil Practice Law & Rules. The parties' briefs are not limited to those two topics; the Court acknowledges that there are likely additional issues that pertain to the question of whether Plaintiffs have standing to bring their as-applied challenges.

IT IS FURTHER ORDERED that Plaintiffs' supplemental brief is due no later than **Tuesday, October 26, 2021**, and must not exceed 25 double spaced pages; Defendants' response brief, also limited to 25 double spaced pages, is due no later than **Tuesday, November 9, 2021**, and Plaintiffs' reply, limited to 10 double spaced pages, is due no later than **Tuesday, November 16, 2021**. Following a review of the parties' papers, the Court will determine whether a hearing is necessary.

IT IS FURTHER ORDERED that Plaintiffs' counsel, Mary Holland, must file a notice of appearance on the docket by no later than **Friday, October 15, 2021**.

IT IS FURTHER ORDERED that all other deadlines in this case are adjourned *sine die*, including Defendants' time to answer, move, or otherwise respond to the Complaint. The initial pre-trial conference, currently scheduled for November 12, 2021 at 2:00 P.M. and the November 4, 2021 deadline to file joint pre-conference submissions are CANCELED.

SO ORDERED.

Date: October 12, 2021
New York, New York

VALERIE CAPRONI
United States District Judge

APPENDIX D

LA51KANC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MICHAEL KANE; et al.,

Plaintiffs,

v. 21 Civ. 7863 (Part I)

BILL de BLASIO, in his official capacity as Mayor of the City of New York; et al.,

Defendants. TRO Hearing
----------x

New York, N.Y.
October 5, 2021
10:35 a.m.

Before:

HON. MARY KAY VYSKOCIL,

District Judge

APPEARANCES

GIBSON LAW FIRM, PLLC
Attorneys for Plaintiffs
BY: SUJATA S. GIBSON, ESQ.

NEW YORK CITY LAW DEPARTMENT
OFFICE OF THE CORPORATION COUNSEL
Attorneys for Defendants
BY: LORA MINICUCCI, ESQ.
Assistant Corporation Counsel

(Case called)

THE DEPUTY CLERK: Good morning, your Honor.

THE COURT: Good morning, Ms. Dempsey.

Please be seated, everyone.

THE DEPUTY CLERK: Counsel, starting with plaintiffs, please state your name for the record.

MS. GIBSON: Sujata Gibson, your Honor.

THE COURT: Good morning, Ms. Gibson.

MS. MINICUCCI: Lora Minicucci for the city of New York and the DOE.

THE COURT: All right. Good morning, Ms. Minicucci.

Any other appearances this morning?

All right. So just a couple of preliminary announcements before we get going:

First, I apologize to people for the delay in getting started this morning, but the delay was occasioned by the fact, ironically, of restrictions as a result of COVID-19. We're here to talk about the city's vaccine mandate for teachers and other employees of the Department of Education. I would just remind people that the court does have rules with respect to social distancing and masking. Anybody not following those rules will be asked to leave the courtroom.

Second, it is illegal to rebroadcast or publish live or record any portion of court hearings. If anybody does so, it will be reported to the Marshals, who will take appropriate

actions.

Now this case is pending in front of Judge Caproni, who has scheduled a hearing on the motion for a preliminary injunction for next Tuesday at 11 a.m. in her courtroom, which is Courtroom 443 of the Thurgood Marshall Courthouse. She will allow the parties the opportunity to file any additional materials. Any supplemental materials that the plaintiffs wish to file will be due on Thursday, October 7th, at 5 p.m., and any supplemental materials by the city or the other defendants will be due Friday by 5 p.m.

We're here today on plaintiffs' application made on an *ex parte* basis for an emergency temporary restraining order pending the hearing next week. Please bear in mind, I have carefully read all of the materials that were submitted to the Court yesterday. The Court received from the plaintiffs 12 affidavits, one from each of the nine plaintiffs, one from counsel, and an affidavit from two medical professionals who opine on matters that, in the Court's view, really have little to nothing to do with the issues framed by the motion for preliminary injunction.

Plaintiffs also filed a memorandum of law, and they did that on an *ex parte* basis, no notice given in advance to the defendants. The Court entered an order directing the defendants to serve any opposition by 8 p.m. last night, which they did, and I have carefully reviewed that opposition as

well.

So I will hear briefly from the parties, but please bear in mind that I have very carefully reviewed everything that has been filed.

All right. Who would like to be heard for the plaintiffs?

MS. GIBSON: I'm the only attorney here, your Honor.

THE COURT: Thank you.

MS. GIBSON: Thank you. Do you want me to go here or there?

THE COURT: Whichever is better for you is fine for me. Is there a microphone there?

MS. GIBSON: There is, your Honor.

THE COURT: Great. Thank you.

MS. GIBSON: So this case essentially brings us a few different questions. The threshold question is: Is a religious exemption required of these vaccine mandates? This case is not the other cases cited by defendants, which are about completely different issues. They're about whether, you know, broader rights of bodily autonomy allow any vaccine at any time; whether, you know, the right to work means no one can ever tell you you have to get vaccinated. That is not before this Court. What is before this Court is whether a religious exemption is required and whether this particular approach to it violates the law. So the Second Circuit injunction does

control on that issue of whether religious exemption is required. They just passed it last week, and they noted that they did uphold -- citing *Roman Catholic Diocese*, they did uphold the right, at least through a TRO, for this preliminary injunctive relief for health care workers to have a religious exemption.

THE COURT: All right. So a couple of things.

First of all, that case, that was, as you say, a TRO, and the case is going to be argued next week, I believe, correct?

MS. GIBSON: I believe the 15th, I think.

THE COURT: Okay. So there's not a final, on-the-merits ruling from the Second Circuit.

MS. GIBSON: Right, your Honor, but they did indicate --

THE COURT: Hold on.

MS. GIBSON: Sorry.

THE COURT: There is now an opportunity in this case for the teachers and other employees of the DOE to apply for medical exemption or a religious exemption. And by the way, in your comments, you've referenced only the religious exemption. Are you dropping your medical exemption argument?

MS. GIBSON: No, your Honor. Just in the interest of time, I'm focusing on that. But yes, there is.

So that brings us to the second point, which is

whether the religious exemption offered through the arbitration award is constitutionally sufficient. The plaintiffs have argued in great detail --

THE COURT: Hold on. You've just hit on a key point that neither side has briefed here, which is that the exemptions were put in place as a result of an arbitration award, which is the product of the collective bargaining process. It was not part of the original mandate, correct?

MS. GIBSON: Correct, and that's why I say facially the law is unconstitutional. As it's applied through this award, though -- which not all of the members are members of UFT -- but as it's being applied, it is unconstitutional, quite blatantly. What it does --

THE COURT: All right. But the point that you haven't briefed -- and I know you want to launch into the argument, but that argument that you want to launch into, you've fully briefed in your papers. What you haven't briefed in your papers is whether an exemption, which is put in place as a result of a collective bargaining process, is government action for purposes of asserting a constitutional claim; and second, whether, because there is the collective bargaining process, the individual teachers, as opposed to the union, have standing to even assert those violations. And that hasn't been briefed at all by either side, correct?

MS. GIBSON: No, it hasn't, your Honor. I would be

happy to put that in my supplemental materials. But one point I'm going to point out now is, we're attacking the whole mandate facially, so whatever happens -- whether this arbitration agreement was allowed to be made or not, you know -- it's not an agreement -- sorry -- it's an award. So it was made not as a result of agreement but rather it was an award through arbitration, so the question is can that be challenged -- can arbitration awards be challenged on constitutional grounds. My clients did not agree to this arbitration award. They did not agree to waive their rights not to be discriminated against facially when they hold religious beliefs that are in the minority or are, you know, personally held religious beliefs, which has been very clearly established as unlawful. You cannot say that only religious beliefs that the Pope sanctions are okay religious beliefs. It is just the most clear-cut Establishment Clause violation I've ever seen. But so the question of whether the arbitration award changes that I think is addressed in the fact that we're challenging this both facially and as applied. So --

THE COURT: I don't think that's a fair read of your papers. Your papers really challenge the application of the exemption, and as you say, the fact that apparently, in some of the appeals the arbitrator has said, apparently, or has taken the position, that if the recognized leader of a particular faith says there is no religious basis for objecting, the

exemption won't be granted, and, apparently, takes the position that one must belong to some kind of an organized religion.

MS. GIBSON: Actually, the award itself takes that position. It says very clearly -- and many people did not even apply because they were precluded from even applying if they didn't provide a clergy note or belong to a religion. Basically the mayor defined it as, if they weren't Christian Scientists or Jehovah Witnesses, he very explicitly said he would not grant it, and the arbitration award itself references you have to belong to a bona fide --

THE COURT: Counsel, somebody who doesn't bother to apply and avail themselves of the process -- and, frankly, this is the other problem that the Court sees with your application for a TRO and your failure to make out the elements, is that some of these plaintiffs didn't even file, or one of them didn't even file an application; some of them, their appeal is still pending; and some of them, as you say, didn't appeal the original denial. Now there are one or two who have gone through the whole appellate process.

MS. GIBSON: I'm sorry, your Honor. I just want to clarify something for the record. The declarations were not all from plaintiffs. Some of those people were just other affected people. We are intending perhaps some changes in the class action. Right now --

THE COURT: It's not a class action right now.

MS. GIBSON: But all the nine defendants did apply for religious exemptions.

THE COURT: Plaintiffs.

MS. GIBSON: Plaintiffs. Sorry. And they did file to appeal it, and half of them have been --

THE COURT: But that's not in the record then. If you're telling me the affidavits that you gave me are not all the plaintiffs, your representations about the state of the record or the state of the plaintiffs' appeals is not part of the record then.

MS. GIBSON: Well, your Honor, this has been happening very fast. Even since Monday, changes -- when we filed yesterday, changes have happened. This was all applied over the weekend. It was a very fast --

THE COURT: Yes, I know you applied over the weekend, after the mandate, as extended, went into effect, on a mandate that was announced at the end of August.

MS. GIBSON: Right. And decisions hadn't been made yet on everybody. But what I am saying is that defendants did put in their materials, that are sworn, that some of our plaintiffs have been denied, and they also put in that some are pending, and in our record it shows that not only are some pending but they were originally denied and then changed to pending in anticipation of this litigation. So I do find that facts concerning -- and I think I -- it's important to point it

out, but they did all apply, as they all said in their statements that they applied, and they all said in their statements that they appealed. They didn't have a decision at the time that we -- they didn't all have a decision at the time that we turned in our emergency motion, but they did all apply. So the --

THE COURT: Counsel, let me just ask you, because I know you want to argue the constitutional issue, but frankly, I'm not prepared to hear that today because I think there are some other threshold things that we need to talk about first. Specifically, I would like you to address the question of why these plaintiffs cannot be compensated with money damages if they were to ultimately prevail on their constitutional claim. So you're here seeking preliminary injunctive relief and, in the interim, from me, a temporary restraining order, so in order to prevail, you have to show irreparable harm.

MS. GIBSON: Well --

THE COURT: Let me finish. The effect of the mandate is not that the teachers are fired, as is the case in the health care workers case that's up in the Second Circuit and going to be heard in two weeks, but rather that they're placed on leave with all of their benefits, and they can then pursue their constitutional challenge in the case that you have filed, that you filed in the third week in September, and if they ultimately prevail, why can they not be fully compensated by

money damages? How can you show irreparable harm?

MS. GIBSON: Your Honor, to correct the record, they are not -- several of them have been fired; effective yesterday, they were fired, and placed on unpaid leave, where you can't get another job and you can't -- and you get health insurance. It is not sufficient. But I would say to your point --

THE COURT: Counsel, you're playing a game of semantics. What the remedy is for failure to comply with the mandate is, you're placed on administrative leave with benefits. Now you're calling that firing. I understand there are certainly implications of that, but that's different than the health care workers case.

MS. GIBSON: Your Honor, I would not agree that that is the consequence of the mandate. You have to make a separate agreement to apply for those, the status of being on leave with benefits, and you have to waive a whole lot of rights in order to do that, including the right to get another job or the right to a lot of other things. So people are scrambling, they haven't decided --

THE COURT: But counsel, those are all the issues that will be litigated in the case that you have brought. We are here on your application for emergency temporary relief.

MS. GIBSON: Yes, and I will speak to that.

So the Supreme Court has -- multiple courts have

stated that is a deprivation of constitutional rights. Being discriminated against openly and placed on unpaid leave or fired is certainly discrimination, and that alone, the ongoing discrimination against constitutional rights based on religious views that are in the minority or heretical -- as the dictionary definition of heretical is this UFT award basically says, if you're a heretic, you don't get the same treatment as everyone else -- that alone is enough. That is irreparable harm, and that has been affirmed by *Jolly v. Coughlin*, that has been affirmed by *Roman Catholic Diocese*, it was affirmed in *Agudath v. Cuomo*, it has been affirmed in *Tandon v. Newsom*. It's been affirmed in multiple contexts.

THE COURT: There are also cases that go on to say, if you haven't shown a likelihood of success on the merits, the presumption of irreparable harm may not attach.

MS. GIBSON: Sure. The most important thing in this case is likelihood of success on the merits.

THE COURT: Correct.

MS. GIBSON: Because if the -- there are multiple cases that say, in a constitutional challenge, if you show likelihood of success on the merits, you are presumed to have met the irreparable harm.

THE COURT: Right.

MS. GIBSON: Because, you know -- so, and that doesn't mean you have to prove that you definitely will prevail but

that you're likely to prevail, and so that is why it's so important to talk about the Constitution today, because the Second Circuit decision is controlling, and that it says, you know -- recognizes that they're likely to succeed. We're not saying that that means they're definitely --

THE COURT: What Second Circuit decision recognizes that these plaintiffs on this mandate are likely to succeed?

MS. GIBSON: That the concept of religious exemption is likely to succeed, in *We The People v.* --

THE COURT: There is a religious exemption. You're just quarreling or taking issue with the scope or how it's applied.

MS. GIBSON: Sure. I would be happy to talk about that. So that is the *Sherr* case, and there is a whole host of other Supreme -- of Supreme Court cases that say that any kind of hostility -- there's the *Masterpiece Cake* case and many others, like *Lukumi* and *Trinity Lutheran* and *Roman Catholic Diocese* and *Agudath* -- well, *Agudath* is the Second Circuit -- and *Tandon v. Newsom* and a host of other cases that have hit home the point that any kind of discrimination or any kind of negative talk about certain religious beliefs versus others or any kind of hint that there may be a, you know, impermissible lack of neutrality, either in reality or as perceived from statements from public officials that are passing these things makes it very likely that the provision will not succeed is

going to be very strictly scrutinized, even if it's neutral law of general applicability, and here we actually have --

THE COURT: And here, the law clearly is a neutral law of general applicability, is it not?

MS. GIBSON: No, it's not, because they're specifically saying, if you hold heretical, you know -- I'm going to call it heretical.

THE COURT: That's in the arbitration award. The mandate itself is a neutral law of general applicability, is it not?

MS. GIBSON: That's certainly something to -- no, I would not say it does. I think the *Roman Catholic Diocese* makes clear that that standard doesn't mean that it -- if it seems to apply to everyone, that it's neutral. The neutrality comes from the hostile statement. That's what -- general applicability --

THE COURT: The statements that you're calling hostile are about the exemption, which is part of the arbitrator's award, not part of the mandate.

MS. GIBSON: The statements that I'm calling hostile are the statements by the governor and the mayor that say that there's no valid religious exemption, objection to this. That is hostility towards religious views that conflict with the Pope's. He says many, many times over: Because the Pope has said that he's okay with vaccines, I hold the position that

there's no valid religious objection to vaccines.

THE COURT: But what the mayor said, with no disrespect intended to the mayor, is not the end of the process. Individual teachers can apply for the religious exemption. If it's denied, there is an appellate review process that the mayor is not a party to, other than in name.

MS. GIBSON: Every single one of these people who were denied, when they went -- if they were given, and a Zoom appeal, which I wouldn't really call adequate process, if they were -- every single one, even people who are Buddhists, not Catholic, they mention the Pope as the reason. The DOE mentioned the Pope in every single one of those hearings as the reason the person should be denied. I mean, I don't know how more clear-cut you can get as an Establishment Clause violation. We do not follow, you know -- the Pope, they have wonderful -- and he may be right that this is what god wants and Governor Hochul may be right that this is what god wants and we have to go after people who don't understand what god wants, but that is not the job of the state, and the state has to maintain the strictest level of neutrality, the government does, and we are seeing here hostility towards viewpoints that do not comport with the Pope's on a level that really shocks the conscience, and even in situations --

THE COURT: All right. Counsel, you have all of this in your papers. So --

MS. GIBSON: Even in situations where it hasn't been that there's these negative statements on top of the, you know, open hostility on top of limiting religious exemptions to vaccinations, you know, the Eastern District case, court case, *Sherr v. Northport Schools*, that case, well, you know, that's not necessarily controlling, although it was appealed and denied; it did overturn New York State law. So New York used to have a statute that limited, in the very similar fashion to the way that the DOE is applying this, limited the exemption, and in fact, you know, the *Sherr* case made them start over and say, no, you cannot -- do not have to have a certification from clergy, that's unlawful and unconstitutional, you can't be limited --

THE COURT: Counsel, I'm going to interrupt you because I told you at the outset we're not here today to argue the merits, the ultimate merits of your case, which is what you're doing. This may be even appropriate next week when you are due for your preliminary injunction. Today we're limited to why are you entitled, on an *ex parte* emergency basis, to the interim relief, and you're repeating all the arguments you've made in your brief. So unless you have something further, I have a trial about to start. I need to hear from the other side too.

MS. GIBSON: I do have something further, your Honor.

THE COURT: Briefly.

MS. GIBSON: As we discussed, irreparable harm is tied in this case to the likelihood of success, so that is why --

THE COURT: Correct.

MS. GIBSON: But in any event, once we get past that, even just the mandate itself, facially, without any religious or medical exemption, that mandate is not justified constitutionally. Then we have to, you know -- once you show that plaintiffs are entitled to constitutional protection, then the state has the burden of showing that it was necessary and the least restrictive means, and that is where my expert affidavits come in, very highly regarded public health experts, and they're prepared to --

THE COURT: Who speak largely to the due process argument that was at issue in the Eastern District case before Judge Cogan, and ultimately rejected. That's not the gravamen of your complaint here. So we're not going to spend the rest of the morning arguing about other cases.

MS. GIBSON: I'm not really familiar with the judge's decision in that case, but I would be happy to read it, but I'm just saying that the burden is on the state to justify that this is the least restrictive means, and I think the fact that this is a non-sterilizing vaccine, that we all recognize can't stop transmission, and the facts of this case --

THE COURT: I don't think that that statement is accurate, and that's what your affidavits go to, and again,

we're not here to litigate the merits or the demerits of the vaccine.

MS. GIBSON: Okay. So I will stick then only to one more thing, your Honor, which is I think very -- what you're asking me, which is, what other irreparable harm other than constitutional violations are these plaintiffs --

THE COURT: Alleged constitutional violations.

MS. GIBSON: Sure, yes, your Honor.

THE COURT: And no briefing on the issue that I raised with you about whether, since the exemptions were put in place as a result of the collective bargaining process and the arbitrator's award, it's government action; and second, whether there's any waiver, implied or otherwise, of the individual right to challenge the exemptions or whether that standing right belongs with the plaintiff. So that's not something you're going to be able to resolve today because neither side addressed it in your briefing, but it is an issue that Judge Caproni will need to hear about, I would think.

MS. GIBSON: Very helpful to know, and I will definitely brief that. At the outset, I will say that your constitutional rights always trump any other kind of arbitration. You cannot make a valid arbitration award or court decision that violates constitutional rights.

THE COURT: You can have an arbitration award that says you waive your constitutional rights, but the Supreme

Court has been very clear in *14 Penn Plaza v. Pyett* that you can waive an individual remedy, and that's the point I'm making to you: Is it the individual employees of the DOE who have the right to raise this issue or is it the union? I don't know the answer to that because nothing about this collective bargaining process and, frankly, nothing even about whether these plaintiffs were subject to or members of that union is before the Court right now. So I just don't know the answer to that.

MS. GIBSON: I would submit that that can't change their individual rights, your Honor.

THE COURT: I heard what you said, but I think there are legal issues about that that you haven't briefed, and frankly, neither did the other side.

MS. GIBSON: I would talk about the irreparable harm beyond the constitutional violations. So in the first place, even if you're accepted under this arbitration award, it still doesn't change that the mandate requires you to not enter any school building, so one of the central things we are challenging, accepted or denied, is whether that is a constitutionally permissible burden on people who have religious objections to vaccines. So if you can never enter a school building and you're a teacher, that is why it is relevant whether they are a direct threat to other people, whether it's justified as the least restrictive means to deal with --

THE COURT: Again, that goes to the merits, the ultimate merits, but I do believe, I do believe that there is case law out there that says that while you may have a constitutional right to pursue your chosen profession, you don't have a constitutional right to a specific job.

MS. GIBSON: Well, you can't be fired or prohibited from doing your job on the basis of your religious beliefs, though. So that is -- this is a discrimination case. So we're talking about reasons. So --

THE COURT: Counsel, you're constantly recasting what your case is about.

MS. GIBSON: I'll try to do a better job, your Honor, of being clear. I do think I was very clear in the papers that this is about discrimination and that First Amendment challenges are generally about discrimination, these ones particularly. But irreparable harm beyond not being able to go into the building, there's more. You know, these are teachers. They're living paycheck to paycheck. People are going, you know -- not able to feed their kids in the meantime; they're not able to, you know -- they may lose their homes. They don't have the kind of resources in tow that this is going to be limited to, oh, I can just be paid back later, I'll use my savings. These are teachers in the New York City public school system, many of whom are struggling to get by, and the effect of stripping them of their salaries entirely, their livelihood

and their ability to even, you know, go and do their jobs inside of the schools, is extremely damaging and extremely urgent for them. I have plaintiffs here today who have already suffered extremely, extreme stress, to the point that, you know, they're getting conditions they had before, like Bell's palsy --

THE COURT: I understand your arguments, counsel. It's in your papers, and I do appreciate your argument, and I understand what you're saying. I'd like to hear from the other side now, please.

MS. MINICUCCI: Good morning, your Honor.

THE COURT: Good morning.

MS. MINICUCCI: So the DOH, or the Commissioner of Health order, is facially neutral. Within the order, it says that religious exemptions and medical exceptions are permitted, and the arbitration, which was with the UFT, which was then extended to other unions, provides a framework by which people can apply for religious or medical exemptions and an appeals process, where they can be, you know, accepted or denied for their appeals.

THE COURT: All right. But counsel, what about the argument made on behalf of the employees that apparently -- and it does seem as though there's some support for this -- the position in the arbitration process is: The Pope says vaccines are okay so certainly if you're a Roman Catholic you can't have

a sincerely held religious belief that the vaccine is not okay. And there's also apparently some indication that you have to belong to an organized religion. Now I disagree with the characterization that it's only Jehovah Witnesses or Christian Scientists because the order says "*e.g.*," but it does seem to indicate that somebody who's an employee of the DOE and not a member of an organized religion cannot qualify for a religious exemption. So how is that not applying the mandate unequally on the basis of people's religious beliefs?

MS. MINICUCCI: So each of those inquiries is an individualized inquiry that has to do with the person's application and what they have said in their application, and then what is said in their appeal. I don't have access to plaintiffs' applications for their religious exemptions, but looking at their affidavits, there really isn't anything particularized about what their religious beliefs have to do with them getting the vaccine. There are a few details about the by-product of abortion, but really, there is no link made between the religious belief and what that sincerely held religious belief is and --

THE COURT: I don't think that's a fair characterization, counsel. I don't think that's fair. If you read the affidavits, there are certainly statements by some of these plaintiffs that that is a sincere religious objection to the way the exemptions are being applied.

MS. MINICUCCI: Yes. I understand that, your Honor, but what I'm saying is --

THE COURT: And they're being told that because the Pope has apparently said he doesn't have a problem with the vaccine, that at least if you're a Roman Catholic, you can't sincerely hold that belief.

MS. MINICUCCI: Okay. Well, that is, again, an individualized inquiry that has to do with the arbitrator who was hearing that appeal.

THE COURT: I think that's part of the question: is it being done on an individualized basis or is it being done as an across-the-board, not-narrowly-tailored exemption.

MS. MINICUCCI: I don't have that information, your Honor.

THE COURT: Who has the burden on that issue?

MS. MINICUCCI: I'm not sure. But in any event, the actual order from the Commissioner of Health is neutral, and to the extent that, you know, plaintiffs have exhausted their appeal, they can also file an Article 75 proceeding.

Furthermore, we've, you know, already litigated this case, or in the -- not this case, but this order was reviewed by Judge Cogan and the Second Circuit and an appeal was made to the Supreme Court, and that order was upheld.

THE COURT: Not on these precise grounds. Those were on the grounds that there's a due process right to control your

own bodily integrity and simply say, I don't believe in the vaccine and I don't want to take it. This complaint is brought on the basis, predominantly -- although there is a challenge to the medical exemption as well, as I understand it, but predominantly on the grounds of religious discrimination, which was not an issue in the case before Judge Cogan.

MS. MINICUCCI: That's true, your Honor.

And then I don't know, your Honor. Did you want to also hear about the actual process about whether they would be keeping their job or -- because that was in the order, that was what we were asked to brief, so if you had enough in our brief, then I won't.

THE COURT: Yes, I think your brief addresses it sufficiently for my purposes today. I will, you know, at the conclusion, give you some thoughts on issues that I see that the parties can decide whether you're going to brief it for Judge Caproni in connection with the hearing on the preliminary injunction next week. Today we're just talking about the temporary restraining order.

MS. MINICUCCI: Okay.

THE COURT: I raise it because I do believe it goes to the point of irreparable harm, and you did address it in your briefing.

MS. MINICUCCI: Okay. So I'll just conclude then by saying that, you know, the irreparable harm, as defined within

our brief, is being -- it will be remedied by money damages to the extent the plaintiffs are successful. The order, the DOH order is lawful. It allows for exemptions as amended on September 28th, and frankly, plaintiffs are now making this application after the mandate is in place, even though they filed their original papers on September 21, and we litigated two other vaccine cases completely, and those cases were appealed. Those appeals were heard and denied, and then they waited almost seven days before filing this.

THE COURT: Is the injunction seeking a mandatory injunction or prohibitory injunction?

MS. MINICUCCI: I'm not sure, your Honor.

THE COURT: Okay. That's another legal issue you all might want to brief.

All right. Anything else, counsel?

MS. MINICUCCI: No. Thank you, your Honor.

THE COURT: All right. As I say, the Court has carefully read all the papers that are before me today, and today, we are here only on plaintiffs' *ex parte* emergency application for a temporary restraining order pending the hearing on their motion for a preliminary injunction, which will take place next week.

Plaintiffs are nine employees of the Department of Education who filed this case on September 21st seeking to enjoin New York City's vaccination mandate for all DOE

employees. That mandate was announced on August 23rd. It was originally scheduled to go into effect on September 27th, but due to ensuing litigation, which these plaintiffs apparently did not join, and the collective bargaining process, implementation of that mandate was delayed to the close of the day, I believe, last Friday, October 1st.

In the complaint that they filed in this case, at paragraph 7, on September 21st, plaintiffs made the following statement: "Without relief, on or before September 27, 2021, plaintiffs and thousands of other New York City teachers will be harmed irreparably by loss of employment." They then go on to talk about alleged harm to the public at large, which I'm not sure these plaintiffs even have standing to assert. But in any event, the point that I'm making is, on September 21st, plaintiffs themselves affirmatively said that if they didn't get relief by September 27, there would be irreparable harm.

No defendant, to the Court's knowledge, was served with the complaint when this case was filed two weeks ago. To date there is still no proof of service on the defendants filed on the docket. In fact, the docket reflects that plaintiffs waited until 3:30 in the morning yesterday to request that summonses be issued for service on each of the defendants, and the Court does not know if the defendants have yet been served with a copy of the complaint.

Yesterday morning, October 4th, at approximately

8 a.m., after the mandate went into effect, plaintiffs moved for a temporary restraining order and a preliminary injunction, seeking to halt implementation of the mandate on the grounds of First Amendment violations, and they also appeared to challenge the medical exemption as being too narrow. That was filed around the start of the school day, as I say, after the mandate was already in effect. No explanation was given in the moving papers, as is required under the federal rules, for why the application was made *ex parte*, why no notice was given to the city.

Now turning to the merits, the Court does note that the mandate as issued contained no exemption for religious or medical reasons, and it's the Court's understanding that there is no testing option for teachers under that mandate. However, after the mandate was issued, one of the unions for certain DOE employees filed a grievance on behalf of its members, and as part of that bargaining process, a neutral arbitrator was put in place and ruled on the issue.

On September 10th, that arbitrator recognized a medical and a religious exemption from the mandate. The scope of those exemptions is set out in pages 7 through 9 of the arbitrator's decision. And the arbitrator also set out a process for applying for the exemption and for appealing from any rulings and also set forth a remedy. Specifically, the arbitrator ruled that employees who have not requested an

exemption or who have had their requests denied and do not receive at least one dose of the COVID-19 vaccine may be placed on administrative leave as of September 28. And as I say, that deadline was later extended to October 1st, last Friday. Those employees will be put on leave. They don't get a salary, but they are provided with full benefits until next September, and there is apparently some process in place to try to apply to extend that leave.

I just want to say a bit, for the record, about the plaintiffs.

All of the plaintiffs, as I understand it, are employees of the Department of Education, but as I noted in my colloquy with counsel, some of those plaintiffs still have appeals pending, some of those plaintiffs didn't even bother to apply at all for the exemption, but at least one of those plaintiffs has had -- and maybe more -- has had the appeal from their application denied and therefore are subject to being placed, and perhaps have been placed, on administrative leave. One of the plaintiffs does assert an entitlement to a medical exemption, and so there is a plaintiff with standing to address that issue. But I do note that that plaintiff has not exhausted the process for the application because the record, or at least her affidavit seems to reflect that she was told to submit additional information and has not done that. So there is a question about the ripeness of that issue right now.

I'm going to turn to the merits of the application that's before me today. And I start with the proposition that injunctive relief is an extraordinary remedy, never awarded as of right. I'll also note that the law draws a distinction between mandatory injunctions, which alter the status quo, and prohibitory injunctions, which maintain it. I asked counsel about this. The papers do not address this issue at all. But the Court sees an issue about the fact that given that the injunction had already gone into effect by the time this application for injunctive relief was filed, there's a question about whether the relief sought is a mandatory injunction or a prohibitory injunction that the parties have not fully and fairly addressed.

There is some suggestion that in determining whether an injunction is mandatory or prohibitory, the Court should look to the last -- and this is a quote -- "the last actual peaceable, uncontested status which preceded the pending controversy." That would certainly suggest that perhaps the status quo is the set of circumstances that were in effect before there was a mandate. On the other hand, since the plaintiffs waited until after the mandate went into effect, there is case law that says if a plaintiff waits to contest the change in circumstance, the relevant status quo may also change. And I am referring to a case called *Williamson v. Maciol*, 839 F. App'x 633. That's a 2001 case.

Turning to the elements of an application for a temporary restraining order -- and the elements are the same with respect to both an application for a temporary restraining order and ultimately for a preliminary injunction -- in order to prevail on that motion, a plaintiff must demonstrate: (1) irreparable harm if an injunction is not entered; (2) a likelihood of success on the merits or sufficiently serious questions as to the merits, plus a balance of hardships that tips decidedly in the plaintiff's favor; (3) a balance of hardships that tips in the plaintiff's favor regardless of the likelihood of success; and (4) that an injunction is in the public's interest.

I'll begin with the requirement for irreparable harm. The law is well settled that irreparable harm is the single most important prerequisite for issuance of injunctive relief. And I would cite you to any number of cases that stand for that proposition. I don't think it's controversial, frankly. I'll refer you to the case of *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). But you can also look at Wright and Miller's *Federal Practice and Procedures*, Section 2951, Third Edition.

The case of *Jolly v. Coughlin*, which was referred to by counsel for the plaintiffs, reported at 76 F.3d 468, 482 (2d Cir. 1996), did say that a court will presume the existence of irreparable harm when the plaintiff alleges a violation of a

constitutional right. However, as I discussed with counsel, if a court finds it unlikely that a plaintiff will succeed on the merits of the constitutional claim, the argument that he's entitled to a presumption of irreparable harm based on an alleged constitutional violation is without merit. I'll explain in a few minutes that I cannot find on the record before me that plaintiffs are likely to succeed on the merits of their claim. I'm not saying they won't; I'm saying on the record before me, plaintiffs have not made an adequate showing to entitle them to a temporary restraining order. As a result, no presumption of irreparable harm attaches here. Instead, we look to the actual harm the plaintiff is asserting.

As I've said, as a result of non-compliance with the mandate, plaintiffs are placed on unpaid leave with benefits, including health care benefits. If plaintiffs ultimately prevail on their constitutional challenge, the alleged injuries are entirely compensable by money damages. I'll just note as well that the Court finds this case is different than the harm in the health care workers case. I'll also note that the Second Circuit -- I think I said this a few minutes ago -- the Second Circuit has scheduled argument for I believe October 14th in two cases involving the vaccine mandate.

I would note, too, that plaintiffs' delay in seeking relief on a mandate that was announced in late August, and where they themselves said they needed to get relief by

September 27th and yet waited until after the mandate went into effect to bring on this motion, undercuts their burden to show irreparable harm.

The Court is also mindful of the potential harm -- actually, the very real harm -- that could flow to the city were I to grant temporary injunctive relief. If I were to grant injunctive relief today pending the hearing next week, there could be an enormous disruption in the conduct of school for thousands of New York City schoolchildren. The plaintiffs will have a full opportunity to be heard on an appropriately developed record next week when they have a hearing before Judge Caproni.

In addition, the Court cannot ignore the harm that could take place if the children in the school system were exposed to the risks of COVID, which is the very harm that the mandate is intended to prevent. If that harm happens, it's a harm that cannot be undone.

Turning to the likelihood of success on the merits, the Court also finds, as I say, that on the record before me now, plaintiffs have not met the burden of showing likelihood of success on the merits. The mandate on its face is neutral and it is generally applicable, and that's what the Supreme Court says is required. Now the Court does acknowledge that the exemptions arguably might raise serious issues in terms of how they are being applied and, most particularly, since that's

the argument that was developed in the record before me, the religious exemption may well raise substantial constitutional issues. The Court notes that the Supreme Court said in *Masterpiece Cakeshop v. Colorado CR Commission*, "The government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon, or presupposes the illegitimacy of, religious beliefs and practices."

Justice Ginsburg, although it is a dissenting opinion, in *Trinity Lutheran v. Comer*, made the observation that faith, they believed, was a personal matter entirely between an individual and his god. Religion was best served when sects reached out on the basis of their tenets alone, unsullied by outside forces, allowing adherents to come to their faith voluntarily. And similarly, in *Engel v. Vitale*, the Supreme Court noted religion is "too personal, too sacred, too holy to permit its 'unhallowed perversion' by a civil magistrate."

And plaintiffs do correctly point to the 1987 Eastern District case that dealt with this precise issue and held that the New York statute's limitation of a religious exemption from vaccinations to those who are members of recognized religious organizations is blatantly violative of a First Amendment guarantee, and that's *Sherr v. Northport*. And that case does not appear to have been appealed.

But as I said earlier, the religious exemption that's at issue here was put in place by a neutral arbitration in response to a labor grievance that was brought by certain other parties not before the Court pursuant to a collective bargaining agreement, as the Court understands it. That collective bargaining agreement is apparently a public-private agreement, and again, it is not before the Court, but there is a significant legal question that neither side has addressed about whether the exemption is issued as part of a government action and can therefore be the basis for a constitutional challenge. Also not addressed by the parties is: does the collective bargaining agreement preempt, in effect, claims by individual plaintiffs and instead require that any claim has to be brought by the union itself. The Court honestly doesn't know the answer to that because I don't have any of the documents in front of me. But that is a significant issue that goes to the ultimate merits of the case.

As I say, there may well be questions, serious questions, about the impact on the plaintiffs' constitutional rights here, but on the record before me, the Court cannot find that plaintiffs have met their burden of showing a substantial likelihood of success on the merits in light of these questions.

The final element that plaintiffs need to carry the burden on is that the balance of equities weighs in their

favor. Where the government is the opposing party, the Court notes that the final two factors in the temporary restraining order analysis -- the balance of the equities and the public interest -- merge. Here, I do find that the balance tips against the plaintiffs because of their delay in bringing this application. Plaintiffs knew that the mandate would go into effect over a month ago, and they waited until after the mandate was already in effect to take action. Moreover, there can't seriously be a dispute that there is a compelling government interest that is served by the mandate.

Numerous courts have held that the government's interest in minimizing the spread of a deadly infectious disease is a compelling state interest. I note too again, as I said a moment ago, there are two pending Second Circuit cases that could serve to moot the issues in this case as well. Given the imminence of a decision in those cases, the Court does not believe it's appropriate to entertain or grant at this point a motion for extraordinary injunctive relief sought on an *ex parte* basis.

So for those reasons, the plaintiffs' application for a temporary restraining order is denied.

As I said at the outset, Judge Caproni has scheduled a hearing to take place next Tuesday. If there's not an order yet in place, we'll take care of making sure that one does get entered, but I've mentioned to you some of the issues that I

think need to be addressed more fully in order for plaintiffs to meet their burden.

That is the Court's ruling. It is so ordered. And we are adjourned.

MS. GIBSON: Thank you, your Honor.

THE COURT: Thank you.

MS. MINICUCCI: Thank you, your Honor.

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APPENDIX E

LacWkanD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MICHAEL KANE, *et al.*,

Plaintiffs,

v. 21 Civ. 7863 (VEC)

BILL DE BLASIO, *et al.*,

Defendants.

Decision

----------x

New York, N.Y.
October 12, 2021
11:00 a.m.

Before:

HON. VALERIE E. CAPRONI ,

District Judge

APPEARANCES

SUJATA S. GIBSON
MARY HOLLAND
Attorneys for Plaintiffs

GEORGIA M. PESTANA
Corporation Counsel of the City of New York
New York City Law Department
Attorney for Defendant City of New York
BY: LORA MINICUCCI
AMANDA C. CROUSHORE
JESSICA GIAMBRONE
Assistants Corporation Counsel

(Case called; appearances noted)

THE COURT: Everyone please be seated.

OK. Let me start, for everyone, and this is both for the people who are present in this courtroom, people who are on the telephone and people who are in the overflow courtrooms, I want to lay out the rules of the road.

First, if you're on the telephone, you may not record or rebroadcast this proceeding. We've allowed a telephone hookup to accommodate constraints on the number of people who can be in the courtroom, but I am not permitting it to be recorded or rebroadcast. If you record it or rebroadcast it, you're in contempt of court, and it will be dealt with accordingly.

Second, let me remind everybody who is present in this courtroom or in any of the overflow courtrooms, the standing order of the Southern District is that you must wear a face covering. It must cover both your mouth and your nose. This is your warning on that front. If you let your mask fall below your nose, whether in my courtroom or any of the overflow courtrooms, the court security officers have been directed to immediately remove you. They're not going to warn you. You've been warned now. You must keep your face covering over your nose and your mouth.

Lastly, let me just say that for all the people in my courtroom as well as in all of the overflow courtrooms, you

must behave in accordance with the rules of decorum that are appropriate for a courtroom. That means there can be no outbursts and no talking. If you're in an overflow courtroom or in my courtroom and you do not think you can abide by that rule, let me encourage you to leave now and to call in on the phone number so that you can participate by listening.

I'm going to give you the call-in number again. So if you're somebody who does not think that you can maintain decorum if something happens during this hearing that you don't like, I'm encouraging you to leave now. The call-in number is 844-291-5489. The access code is 9438556. And as with the issue of wearing face coverings, the court security officers have been directed that there is zero tolerance for misconduct in the courtroom, whether you are physically in my courtroom or you're in an overflow courtroom.

That's it for the preliminary matters. Let me turn first to the issue of witnesses.

Ms. Gibson, you have indicated a desire to call a whole bunch of witnesses. I'm not quite sure what the purpose of that would be, so can you tell me; can you give me a proffer for what, understanding you were going to update what has happened with some of the plaintiffs via the appeal process, what else did you want people to testify to?

MS. GIBSON: Your Honor, primarily with the witnesses, if it would be acceptable to counsel and the Court, I could

just put in additional declarations rather than waste time on having a full hearing, but I just wanted to update. Almost all of them have been denied at this point, which wasn't the case when we first filed.

As to Amanda Ruiz, she was going to testify about the conditions in one of the schools where the plaintiff teaches now that the plaintiffs and others have been removed from the school, which goes to the public interest element of this analysis.

THE COURT: OK.

MS. GIBSON: I did submit a declaration from her in lieu of testimony.

THE COURT: I saw it. I'm going to ask you if you can stand up when you talk, because otherwise I can't see you.

MS. GIBSON: Oh, my goodness. I'm sorry, Judge.

THE COURT: It's OK.

MS. GIBSON: And as to the expert witness, that would just be going to really the substance of their declarations, but going to the issue of whether the plaintiffs constitute a threat based on their vaccine status and the significance of that threat.

THE COURT: OK. So they weren't going to add to their declarations; they were just going to reiterate what they'd already said in it.

MS. GIBSON: I would say so, your Honor, yes. It

would give the other side a chance to cross-examine them and so forth.

THE COURT: I really don't think that's necessary. I've read all the affidavits, and I understand your point that some of the plaintiffs who had not previously been denied have now been denied, so I don't think their testimony is required.

MS. GIBSON: Thank you, your Honor.

THE COURT: All right. This is your motion. Would you like to be heard?

MS. GIBSON: Thank you.

Your Honor, we're here today challenging two overarching policies of the defendants. The first is a policy promulgated by Mayor de Blasio, Commissioner Chokshi and implemented by the Department of Education, which is the overall vaccine mandate for teachers, which requires, among other things, that nobody who is unvaccinated is allowed to go into any school building as of October 4, 2021, and that includes people who have religious or medical accommodations pursuant to the other policy we're challenging.

On its face defendants have pointed out that there is a clause that says legally required accommodations are not necessarily excluded from consideration, but in practice, the city has made very clear that they do not consider religious accommodations to be a valid reason to have to legally excuse someone from the requirement.

THE COURT: That means if the religious exemption has been granted.

MS. GIBSON: I'm still just dealing with the overarching view of the Commissioner Chokshi policy. That doesn't even really provide for religious or medical exemptions. That was challenged then by the union and an arbitration award did provide for limited religious and medical exemptions, but the DOE has implemented it in a manner, and facially that policy which the DOE has implemented is facially discriminatory against anyone who holds beliefs that are outside of certain dogmas of certain religions. And both that policy and the overarching policy were promulgated amidst a flurry of hostile statements by the mayor and by representatives of the DOE.

THE COURT: I looked at your papers, and I didn't see -- the mandate was issued in late August. The only thing that you cited prior to that, so when you say it was announced amidst a flurry of antireligious statements, the only statement you quote in your papers is from August the 3rd that preceded the announcement of the policy.

Is that what you're relying on?

MS. GIBSON: Well, that was the first, one of the first statements, but the mayor and the governor both went on record many times saying that they do not believe, and afterwards saying that they do not believe that religious

exemptions are legitimate to --

THE COURT: Well --

MS. GIBSON: -- that there's no legitimate religious reason to opt out of the vaccine and they, many times, mentioned the Pope, which later the DOE, and that's where the declarations come in, each of the plaintiffs, when they were in their Zoom appeals, the DOE attorneys repeatedly, over and over, the representatives of the DOE would mention the Pope as the reason they should be denied.

THE COURT: That appears to be an as-applied argument.

Do you want to just start on the facial validity or invalidity? You mentioned that it was promulgated amidst a flurry of antireligious statements, so I'm trying to nail you down on that. What exactly are you referring to? Because the only thing in your papers that was around the time or preceding the announcement is this transcript from Mayor de Blasio when he announced generally that you need a vaccine, if you're in New York City, to do just about anything. But there's nowhere in it that references religion.

MS. GIBSON: Your Honor, I do apologize. I can go back and look at the record and pull out a few other examples, but I do believe that there were some news articles from that time, right after it was promulgated, where the mayor came forward and said that there are no valid religious issues for exemption and that the Pope is very much in support of

vaccination, and so he takes the position that, therefore, nobody's religious beliefs that are contrary to the Pope's would be valid.

THE COURT: OK. But again, do you have anything other than the August 3 transcript of Mayor de Blasio's interview, which is silent on religion, that suggests hostility to religion at or before the time the mandate was announced?

MS. GIBSON: I believe I do, your Honor. I'm just looking for it. The complaint discusses it, I believe, and then also, my motion papers.

THE COURT: What paragraph of the complaint particularly?

MS. GIBSON: Your Honor, that's a fair question, and I just wasn't prepared for it. I'm sorry. But I do have several articles, one from Spectrum.

THE COURT: Dated what?

MS. GIBSON: So, in exhibit 17, 17-1 -- sorry, I mean 17-3, -4, -5 and -6.

THE COURT: 17-3 is October 3. 17-5 is September 15. 17-4 is September 26.

MS. GIBSON: Well, your Honor, my understanding of this law is that it doesn't -- I mean of animus, the indicia of animus is it doesn't have to be preceding the promulgation of the rule. It can also come afterwards, like it did in the *Masterpiece Cakeshop*, where the court held that

post-deprivation statements or during the time --

THE COURT: That's not true. Those statements were made at around the time they were considering. It was an as-applied challenge.

MS. GIBSON: I'd be happy to have a hearing on the factual issue of whether there was others.

THE COURT: None of the witnesses that you proposed can speak to this.

MS. GIBSON: I do believe, your Honor, that my witnesses can speak to the animus that they received from the DOE.

THE COURT: That was after this mandate was announced. Right? I mean you're making a facial challenge, and you said, the first thing out of your mouth almost, was it was promulgated among a flurry of antireligious comments; that's almost a quote. So I'm trying to see if you actually have anything to back that up, and it sounds to me like the answer is you do not.

MS. GIBSON: Well, your Honor, I believe there's an article with the mayor and the governor discussing passing this together, and then another article sharing the governor's very clear stance on this issue.

THE COURT: Well, there's no question that the governor has suggested that she believes that people should get vaccinated. That's clearly her statement. But that's not what

you're challenging. You're challenging the city's mandate. The governor didn't have anything to do with the city's mandate.

MS. GIBSON: I would counter that, your Honor. I mean the governor and the mayor, and there is an article in here, in No. 17, as well, the governor and the mayor sat down right before August 24, when this was promulgated, and they announced that they were together passing initiatives on the state and city level to ensure that there would be no exemptions for vaccinations.

THE COURT: Whoa, whoa, whoa. Please tell me where that is in the record, because I don't remember that.

MS. GIBSON: So, exhibit 3 of --

THE COURT: 17-3?

MS. GIBSON: 17-3 is a Spectrum article, and I'm going to get to the next part. Exhibit 3 is the Spectrum article from August 24, which is the date this mandate was passed, and in that article the mayor and the governor announced that they'd been meeting regularly and were both going to be working in concert to enact regulations that would protect the public health with vaccination.

The second --

THE COURT: Where? Where? Whoa, whoa, whoa. Can you direct me to a paragraph?

This is a kumbaya article. This is saying that the

mayor and the new governor have sat down, they've worked together, they're happy.

MS. GIBSON: And it says they're going to work in coordination to protect the public health.

THE COURT: OK, but that --

MS. GIBSON: So then --

THE COURT: First off, it says -- what you quoted -- the mayor says vaccine mandates are on his to-do list.

MS. GIBSON: Right. The timing --

THE COURT: Nothing in there suggests hostility to religion.

MS. GIBSON: So, correct, your Honor.

THE COURT: OK.

MS. GIBSON: But then the next article, The New York Times article, the NPR article and, I believe, the Post article, discuss -- oh, the Post and the Gotham article then discuss the mayor's open hostility towards people who have religious beliefs that aren't in line with the Pope's.

THE COURT: The Post article, what's the number on that one?

MS. GIBSON: No. 7, your Honor.

THE COURT: All right. 17-7. Here's the issue with 17-7. One, it's hearsay. Right?

Two, it doesn't actually quote the mayor. It says de Blasio has said the religious exemptions would also be limited

to "two well-established religions: Christian Science and Jehovah's Witnesses, that have a history on this of religious opposition."

They're not quoted. The newspaper article says the mayor warned those exemptions would be rare. So I don't know exactly what the mayor said, but in any event, this was after the arbitration award. This was after the arbitrator had determined that there would be exemptions.

MS. GIBSON: I believe it shows that the mayor does not believe that they -- he has made other comments as well, and I'm happy to gather them. But the mayor has gone on record.

THE COURT: Tell me. This is your opportunity.

MS. GIBSON: The mayor has gone on many times stating that, just as Governor Hochul has, that there aren't valid religious objections to vaccination; that it's illegitimate.

THE COURT: That's an as-applied challenge, right?

MS. GIBSON: I don't know. I believe that that shows animus and legitimacy.

THE COURT: Why does it show animus? Why does it show animus that the mayor says, in his view, there are going to be few religious exemptions because major religious leaders, which would deal with a vast majority of people, have all said it's OK? That's not to say that there's not any religious leader anywhere or any religious person anywhere that believes, as a

religious matter, they can't take the vaccine. But saying they don't think this is going to be common because there is widespread, from established religions, acceptance and support of the vaccines does not -- I'm having difficulties getting from that to hostility to religion.

MS. GIBSON: Your Honor, I think *Masterpiece Cakeshop*, *Lukumi* and a number of other cases talk about any comments that would call into question the city's neutrality on the legitimacy of religious viewpoints. So it's not just religions. But the mayor has gone on the record. The governor who is -- I think the circumstances do lead to indicia of animus and working together because not only did they announce they're working together, two days after this mandate from the New York City Department of Health was issued, a parallel mandate was issued by the governor through the state department of health.

THE COURT: Do you have any evidence that those were coordinated?

MS. GIBSON: I believe that the Spectrum article leads --

THE COURT: No.

MS. GIBSON: -- to the inference that they were.

THE COURT: OK, but remember, you're the plaintiff. You're asking for extraordinary relief, so you've got to show a substantial likelihood that you're going to prevail on this

argument, and you're relying on a Spectrum -- I'm not quite sure what Spectrum is, a Spectrum article that's hearsay.

MS. GIBSON: Your Honor, in terms of animus, I believe that in a preliminary injunction hearing, hearsay is appropriate as published by the papers.

THE COURT: It may be if you can tell what the context is. There are certainly times that I would say that's good enough, but here, they tell nothing about the context in which the statement was made, and you're relying on statements that are not quotes. So even assuming that the reporters are reliable and responsible journalists, you don't have a full quote.

MS. GIBSON: We do have a quote, your Honor, from the mayor saying that only Christian Scientists and Jehovah's Witnesses will be considered.

THE COURT: That's not really what he says. Again, I just read that quote into the record. You're quoting the Post article, which isn't a quote at all.

The other article, which I just quoted, has the piece that says religious exemptions would be limited to Christian Science and Jehovah's Witnesses. That piece of the sentence is not in quotes.

MS. GIBSON: OK, your Honor. It was reported on by multiple papers, the Gothamist paper --

THE COURT: I did not myself go out and hunt for

statements. I relied on what the plaintiffs presented me.

MS. GIBSON: Understood, your Honor.

I would then say that additional indicia of hostility and animus was those with religious beliefs against vaccinations can be found in the conduct that the Department of Education, both within the hearings and also in response -- so one of the things that happened that the plaintiffs, many of them, did report on -- and I can bring them up to testify some more if you'd like -- is that in nearly every appeal, the Department of Education was advocating for them to be denied on the basis that the Pope does not believe in vaccination -- or does -- has been vaccinated, and this was even said to Buddhists. This was even said to, you know, people who are not Catholic.

THE COURT: But then what do you make of the DOE's affidavit that says they've granted more than 20 for a wide variety of expressed religious beliefs?

MS. GIBSON: Well, I'm not sure really on what basis. Facially, the arbitration award itself, which they've adopted as their policy, so they can't say that it's not.

THE COURT: Well, let me ask you about that. Did they? The city's position was no exemptions. You must be vaccinated, period, end. The union objected. They hit an impasse, and per requirements of the collective bargaining agreement, they then ended up in arbitration. The arbitrator

said this is how it's going to be implemented.

So what was the city supposed to do? Or what was the union supposed to do?

MS. GIBSON: The city couldn't even avoid liability for discrimination when they implemented a state standard, state-required test on teachers in the famous case of, I believe -- I'm sorry. I'll get the citation for your Honor, but it's just been settled after 20 years, where teachers -- there was a discriminatory impact from the state-required tests, and the Second Circuit held that it wasn't enough for the city to say, Well, this is required by the state.

I don't see how in this instance, when they have implemented a facially discriminatory policy, which really on its face --

THE COURT: How is it facially discriminatory? How is the mandate facially discriminatory?

MS. GIBSON: The UFT award is facially discriminatory.

THE COURT: OK. On that, why are you the right person to sue? Why isn't that the obligation of the union, and at best what your claim might be -- and it might be; I haven't really agonized over it -- a claim against the union for not providing appropriate representation of its represented members?

MS. GIBSON: No, your Honor. The plaintiffs against the DOE, as the employer, who has the responsibility as the

state, not to enforce discriminatory laws against my clients who have personally held religious beliefs and are excluded from the protection of, you know, reasonable religious accommodations on the basis of the type of religion that they practice. So if they're not a Christian Scientist or a Jehovah's Witness -- and, you know, frankly, the DOE's response that they've granted these exemptions to 20 people is also hearsay, and we haven't talked to those people or determined on what basis they said yes to them versus our clients, who really were told point-blank that they cannot get relief if they have personally held beliefs or if they do not submit a letter from clergy.

That's facially discriminatory, and so the reason that the union is not the appropriate party is that this is the state's responsibility, and they can't sidestep this by saying -- the union didn't agree to this award either. This was an arbitrator, with whom I would push back on the assertion that it's a neutral arbitrator. I did include two articles about Arbitrator Scheinman's relationship as a fund-raiser for the mayor. But in any event, once the state implements a facially discriminatory award, that facially discriminates against my clients, they have a right to sue the state.

THE COURT: OK. You don't think they have an obligation to start by filing an Article 75 to challenge the award?

MS. GIBSON: No, your Honor. In fact, I think the case law is pretty clear on that with the -- they haven't waived their right to proceed.

THE COURT: They haven't waived their rights. There's no question they have not waived their rights.

MS. GIBSON: And the appropriate place to challenge constitutional issues is not within an Article 75 proceeding. An Article 75 proceeding can't really even deal effectively with constitutional issues. It has very narrow grounds for relief.

What we're challenging is the constitutionality of the state imposing on these teachers a facially discriminatory requirement that they have to belong to only certain religions, which violates both the establishment clause and the free exercise clause.

THE COURT: That sounds like you are not challenging the mandate, that you've abandoned your challenge to the mandate.

MS. GIBSON: Your Honor, we are challenging the mandate.

THE COURT: The mandate is neutral. Do you agree that the mandate, as promulgated by Mr. Chokshi, is neutral? It says you must be vaccinated.

MS. GIBSON: No, your Honor, I wouldn't agree, but I do think that the indicia of animus is there. I'm happy to

supplement it and bring another motion with more materials on that issue, but at the -- I am, we are challenging both. I mean it also has a disparate impact on people who have religious beliefs. It's burdening their rights in a way that is not --

THE COURT: But again, if you go back to the jurisprudence of how you evaluate something that has a First Amendment impact, if you look at Chokshi's mandate, it is neutral as to religion. It applies to everybody. It applies to people regardless of why they're not vaccinated. You've got to be vaccinated if you're a DOE employee, period, end. That is a sort of prototypical neutral position, isn't it?

MS. GIBSON: I would say not in light of the comments, but also, I would say not in light of the fact that people who only have one dose of the vaccine are allowed to go in, even though they're not fully vaccinated.

THE COURT: But what does that have to do with the religion? How does that make the mandate not neutral from a religious perspective?

MS. GIBSON: For example, in *Roman Catholic Diocese*, the court held that it wasn't neutral because, *v. Cuomo*, that they weren't neutral because there were secular activities that were excused.

THE COURT: But that was on the statute itself or on the executive order itself. It distinguished between houses of

worship and secular activities, so on its face it was not neutral.

Again, what about Chokshi's mandate, on its face, is not neutral, other than your claim that there were hostile statements made, which you have no evidence of in the record?

MS. GIBSON: I believe that the neutrality goes to if you have a religious need to not be vaccinated, it is just arbitrary to discriminate between --

THE COURT: But that's an incidental effect on the religion. It's a neutral statute that has an incidental effect on some people. Right? That's the definition of it.

Look, there are two different ways of making a First Amendment analysis. One is is it a neutral statute that has incidental effect on religion? If so, it has to be rational. It has to pass the rational relationship test. We'll get to that in a second.

The second is if, on its face, it discriminates or it makes distinctions between religious and nonreligious. That's subject to strict scrutiny. Right?

OK. So we agree on the basic structure of First Amendment law.

MS. GIBSON: Well, general applicability is the second thing, so this vaccine mandate is not generally applicable to those who are only vaccinated with one dose of a vaccine. They're not fully vaccinated, but they're allowed to be in the

building.

THE COURT: What does that have to do with religion?

MS. GIBSON: Well, religious people are not allowed to be in the building although they also aren't fully vaccinated.

THE COURT: Again, saying someone who has a political objection isn't allowed in the building either if they're not vaccinated.

MS. GIBSON: I don't believe the standard is that everybody, only religion has to be excluded. I believe if there's anybody excluded for a secular purpose, that that could go towards general applicability. But again, going back to the indicia of animus, I think that the fact that unvaccinated people who have only had one dose are allowed in the building but people with religious exemptions are not --

THE COURT: On the one dose, aren't they required to get the second dose; there's like a time frame and by X point you have to get the second dose too?

MS. GIBSON: Yes, your Honor, but October 4 that wasn't in effect. It doesn't make any sense why starting October 4 they wouldn't be allowed in.

Also, just so I can clarify my argument for the Court and I don't waste your time, is the Court's taking the position that Governor Hochul's quite blatant statements about the illegitimacy of people who hold opinions different from hers about what God wants according to vaccines not relevant here?

THE COURT: What she had to say had nothing to do with Chokshi's mandate. Chokshi's mandate preceded that by a month and a half, and it's a city mandate, not a state mandate.

MS. GIBSON: Well, it was on the eve of -- both mandates were passed through the DOE after Governor Hochul and de Blasio announced that they were working in partnership, within two days of each other. Both mandates were supposed to take effect on September 27. Both mandates were highly controversial in that they negated any religious exemption, and Governor Hochul actually went forward and said she did that on purpose, which is recorded in the NPR article, Dkt. 17.

THE COURT: That's the healthcare mandate. You're representing the teachers.

MS. GIBSON: And my position, or plaintiffs' position, is that these were promulgated in concert.

THE COURT: You might be able to prove that at some point, but you certainly haven't proved it for purposes of preliminary relief.

MS. GIBSON: Understood, your Honor.

And then we would take the position that later statements and just open hostility towards those who get religious exemptions or who are denied because the Pope, you know, does not agree with them, they do indicate hostility towards those with religious beliefs. The mayor, whether or not he said it openly on August 24, he certainly said it later,

that he doesn't believe that there are legitimate reasons for vaccination.

THE COURT: He doesn't believe there are legitimate reasons for vaccination?

MS. GIBSON: Sorry. Religious exemptions for vaccination, religious objections to vaccination.

THE COURT: Or he says he doesn't believe there are going to be many.

MS. GIBSON: I believe the Gothamist and the Post article both also reference the Pope. Am I mistaken, your Honor?

THE COURT: I don't know whether it does or not, but saying that he doesn't anticipate a lot of objections because there is widespread acceptance within many religious communities is not saying he's hostile to other religions. It's just a statement in the context of what impact is this going to have? I don't think it's going to have a big impact because most religions say there's nothing wrong with the vaccine. That doesn't suggest hostility to religion.

I'm struggling, again, to get from what you've quoted, the limited quotes that you have, that are quotes to hostility. What I read the Pope -- not the Pope. What the governor and the mayor, but the governor's statements that are not all that significant. What the mayor is saying I don't anticipate a lot of it, because there was a lot of discussion at the time about

what kind of impact is this going to have on DOE.

MS. GIBSON: Your Honor, I think read in connection with the UFT award and how it was implemented by the DOE, you know, reading statements like only Jehovah's Witnesses and Christian Scientists have a prayer for relief, and sure, it's not in quotation marks, but it was reported on by both the Gothamist article and the Post article does clarify that the intention is to deny -- when you look at the UFT arbitration award, which also says the same thing, that people will be denied if any religious leader within their proposed religious belief system, as applied by the DOE, if they think any religious leader has ever come out in favor of vaccination, they're going to be denied, if they have personally held beliefs that conflict with the Pope's, they're going to be denied.

THE COURT: You do agree that DOE has a right to separate out people who have genuinely, sincerely held beliefs from people who are just politically objecting?

MS. GIBSON: Yes, your Honor.

(Indiscernible overlap)

MS. GIBSON: And I would point to Mr. Kane's declaration in which he describes how when the arbitrator asked whether the DOE objects to his, the sincerity of his beliefs, they didn't even know that that was part of the inquiry. They said again, No, we just think that -- you know, we would like

him to be denied because the Pope is in favor of vaccination, and he doesn't have a clergy letter. So this isn't about sincerity. I'll also point out --

THE COURT: Again, that's your as-applied argument.

MS. GIBSON: Yes.

THE COURT: It would help the record if you could keep these two separate, because they are truly separate arguments.

MS. GIBSON: Sure. I understand, your Honor. I'll try to do that.

So, I would, as applied, as a general policy, not even just to these individual plaintiffs, I would say that the department -- it's quite clear that the department adopted a policy of denying, in conjunction with the facially discriminatory UFT award, of attempting to deny anyone protection who has religious beliefs that would be, would meet the dictionary definition of a heretic, or heretical, somebody whose beliefs conflict with established religious dogma, which violates the establishment clause.

THE COURT: OK.

MS. GIBSON: So I do think that that's been established in this motion, but also, they denied everybody at the outset. That's another part of this motion.

The DOE issued blanket denials to every person that applied, stating that it would be an undue burden to accept any religious exemption given that the commissioner's mandate

doesn't allow them to be in the building. And so on that basis, they categorically said religious exemptions shouldn't be granted to anybody. Then the appeals process unfolded.

None of my plaintiffs were given the impression that the process could really challenge the constitutionality of it, and indeed, it can't, because the arbitrators are bound really to that agreement. But the DOE then aggressively advocated to have them denied based on discriminatory reasons.

Then after that, they implemented a policy where anybody that they had denied as having personally held religious beliefs -- and nobody was told that they were being denied because they were insincere, by the way. But everybody whose religious beliefs were deemed invalid by the DOE or the arbitrator, for whatever reason, because they weren't actually given a reason, was then subjected to very harsh treatment, some of them -- all of them policies adopted by the DOE. They're not allowed to be paid. They're not allowed to get unemployment insurance. They're not allowed to even use their accrued vacation and sick time. They really -- it's really openly hostile in terms of the effect on these plaintiffs' rights.

THE COURT: Isn't it the same effect that applies to someone who had a political objection and therefore is out of compliance with the policy? There's not a separate set of penalties for people who assert a religious exemption and are

denied, is there?

MS. GIBSON: No, your Honor, there's not.

THE COURT: OK.

MS. GIBSON: So, I would just submit that implementing the openly discriminatory policy is state action, is openly discriminatory. It does violate *Sherr v. Northport* schools, which I know isn't binding but is an important case in this arena. That's the Eastern District case. The entire state of New York changed their religious exemption policy because of that case, and this case is really just the same, the same thing that was challenged there. Can you say you have to belong to a bona fide religion? Can you require a certification of a clergy member? And the court held that you cannot and that that is discrimination against personally held religious beliefs and the state of New York changed their statute as a result. So they knew or should have known that they couldn't implement this policy in that way and that it is facially unconstitutional, and yet they proceeded to do it. And I would say that the mayor's statements to the media indicated that they intended to do that.

I would ask the Court, if the Court's position is that we have not put in enough information about animus, whether the Court would give us leave for that portion of the motion, to hold that in abeyance and supplement the record with additional indicia of animus and evidence that would meet the Court's

standard, that has direct quotes and so forth, instead of just being newspaper articles that report on what was said.

THE COURT: I'll take that request under advisement.

MS. GIBSON: Thank you, your Honor.

THE COURT: Anything further?

MS. GIBSON: Implementation of the discriminatory policy is something that we need to -- we feel that, the plaintiffs feel that needs to be addressed now, because they haven't raised their right to challenge being subjected to that unlawful discriminatory policy, and they have been impacted quite egregiously by it.

And that is all for the motion. Thank you, your Honor.

THE COURT: So you're abandoning your medical exemption issue.

MS. GIBSON: We're focusing on the religious exemption now. If anyone is denied their medical exemption, we will bring that as a separate motion.

THE COURT: OK.

Ms. Minicucci.

MS. MINICUCCI: Your Honor, do you have any specific questions about our papers?

THE COURT: I have a question about the DOE's blanketly denying requests for religious exemptions. And what's the current status of the appeal? If you can also help

me, 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.

THE COURT: Have any Article 75s been filed?

MS. MINICUCCI: Not to my knowledge. Not to my knowledge.

THE COURT: OK.

What about the plaintiffs' argument that the UFT award

facially is drawing distinctions between types of religious practices that are unconstitutional?

MS. MINICUCCI: Your Honor, the UFT award obviously was not, is not a policy of the Department of Education, although the Department of Education is a party to this arbitration.

On page 5, it sets forth some requirements, some of the procedural requirements for the religious exemptions, and it names as an example Christian Scientists, and I think the -- I mean I can't speak for what the arbitrator was thinking when he put it in the decision, but I think that's just an example of a well-known religion that generally opposes medical treatment.

Obviously, as our supplemented declaration shows, that over 20 religions, both established and personal religious beliefs have been granted and this is over -- you know, more than 20 people have had religious exemptions granted. This is just a listing of the different religions within the DOE (inaudible). So -- right. So, the DOE --

THE COURT: So in the first sentence, the documentation in writing, *e.g.* clergy, it doesn't have to be a clergy member; it could be the person himself or herself.

MS. MINICUCCI: Well, it has to be a religious official, so unless plaintiffs are religious officials themselves, that would not necessarily work. But I think

ultimately it's not just one document that's going to make the difference, and in any event, each of these applications are individual. Each of them are evaluated by the arbitrator based on the individual's belief, which are personal, so it makes it very difficult to find a blanket challenge to this policy, because 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 and it relates to the vaccination generally and is not a political --

THE COURT: And it's religious.

MS. MINICUCCI: Correct.

THE COURT: All right.

MS. MINICUCCI: Any other questions, your Honor?

THE COURT: I've discussed with your adversary the issue of the mayor's statements, but what was the mayor trying to say?

MS. MINICUCCI: I could not speak for what the mayor was trying to say, because I don't know. I will say that the mayor is not responsible for making these determinations, nor was he a party to the arbitration agreement. DOE and the arbitrators, who are not DOE employees, not part of the city of New York's employees, came to this determination ultimately for a framework and then make the individual decisions. So I submit that the mayor's comments are irrelevant to this

specific process.

THE COURT: The plaintiffs' argument is that the city can't escape liability by saying, Hey, we're complying with the UFT award if the UFT award itself is being applied in a discriminatory way. Do you agree with that?

MS. MINICUCCI: Certainly in -- if we're evaluating questions of liability, those are questions that are ultimately questions of fact for a case to be litigated at the end. Certainly if the DOE is liable, then they're liable. I don't think that's the position that our papers take, that we would escape all liability because an arbitrator made the decision.

THE COURT: Well, what is your position?

MS. MINICUCCI: About liability?

THE COURT: No. About whether they've sued the right people. I understood your argument to be, until you said they can bring a plenary claim, I understood your position to say if they're complaining about what happens in the arbitration, they need to either fight that out by bringing a claim that the union is violating its duty of fair representation to them or they take an Article 75. But just five minutes ago, you said, Or they can file a plenary lawsuit like this.

MS. MINICUCCI: Correct. I meant that they can bring a lawsuit as individuals if they believe their individual rights were violated.

THE COURT: So why would you argue in your papers

about duty of fair representation?

MS. MINICUCCI: Because in that case, your Honor, they were talking about the arbitration awards.

THE COURT: They're still talking about the arbitration awards.

MS. MINICUCCI: Correct. I'm sorry. I'm getting mixed up between plaintiffs' claims as applied, and that's what I mean. They can bring a plenary challenge to the arbitration award, or not even the arbitration award, to the way that DOE is applying the challenge to them, the award to them.

THE COURT: Like an as-applied challenge.

MS. MINICUCCI: Correct.

THE COURT: Like what this lawsuit is.

MS. MINICUCCI: Correct. However, this injunction is saying that this award and the law is facially unconstitutional, which it is not.

THE COURT: Well, they're also saying that as applied it's unconstitutional.

MS. MINICUCCI: It may be ultimately found to be unconstitutional. At this juncture, there's no evidence to support that.

THE COURT: Why don't you articulate your argument on why there's no evidence, on an as-applied basis, that the mandate, as applied via the UFT decision -- as applied -- is unconstitutional.

MS. MINICUCCI: The mandate is not unconstitutional because it doesn't favor one religion over another.

THE COURT: Not the mandate.

MS. MINICUCCI: I'm sorry.

THE COURT: As applied by the UFT decision.

MS. MINICUCCI: Correct. The mandate, as applied by the UFT decision, is not unconstitutional because it doesn't favor one religion over another and it doesn't give any religion an advantage. It just sets forth a framework by which to apply for an exemption.

THE COURT: So all of the plaintiffs' argument that the DOE lawyers are quoting the Pope and the exemptions are being granted almost not at all and they've been summarily denied their requested exemption even though there's no question that they have -- they didn't question the good faith belief on the plaintiffs' part, according to your affidavits, what do I make of that?

MS. MINICUCCI: Those are individual as-applied challenges. They're not challenging the law itself or the award. They're just saying what happened between, you know --

THE COURT: Are you saying that the Court should grant these ten plaintiffs' as-applied challenges?

MS. MINICUCCI: No, your Honor. I submit that they haven't met that requirement either.

THE COURT: So talk about that.

MS. MINICUCCI: OK. So, in order to bring a case for a violation of constitutional right or to qualify for -- excuse me.

To qualify for religious exemption, plaintiffs would have to show that their religious beliefs prevent them from getting a vaccine, and it's the DOE's position that they have not shown that. And that's what the DOE argued in the arbitration, and that's why they don't qualify for a constitutional -- for an injunction in this case either.

THE COURT: OK, but the plaintiffs have put in affidavits that say they have an honestly held religious belief and they, at least some of them, were denied the exemption. They appealed it to the arbitrator. The denial of the exemption was upheld. What does the city put in to controvert that?

MS. MINICUCCI: It depends on the specific case. I'm not sure what the DOE put in specifically to controvert --

THE COURT: What do you put in to me?

MS. MINICUCCI: The updated and supplemented declaration.

THE COURT: Which says that over 20 people have been granted exemptions.

MS. MINICUCCI: It says that people from over 20 religions have been granted.

THE COURT: Sorry. OK. Because you didn't give me a

number, I can only assume it's one per religion.

MS. MINICUCCI: Your Honor, it's more than that. Last time I checked, it was over a hundred people.

THE COURT: OK. And therefore, the Court should infer that the problem is not how the rule is being enforced; it is that there was something about the plaintiff's particular claims that the arbitrator didn't buy.

MS. MINICUCCI: That's correct, your Honor.

THE COURT: OK.

MS. MINICUCCI: Just in conclusion, we submit that the plaintiffs have not met their burden for a preliminary injunction, let alone a mandatory injunction, and that they don't have success of likelihood of the merits and that the balance of equities is really in the favor of upholding the mandate and keeping unvaccinated teachers outside of schools.

THE COURT: What's DOE going to do with people who are granted a religious exemption? They're not letting them on the school grounds, correct?

MS. MINICUCCI: That's correct.

THE COURT: What are they going to do with them?

MS. MINICUCCI: I believe the arbitration awards set forth that they are to stay on payroll and that to the extent there are --

THE COURT: If they can find jobs for them that won't require them being on premises, they'll get them, if possible.

Otherwise, they're out. Otherwise they're going to be discharged as well, correct?

MS. MINICUCCI: I don't believe that that's been set forth in the awards.

THE COURT: Oh.

MS. MINICUCCI: That there would be a termination for anybody who meets the burden of religious exemption.

THE COURT: Well, but if you can't accommodate them, then what?

OK. Never mind.

Does any of the rest of you know what the DOE is going to do for people who cannot be accommodated? Normally, if you can't accommodate a religious exemption, the employee's not kept on.

Not you. You do not represent DOE.

MS. GIAMBRONE: I think that the DOE's attempting to accommodate everybody as best they can, and I don't think that that has presented itself yet.

THE COURT: It's not a live issue. OK. Fine.

Anything further?

MS. MINICUCCI: No, your Honor.

THE COURT: All right.

Ms. Gibson, I'll give you the last word.

MS. GIBSON: Your Honor, just to reiterate, this UFT arbitration award, which has been implemented by the DOE is

facially discriminatory. It says right in the award that people with personally held religious beliefs or who have religious beliefs that are not the same as the Pope or --

THE COURT: Where does it say that? Where does it say that if you don't agree with the Pope you're out?

MS. GIBSON: Pardon me. Let me rephrase.

People who have religious beliefs that have been contradicted by any religious leader.

THE COURT: Where does it say that?

MS. GIBSON: It says it in the UFT arbitration award.

THE COURT: What page?

MS. GIBSON: If there's any religious leader of your --

THE COURT: What page?

MS. GIBSON: Your Honor, just give me a moment, please. Your Honor, I just have to pull the award. I believe I quoted it in the motion papers, but I -- one moment.

I'm happy to supplement that record with a written page citation, but it does say in the UFT award and the CSA award if any religious leader of your religion has come forward and made statements in favor of vaccination, you will not be granted an exemption.

THE COURT: Right, but it's clear that they're granting exemptions notwithstanding that. So whatever the gloss is on that, which presumably would be some employee who

is saying, I'm X, therefore I can't be vaccinated, except that the leader of X says that's not right, that's not what our religion believes, and the employee doesn't say, Well, OK, so it's not because of the specific doctrine of my church, but I have a specific religious belief of something else. It's clear that whatever he meant by that, it hasn't precluded DOE of granting exemptions to people even though the head of their faith organization has made statements supporting vaccines.

MS. GIBSON: Well, your Honor, this is news to us, these 20 people who have gotten --

THE COURT: You got it.

MS. GIBSON: -- exemptions that don't --

THE COURT: You got it last week.

MS. GIBSON: -- comply with the UFT awards.

THE COURT: You got it last week.

MS. GIBSON: Yes, but we don't know the names. We haven't had --

THE COURT: You didn't ask to adjourn this hearing so that you could take expedited discovery. You didn't do any of that. If you had asked for that, to take discovery of DOE on this issue, I may have granted it, but you didn't.

MS. GIBSON: So, your Honor, just to point out that to the extent that they've deviated from the facially discriminatory policy in 20 cases or even a hundred cases out of thousands doesn't mean that these plaintiffs got any such

deviation. In fact, these plaintiffs were told very precisely that they would not get a deviation from the award, that this award is binding, it's discriminatory and that they just have to live with that if they don't meet the criteria, which is not about sincerity but, rather, about whether you belong to one of these established religions and whether your religious leaders have ever said anything contrary to what you believe.

So let's take the case of Margaret Chu, for example. She details in her declaration how she repeatedly told the arbitrator and the DOE attorney that she, as a practicing Catholic, believes that her moral conscience is more important than anything that the Pope has taken a position on and that that is a part of her religion. She was told that that doesn't matter and that they're going to take the word of the Pope over a layperson like her.

THE COURT: Did you submit an arbitration award where the arbitrator said, We reject your view because the Pope said X?

MS. GIBSON: The arbitrators didn't put any reason for any of the plaintiffs' denials. They simply wrote, checked the box that said denied.

THE COURT: OK.

MS. GIBSON: (inaudible) arbitration they said that.

THE COURT: But you don't know exactly what, then, was the deciding factor for the arbitrator.

MS. GIBSON: Well, what they told her was that --

THE COURT: They who?

MS. GIBSON: The arbitrator told Margaret Chu that he was going to take the word of the Pope over a layperson and he could not consider her personally held Catholic beliefs over the word of the Pope. And that was brought up in multiple plaintiffs' arbitration hearings not only by the arbitrators but by the DOE who advocated that the policy on its face requires discrimination. To the extent individual arbitrators -- 20, maybe a hundred times, and I don't know if that was after the suit was filed or not. But to the extent that any of them deviated from the facially discriminatory standard, the standard itself is discriminatory. And so at that point, strict scrutiny has to apply.

So in this instance, I would submit, and we have submitted, evidence from two very highly regarded public health officials, certainly not antivaccine. They're Stanford and Johns Hopkins public health authorities who have --

THE COURT: The guy from Stanford is a public policy guy, health policy.

MS. GIBSON: Well, I believe he's published over -- he's been cited in over 11,000 public health scientific articles. He is an authority on this subject.

THE COURT: On vaccines in particular? That's not what his affidavit says, but go ahead. Make your argument.

MS. GIBSON: Dr. Makary, from Johns Hopkins, who has sat on the World Health Organization advisory committee, who is also an authority in this subject, they both have extensive things to say about whether people pose a direct threat based on their vaccination status in this instance, which it would then become the obligation of the Department of Education and the other defendants to prove that they cannot grant sincerely held religious exemptions because of that. And in this instance -- or that these people cannot be in the building at all. And in this instance, you know, there's really not, there's really not good science on that.

The CDC has admitted, and that's in exhibit 5 of my most recent affidavit that went with my supplemental materials, the CDC director went on national TV and stated that the vaccines can't stop transmission.

THE COURT: OK. Let me stop you. Do you agree, do the plaintiffs agree, that the vaccines make it less likely that someone who has been vaccinated will contract Covid?

MS. GIBSON: Your Honor, that's why the expert testimony is interesting. The experts both --

THE COURT: They don't address this. They do not address the issue of whether the vaccine is effective to reduce the risk of contracting the virus.

MS. GIBSON: They do discuss the waning vaccine immunity, and they discuss the extensive science showing that

you're just as infectious, if you're infected, and that even if vaccinated, even if there's some slight protection against infection --

THE COURT: Some slight protection?

MS. GIBSON: -- that it wanes rapidly.

THE COURT: Slight protection?

MS. GIBSON: Yes, and there's a number of --

THE COURT: Slight?

MS. GIBSON: Yes. Slight.

THE COURT: Come on.

MS. GIBSON: Your Honor, there's a number of studies that are showing --

THE COURT: Come on. You're losing credibility.

MS. GIBSON: -- that it goes from pretty fairly good protection for a few weeks to, and then within a couple of months drops down to almost no protection against infection, and we don't have --

THE COURT: It does not. There are not peer-reviewed studies that show that.

MS. GIBSON: I think --

THE COURT: That they drop to almost no protection, six weeks after vaccination.

MS. GIBSON: No. Six months, your Honor. There are. I mean, there's just a study out of Israel that says that. But we haven't even been tracking right through --

THE COURT: That drop to nothing? No.

MS. GIBSON: They said nothing yesterday, but I would be happy to bring Dr. Bhattacharyta and even Dr. Makary up to talk about these studies. But even if there was some protection against infection, that goes away if you've had natural immunity, so anyone who was vaccinated --

THE COURT: What do you mean it goes away if you've got natural immunity?

MS. GIBSON: Well, there's no -- you don't have a greater -- there's no greater -- like, the natural immunity has a greater protective effect against subsequent infection than the vaccine immunity does, and there's a lot of studies that show that, and they both speak about that extensively.

Your Honor, you're shaking your head, and I appreciate that. But that's why it's so important to bring experts on. They can discuss the studies that have been done, which have been extensive and thorough.

THE COURT: Do you know how many studies --

MS. GIBSON: And there are other mitigating --

THE COURT: Excuse me.

Do you know how many of the studies that your experts cite that are not peer reviewed?

MS. GIBSON: I'm happy to bring them up here. I don't think there's any --

THE COURT: Do you know? You are the attorney arguing

this. You are propounding these people as experts. That's my question. Do you have any idea how many of the studies that they cite are not peer reviewed?

MS. GIBSON: No, your Honor, I don't. But I do know that there are no peer-reviewed studies -- the only study -- there are no peer-reviewed studies that say that naïve, unvaccinated versus people with natural immunity have a greater protection. The Kentucky study that the defendants cite, I don't know if it's even peer reviewed. It's odd. It's a CDC study that takes Kentucky out of the 50 states that they have data on, so it's not clear why they chose that state. And it doesn't test unvaccinated -- I mean vaccinated people who have not had infection against people who have had infection. It tests vaccinated people who have already been infected against people with infection to see if vaccination can further protect against immunity. But if you just take all of the studies that have shown vaccinated people who have not had infection against unvaccinated people who have had infection, show that natural immunity is substantially more robust. And I do believe some of them are peer reviewed. But I'm happy to bring them up here.

I think the other mitigation strategies, though, suggested are the -- there's no reason why these plaintiffs can't do the weekly testing or the biweekly testing.

THE COURT: All you're saying is that there are other

things that might also be a rational response, but that doesn't mean that the plan that the city came up with is irrational.

MS. GIBSON: Well, if you have to -- we're looking at strict scrutiny for the UFT arbitration awards. So if we're looking at, you know, whether that's the least restrictive means, it's certainly not; that there are -- every other teacher in the state, people two miles away from the schools in Queens, for example, do not have to get vaccinated. They're getting tested, so there's no real reason why these particular teachers have to be subjected to violating their religious beliefs or getting fired when they have that other testing option.

In terms of whether it's a rational reason, if we were in that realm, I'm not sure that it is completely rational. The unrefuted record right now --

THE COURT: Why isn't it rational?

MS. GIBSON: We don't really have facts in the record to establish what you're saying about infection, your Honor, and so if we want to have a hearing --

THE COURT: Just to be clear, you brought this on by order to show cause. You sought a preliminary injunction. Your obligation is to show that there's a probability of success for you; that is, that you're going to win the lawsuit. So that's your burden. And I asked you at the very beginning what you proposed to put on in terms of testimony, and you said

they would repeat what's in their affidavits. I've read their affidavits.

MS. GIBSON: If you'd like to cross-examine them on infection --

THE COURT: I don't want to cross-examine them. I want to decide based on the evidence you've presented me.

MS. GIBSON: OK, your Honor. Well, I believe that our burden is to show likelihood of success on the merits. In terms of whether the people are a direct threat, then the burden shifts. Once we've shown likelihood of success on the merits because there's a facially discriminatory policy adopted by the New York City Department of Education, the burden then does shift to defendants to prove that they've used the least likely, least burdensome -- I mean, sorry, least intrusive and least burdensome methods to meet their compelling interests. That is *Roman Catholic Diocese*, for example, and a number of other cases.

THE COURT: Again, those were very different. Those were facial claims where you had overtly discriminatory provisions. That's not this.

MS. GIBSON: And I would submit that the UFT arbitration award, as implemented by the DOE, is overtly discriminatory --

THE COURT: That's an as-applied challenge.

MS. GIBSON: -- people. It's overtly discriminatory

to all people who don't belong to certain religions or have religious beliefs that are echoed by their religious leaders, so anyone with personally held religious beliefs is overtly discriminated against by this policy.

THE COURT: OK.

MS. GIBSON: Your Honor, the last thing I'd like to say is the mandatory versus prohibitory injunction standard, there's a lot of different -- discussion about different dates of things being announced, but I don't believe there's any real debate about when it was to go into effect, and that was October 4. I'll direct the Court to exhibit 45-2.

THE COURT: You mean October 1.

MS. GIBSON: October 4 is when they were excluded from school.

THE COURT: OK.

MS. GIBSON: October 1 is when they had to get vaccinated, but they could still go to school and were still being paid. October 4 is when they could no longer come into the building.

THE COURT: But October 1 was the deadline.

MS. GIBSON: No -- but October 4 is when they stopped getting paid, and the mayor said that anyone who wants to get vaccinated over the weekend -- a lot of people did get vaccinated after October 1 and were allowed in October 4.

THE COURT: OK.

MS. GIBSON: So the only meaningful -- the meaningful deadline, in any event, is October 4. And the case law, as defendants acknowledge, discuss that the status quo is the last applicable time line before the controversy arose. So we're talking about a couple of days here, but not even, because as exhibit 45-2 shows, the school -- the DOE clearly told people that they had to be vaccinated before October 4 or they'd be excluded. And we filed the morning of the 4th, so at the time of filing, all of these plaintiffs, the status quo was that they could teach. In fact, most of them have been teaching in the schools for the last year and a half unvaccinated. There's really no difference between then and allowing them to keep doing so while we determine the merits of this case.

And then on top of that, if the Court was to ultimately find that they did not deserve relief, either as applied or facially, they could always then be told to leave at that point.

In closing, I would like to state that we are looking for a stay of this entire policy because it is facially discriminatory. But if the Court doesn't grant that, in the alternative, we would like at least the as-applied relief for these plaintiffs who have not been -- who have put declarations in stating that they have sincerely held religious beliefs and were denied protection on the basis of a discriminatory policy adopted by the DOE.

THE COURT: Thanks.

Why shouldn't I view the UFT decision as facially discriminatory?

MS. MINICUCCI: Your Honor, because it's not. Like I said before, it simply provides a framework.

THE COURT: It does say that if the leader of the faith organization has said something to the contrary, then the exemption will not be granted. Right?

MS. MINICUCCI: Correct. I mean it does say that on page 5, but obviously, there have been Roman Catholic people who have had exemptions granted, and the Pope has come out for vaccines.

THE COURT: So you're saying that because there was an exception, the language of this doesn't mean what it says it says?

MS. MINICUCCI: I think that the way that the UFT award is written, it's setting forth examples of reasons that would lead to a denial, because the next sentence after that says where the documentation is readily available, so that goes to, Well, if you can just find this letter online, it's going to be denied.

THE COURT: I understood that point. The notion that because you've read about it in the papers, that there are all kinds of charlatans who are just posting Religions R Us letters that say we're opposed, but that was what that was addressed

to. I understood that.

I was more focusing on the first sentence, which is -- the second sentence, "requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine," that clause.

MS. MINICUCCI: Yes, your Honor. And I guess I'm using the second clause to provide context. I think it's creating a shorthand, but in any event, this is sort of the last step of the award. The award itself is one that's facially discriminatory against any religion, even privately held religious beliefs, and the mandate is the DOE's mandate. The award is going beyond what plaintiffs are challenging. The mandate from the department of --

THE COURT: No, that's not true. They are quite clearly challenging the UFT awards, the UFT structure, whatever you want to call this. They're saying that, as the arbitrator came down with this decision, this decision discriminates on a religious basis.

That's your claim, right, Ms. Gibson?

MS. GIBSON: Yes, your Honor.

MS. MINICUCCI: So, to sort of -- I don't know. I can't speak to what the arbitrator was thinking when he wrote this, but I think that it was created as a sort of shorthand. And again, it's obviously not proof that people who had requests for religious exemption that fall under these

categories where the religious leader did speak out for vaccines but they weren't granted. Obviously there's a lot of personal decisions and personal documentation and personal testimony with each application, and that's where the arbitrator specifically needs to consider.

THE COURT: OK.

MS. MINICUCCI: Thank you.

THE COURT: All right. I'm going to take about a ten-minute break. It's 12:15 now. I'll be back at 12:30 on the dot.

(Recess)

THE COURT: Please be seated.

Thank you, all. I'm now ready to rule.

I want to start by thanking the ten plaintiffs and the many other DOE employees in my courtroom, in the overflow courtrooms and listening on the phone for their tireless work on behalf of the students of this city in what can only be described as next-to-impossible conditions this past year and a half. You've all worked hard to do the best you can under very difficult circumstances.

I also want to thank the city defendants, who have been tireless in pursuing a strategy for the city to get back to normal while minimizing the risk to public health and safety. The city officials have plotted a course between Scylla and Charybdis and have done so in the face of rapidly

evolving scientific and medical knowledge. They have done so in the face of massive disinformation about Covid and vaccines that has been relentlessly pushed out through social media and has been swallowed by some people hook, line, and sinker. It is clear to me that if social media had been around at the beginning of the last century, we would not have eliminated smallpox, and polio would still be endemic in this country.

Plaintiffs have applied for a preliminary injunction to enjoin the implementation of the city's Covid vaccine mandate for DOE employees. For the reasons I will lay out in detail, plaintiffs have not shown that they are entitled to this extraordinary remedy, and their application for preliminary injunction is denied.

Ten Department of Education employees have sued the mayor, the city health commissioner, and the DOE, claiming that a city order requiring DOE employees to be vaccinated against COVID-19 violates their constitutional rights. The challenged order, which was initially published on August 24, required all DOE employees to provide proof of vaccination by September 27. *See* Aug. 24 order, which is at Dkt. 1-1. After discussions with DOE regarding the impact of the order on the employees it represents were unsuccessful, on September 1, the United Federation of Teachers, or UFT, filed a declaration of impasse and the parties proceeded to arbitration. Compl., Dkt. 1 at ¶ 29.

On September 10, the arbitrator published an award which required that DOE provide eligible UFT employees with medical and religious exemptions according to criteria laid out in the award. *Id.* ¶ 30; Arb. Award, Dkt. 1-2. The award also established that employees who do not submit proof of vaccination and who do not have a pending or granted exemption would be placed on leave without pay, Resp., Dkt. 31 at 4. A similar award was entered a few days later to cover DOE employees represented by the Council of School supervisors & Administrators, or CSA, Compl. ¶ 31. The two awards will be collectively referred to as "arbitration awards."

On September 15, Commissioner Chokshi updated the vaccine mandate order, adding a provision that "nothing in this order shall be construed to prohibit any reasonable accommodations otherwise required by law." Sept. 15 order, Dkt. 31-2 ¶ 6. And on September 28, 2021, Commissioner Chokshi extended the date by which DOE employees must submit proof of vaccination to October 1. Sept. 28 order, Dkt. 31-3.

I will refer to the various commissioner of health orders I just described as the vaccine mandate.

Plaintiffs filed this lawsuit on September 21, after the arbitration awards had been issued and after Commissioner Chokshi added to the mandate the possibility of a reasonable accommodation. Almost two weeks later, after the extended date for compliance had passed, on October 4, plaintiffs applied for

an order to show cause why a preliminary restraining order, or TRO, and a preliminary injunction should not be ordered. The next day, Judge Vyskocil, sitting in part 1, denied the plaintiffs' request for a TRO and scheduled this hearing on plaintiffs' application for a preliminary injunction. *See* order, Dkt. 33.

Plaintiffs challenge the vaccine mandate facially and as applied, Compl. ¶ 2. An as-applied challenge addresses "the application of an order to a particular set of plaintiffs," whereas a facial challenge addresses "the legality of the [order] itself." *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F.Supp.2d 574, 611 (S.D.N.Y. 2011) *aff'd sub nom.*, 945 F.3d 83 (2d Cir. 2019) (cleaned up).

I will begin with the plaintiffs' as-applied challenges.

The vaccine mandate is applied to these 10 plaintiffs through the arbitration awards. Defendants report -- and plaintiffs do not contest -- that all 10 plaintiffs are represented by either the UFT or the CSA and are, therefore, subject to the procedures and consequences outlined in the arbitration awards. *See* first Bernstein Decl., Dkt. 31-10, ¶¶ 2, 4. Instead of arguing that the arbitration awards do not apply to them, plaintiffs argue that the contours of the arbitration awards' religious exemptions are unconstitutional or that, as interpreted by the arbitration panels that are

handling the exemption process, are being applied unconstitutionally. *See generally* Compl., Dkt. 1; Mem. of Law, Dkt. 16.

On the record before me, I cannot conclude that plaintiffs have standing to challenge the exemption process established by the arbitration awards as applied to them. In denying the TRO, Judge Vyskocil noted that neither party had briefed the question of "whether, because there is the collective bargaining process, the individual teachers as opposed to the union have standing to even assert those violations." TRO hearing Tr. at 6; *see also Id.* at 18. Despite having the issue flagged for them and being given the opportunity to submit supplemental briefing, inexplicably, plaintiffs' counsel did not address this crucial threshold issue.

Under New York law, it is well established that "[i]f there is no claim that the union breached its duty of fair representation, an individual employee represented by a union generally does not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties." *Katir v. Columbia Univ.*, 15 F.3d 23, 24-25 (2d Cir. 1994) (internal citation omitted); *see also Chupka v. Lorenz-Schneider Co.*, 12 N.Y.2d 1, 6 (1962) ("[E]ach individual employee in becoming a beneficiary to the [collective bargaining agreement] gives up to the union, as his

representative, his individual right to sue on or litigate as to the contract."); *Bd. of Educ. Commack Union Free Sch. Dist. v. Ambach*, 70 N.Y.2d 501, 508 (1987) (collecting cases). Plaintiffs may have a claim of breach of the duty of fair representation, but the complaint does not articulate it, and I have no facts before me that even remotely suggest that the unions' conduct was arbitrary, discriminatory, or in bad faith. *See Hunt v. Klein*, 2011 WL 651876, at *3 (S.D.N.Y. Feb. 10, 2011), *aff'd*, 476 F.App'x 889 (2d Cir. 2012).

In this case, due to the lack of briefing, it is not clear that plaintiffs have standing. Accordingly, I will order supplemental briefing on that issue as well as the issue of whether plaintiffs' remedy is an Article 75 proceeding.

Plaintiffs' facial challenges concern the legality of the vaccine mandate itself. To be entitled to a preliminary injunction enjoining the implementation of the mandate, plaintiffs must show: (1) a likelihood of success on the merits; (2) that the plaintiff is liked to suffer irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the plaintiff's favor; and (4) that the injunction is in the public interest. *Capstone Logistics Holdings, Inc. v. Navarette*, 736 F.App'x 25, 26 (2d Cir. 2018). That burden is even higher when a party seeks "a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction

seeking only to maintain the status quo." *Cachillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (cleaned up). To meet that higher burden, a party seeking a mandatory injunction must show a "clear or substantial likelihood of success on the merits." *Donninger v. Neihoff*, 527 F.3d 41, 47 (2d Cir. 20008) (cleaned up).

Plaintiffs are clearly seeking to change the status quo. The vaccine mandate went into effect on October 1, and their challenge was filed on the morning of October 4. But because I find that plaintiffs have not met the lower standard of a likelihood of success on the merits, I need not grapple with the question of whether plaintiffs are seeking a prohibitive or mandatory injunction.

Because plaintiffs assert a violation of their constitutional rights as the irreparable harm, the first two prongs of the preliminary injunction standard merge into one. In order to show irreparable injury, plaintiff must show a likelihood of success on the merits. *Turley v. Giuliani*, 86 F.Supp.2d 291, 295 (S.D.N.Y. 2000).

Before I turn to the likelihood of success on the merits, I note that preliminary injunctions are generally issued when there is an urgent need for speedy action to protect a plaintiff's rights. As the Second Circuit has noted, "a delay in seeking enforcement of those rights...tends to indicate at least a reduced need for such drastic, speedy

action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985).

I am absolutely baffled by plaintiffs' delay in seeking a preliminary injunction. The vaccine mandate was announced on August 23 and published on August 24. Plaintiffs filed this action almost a month later, on September 21. Although the complaint asserted that plaintiffs were seeking a preliminary injunction, *see* Compl. ¶ 6, there is no indication that they served the complaint promptly and, even if they did, they waited to seek an order to show cause why a TRO and preliminary injunction should not be granted until October 4, three days after the effective date of the order they were challenging. Although I am not denying the request for emergency relief because of plaintiffs' delay, the apparent gamesmanship by plaintiffs' counsel in waiting to file this case and then in seeking a preliminary injunction does nothing to help her cause.

I now turn to the likelihood of success on the merits of plaintiffs' constitutional challenge, starting with the alleged violations of the free exercise clause of the First Amendment.

The Court's assessment of the free exercise claims turns on whether the challenged restriction is "neutral" and of "general applicability." "[W]hen the government seeks to enforce a law that is neutral and generally applicable, it need

only demonstrate a rational basis for its enforcement, even if enforcement of the law incidentally burdens religious practices." *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 212 (2d Cir. 2012). If the restriction is not neutral and generally applicable, then it is subject to "strict scrutiny," which means that the restriction must be "narrowly tailored" to serve a "compelling" state interest. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020).

The first step in determining whether a law is neutral is to look at the text of the law, because "if it refers to a religious practice without a secular meaning discernible from the language or context," it lacks facial neutrality. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). In *Roman Cath. Diocese of Brooklyn v. Cuomo*, for example, the Supreme Court found that New York State regulations that expressly established more restrictive Covid rules for houses of worship than for similar secular activities could not be viewed as neutral. 141 S.Ct. at 66. Similarly, in *Church of Lukumi*, the Supreme Court found that a city ordinance was not facially neutral in part because it expressly recited that the ordinance was passed to address the fact that "certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety." 508 U.S. at 535. There is no analogous language in the vaccine mandate; it does not mention religion or religious practices at all.

Although the explicit text of the order begins the evaluation, it is not the end of the inquiry. In addition to overt discrimination against religious practices, the free exercise clause also "forbids subtle departures from neutrality," and "covert suppression of particular religious beliefs." *Church of Lukumi*, 508 U.S. 534 (internal citations omitted). To ascertain whether such "subtle departures" exist, courts consider "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* at 540.

For example, in assessing New York State's Covid restrictions on houses of worship, the Supreme Court and the Second Circuit found it significant that a day before issuing the order, then-Governor Cuomo said that if the "ultra-Orthodox community" would not agree to enforce the rules, "then we'll close the institutions down." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 627 (2d Cir. 2020); *see also Roman Cath. Diocese of Brooklyn*, 141 S.Ct. at 66 (citing *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020) (Park, J., dissenting). And although *Masterpiece Cakeshop* was an as-applied challenge that is not directly on point, in that case the Supreme Court found significant the "official expressions of hostility to religion," including a comment by a commissioner that freedom

of religion had been used to justify slavery and the Holocaust. 138 S.Ct. 1719, 1729, 1732 (2018).

In this case, plaintiffs argue that comments by the mayor indicate that there is religious animus surrounding the vaccine mandate. Their rhetoric notwithstanding, plaintiffs have not provided a single statement made by the mayor or the governor or Dr. Chokshi preceding or contemporaneous to the vaccine mandate that suggests even a whiff of antireligion animus. The vaccine mandate was first announced on August 23 and it was published the next day. The only statement cited by the mayor cited by plaintiffs that precedes those dates was made on August 3. In that statement, the mayor is reported to have said: "if you're unvaccinated, unfortunately, you will not be able to participate in many things. That's the point we're trying to get across. It's time for people to see vaccination as literally necessary to living a good and full and healthy life."

But far from targeting religious practices, the mayor's messaging was clearly aimed at 100 percent of the unvaccinated populace, whether their reason for being unvaccinated was inertia, political objection, disinformation, fear of needles, hostility to Big Pharma, or religion. In short, his statement did not in any way signal that the goal of the law was to infringe on or to restrict the free exercise of religion.

The other two statements attributed to the mayor were allegedly made on September 23 and 24, a month after the vaccine mandate had been announced. *See* Mem. of Law at 16 (citing the two media articles). Plaintiffs' reliance on those statements is baseless. Putting aside the fact that the articles are hearsay, they neither quote the mayor in full nor provide the context in which the complained-of statements were made. Statements in which the mayor purportedly suggested that religious exemptions would be available only to Christian Scientists and Jehovah's Witnesses say nothing about the purpose of a vaccine mandate and, if anything, to the plaintiffs' as-applied challenges. Evidence that the mayor's statements may be being taken out of context can be found in the fact, whomever he thought would be eligible for religious exemption, religious exemptions have in fact been granted to DOE employees who self-identify as adhering to at least 20 different religions. Second Bernstein Decl., Dkt. 52 ¶ 7. In any event, the mayor's statements are of no moment to the inquiry before me, which is whether the vaccine mandate itself, not the arbitration awards, is neutral and generally applicable to everyone, regardless of why he or she is not vaccinated.

Plaintiffs also contend that the vaccine mandate was a "coordinated effort between the state and the city." Mem. of Law at 18. Here, too, the only statements preceding or contemporaneous with the vaccine mandate were purportedly made

on August 24. Those statements concerned the mayor's attempt to forge a productive relationship with the new governor, *see* Mem. of Law at 2, and have nothing to do with religion or vaccines. Moreover, the statements attributed to Governor Hochul and allegedly made on September 15 and September 26 concern the state vaccine mandate for healthcare workers, *see* Mem. of Law at 2-3, which has no bearing on whether the city's mandate for DOE employees is a covert attempt to interfere with the free exercise of religion by DOE employees. In short, none of the statements highlighted by plaintiffs is indicative of subtle or covert departures from neutrality.

Additionally, when determining whether restrictions are neutral and generally applicable, the Supreme Court requires courts to assess whether the text of the restriction was crafted to proscribe religious conduct while permitting similar secular activities. For example, in *Church of Lukumi*, the Supreme Court found that the city ordinance at issue was drafted in a way to prohibit the killing of animals as part of a Santeria religious sacrifice but to permit the killing of animals that is no more necessary or humane than a sacrifice would be (like hunting, extermination of mice and rats, and killing stray animals).

Here, the text of the vaccine mandate was not crafted to target religious conduct for less favorable treatment than the secular conduct. DOE employees with political, moral, or

philosophical objections to vaccines are all required to be vaccinated. In short, plaintiffs are not likely to prevail on their argument that the vaccine mandate is not neutral and generally applicable.

Because the city is likely to prevail on its argument that the vaccine mandate is neutral and generally applicable, for it to be unconstitutional, it must lack a rational basis. Plaintiffs argue that the vaccine mandate is, in fact, irrational. *See, e.g.*, Compl. ¶ 312. In support, plaintiffs rely principally on a declaration from Dr. Jayanta Bhattacharya, a medical doctor on the faculty of Stanford Medical School, whose review of medical literature plaintiffs claim supports their conclusion that the COVID-19 vaccines "are for personal protection, and will not meaningfully mitigate the spread of COVID-19 through the population." Mem. of Law at 10; Bhattacharya Decl., Dkt. 18.

Data cited by the CDC, on the other hand, indicate that "fully vaccinated persons are less likely than unvaccinated persons to acquire [COVID-19]" in the first place. *See Science Brief: COVID-19 vaccines and vaccination*, Centers for Disease Control & Prevention (last updated Sept. 15, 2021) (collecting studies). I do not need to conclude whose review of the data is more accurate. Given the data that exists, it was not irrational for the city to conclude that vaccinations reduced the probability of infection. As Judge Cogan stated in

a different challenge to the DOE vaccine mandate, "even if plaintiffs disagree with it, the order at issue represents a rational policy decision surrounding how best to protect children during a global pandemic." *Maniscalco v. New York City Dep't of Educ.*, 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021).

Although that is enough on its own to find that plaintiffs are unlikely to prevail on their argument that the vaccine mandate is irrational, I do want to take the opportunity to highlight some of the indefensible assertions in plaintiffs' discussion of the Covid vaccines. As an initial matter, it is unclear whether Dr. Bhattacharyta's opinion would survive a *Daubert* challenge. Putting aside the fact that his expertise is not epidemiology -- he has a Ph.D. in economics and specializes in health policy -- 15 of the studies he relies on come from MedRxiv or BioRxiv, websites that post preliminary reports of work that have not been peer reviewed. MedRxiv explicitly cautions readers not to rely on the studies on the site "to guide clinical practice or health-related behavior and should not be reported in news media as established information." While the websites do not expressly caution against citing studies on its site in court papers, Dr. Bhattacharyta should have known better or at the very minimum should have provided a disclaimer of some kind to designate for the Court which of the studies he was relying on

are not peer reviewed. Because a substantial portion of the authority on which he relies has not been peer reviewed, the Court is entirely unable to assess what weight, if any, should be given to his opinion.

Plaintiffs also emphasize that "vaccination cannot stop transmission" of the virus. *See, e.g.*, Compl. ¶ 117. But you do not have to be an epidemiologist or a statistician to see that plaintiffs are conflating conclusions about transmissions by vaccinated persons with rates of infection among vaccinated persons. There is no dispute that there have been breakthrough infections and that the Covid vaccines do not fully prevent transmission. But so what? The fact that a vaccinated person can become infected does not mean that vaccinated persons and unvaccinated persons have the same likelihood of becoming infected. Put another way, concluding that infected vaccinated persons transmit the virus at similar rates to unvaccinated persons says nothing about how likely it is for someone who is vaccinated to be infected in the first place. The CDC director brought home that point in the very CNN interview on which plaintiffs rely when she noted that surges of Covid infections were occurring "areas that have pockets of people who are unvaccinated." If *both* the susceptiblity to infection and the rate of transmission were the same for vaccinated and unvaccinated persons, we would have expected to see uniform case numbers of COVID-19 across the

country after the vaccine became available. But we do not see that; there is no disputing that places with higher vaccination rates are seeing lower rates of Covid infections than areas with lower vaccination rates.

Additionally, plaintiffs argue strenuously that people who have recovered from COVID-19, even if they are not vaccinated, have robust natural immunity that prevents transmission of the disease. *See, e.g.*, Compl. ¶ 114; Mem. of Law at 11; Bhattacharya Decl. ¶¶ 14, 18; Makary Decl., Dkt. 19 ¶ 12. But even assuming that were true -- an assessment the Court cannot make given plaintiffs' expert's heavy reliance on articles that have not been peer reviewed -- it says nothing about whether the city acted rationally in relying on the CDC advice that even people who have had Covid should be vaccinated. In addition to it being rational to follow the advice of the CDC, the Court can think of other rational reasons not to exclude from operation of the mandate to employees who have had, or believe they have had, COVID-19. Just to name one, the city may wish to avoid a policy that may encourage employees to purposely infect themselves with the virus, especially because -- as plaintiffs recognize -- unvaccinated persons are more likely to suffer a severe course of infection, including hospitalization and death, than those who have been vaccinated.

In short, I cannot conclude that plaintiffs are likely

to prevail on their claim that the vaccine mandate is unconstitutional because it is irrational.

Plaintiffs have not shown that they are likely to succeed on the merits of any of their other facial challenges to the mandate. Plaintiffs contend that the vaccine mandate violates the establishment clause of the First Amendment, which prohibits excessive government entanglement with religion. Mem. of Law at 19-20. But that argument is unlikely to succeed on the merits for the same reason as plaintiffs' free exercise claims; most of plaintiffs' challenges regard the application of the vaccine mandate through the arbitration awards, an issue I cannot at this point for the reasons I've already discussed. And facially, the vaccine mandate requires no entanglement with religion whatsoever. In short, plaintiffs' establishment clause claims are unlikely to succeed on the merits.

Plaintiffs also argue that the vaccine mandate violates their substantive due process rights under the Fourteenth Amendment. *See, e.g.*, Compl. ¶¶ 318-319; Mem. of Law at 8, 22. "To allege a violation of substantive due process, plaintiff must claim (1) a valid...fundamental right; and (2) that the defendant infringed on that right by conduct that shocks the conscience or suggests a gross abuse of governmental authority." *Dukes v. New York City Employees' Ret. Sys.*, 361 F.Supp.3d 358 375, (S.D.N.Y. 2019). I do not need to opine on whether the rights identified by plaintiffs,

including the right to refuse administration of medical products and the right to bodily integrity, *see* Compl. ¶¶ 318-321, constitute fundamental rights under pertinent case law. Instead, I find that plaintiffs' substantive due process arguments are unlikely to succeed on the merits because the vaccine mandate does not shock the Court's conscience. Vaccine mandates are not new, *see, e.g.*, *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and it is far from shocking for the city to conclude that requiring vaccination of its DOE employees is a rational way to get and keep the schools open and to protect school children, many of whom are not yet eligible to the vaccinated.

Plaintiffs also argue that the vaccine mandate unlawfully discriminates against unvaccinated persons in violation of the Fourteenth Amendment's equal protection clause. Compl. ¶ 329. Because the unvaccinated are not a "protected class," to prevail on their equal protection claim, plaintiffs must demonstrate that there is no rational basis for the difference in treatment between the vaccinated and the unvaccinated. *See Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988). Plaintiffs have not demonstrated that they are likely to prevail on their argument that there is no rational basis for the vaccine mandate. It follows that they are also not likely to prevail on their argument that there is no rational basis to distinguish, for purposes of employment in

New York City public schools, between those who have been vaccinated and those who have not.

In short, plaintiffs have not shown that they are likely to succeed on the merits of any of their facial constitutional challenges to the vaccine mandate.

Although plaintiffs' failure to show a likelihood of success on the merits is enough of a reason for me to deny their application for a preliminary injunction, I will also consider the last two elements of the preliminary injunction standard: the balance of the equities and the public interest. Because the government is the opposing party, those two factors merge and are considered together. *Coronel v. Decker*, 449 F.Supp.3d 274, 287 (S.D.N.Y. 2020). In assessing the two factors, a court must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, as well as the public consequences in employing the extraordinary remedy of injunction." *Yang v. Kosinski*, 960 F.3d 119, 135-36 (2d Cir. 2020) (cleaned up).

Defendants contend that the vaccine mandate furthers the "public interest in limiting the spread of COVID-19 in schools for the safety of children, other school employees, and the community at large" And that it ensures "that in-person schooling may continue, uninterrupted, for as many children as possible." Resp. at 18. Plaintiffs, on the other hand,

emphasize that losing 15,000 teachers and staff will "endanger and harm the one million children who attend public schools in New York City." Mem. of Law at 25. Although defendants report that the 15,000 number is likely closer to 7,000, *see* second Bernstein Decl. ¶ 5, I have no doubt that students will suffer from losing their regular teachers and support staff.

Reasonable minds can disagree on the right way to achieve public goals. In this case, plaintiffs argue that the city's way is draconian and unfair; the city's response is that it is neither and that it strikes an appropriate balance between the needs of its schools and their employees and public health risks. Different public officials may weigh all of those interests differently, but given the complex and life-threatening challenges associated with the COVID-19 pandemic, striking that balance is left to our elected officials -- not the courts. In short, the balance of the equities and the public interest tip decidedly in defendants' favor.

In sum, based on the record before me, because there is a question whether plaintiffs have standing to challenge the UFT awards and because plaintiffs have not shown that they are likely to succeed on the merits of their facial challenges, plaintiffs' application for a preliminary injunction is denied. Plaintiffs' request to hold the record open for additional evidence of animus is denied, because plaintiff had more than

enough time to pull the evidence together before this hearing. I will consider any such evidence on the merits outside of the preliminary injunction context.

The Court had previously set a conference in this case for November 12. Before I get to the briefing schedule on the standing issue, is the city's plan to answer the complaint or move to dismiss it?

MS. MINICUCCI: Move to dismiss, your Honor.

THE COURT: OK.

To the plaintiffs, if the city moves to dismiss your complaint, as of right, you can amend your complaint. If you think you can solve the problems that they identify in your complaint, I encourage you to amend the complaint. I'll then dismiss their motion at moot, and we'll start all over again. If you can't fix the complaint to deal with the problems they raise, then respond to it. But please do not do both. OK?

MS. GIBSON: Yes, your Honor.

THE COURT: Now, the issue of standing, I'm going to give the plaintiffs the opportunity to go first.

How long would you like?

MS. GIBSON: Five minutes, your Honor.

THE COURT: You're going to brief it in five minutes?

MS. GIBSON: Oh. Oh, OK. Yes, I thought you wanted me to argue.

THE COURT: Holy cow.

MS. GIBSON: A week.

THE COURT: I'm going to give you two. I want you to do a good job on this. This is a significant issue to your clients. If they have standing to challenge the arbitration awards, then I'm going to be asking you to brief, in a rational way, whether they have, in fact, been discriminated against; that is, as they actually were injured on an as-applied basis, but the critical first point is whether they can challenge the awards.

I'm going to give you two weeks, and I urge you to do a good job, a much better job than you've done on your papers that were before me. This is a critical issue.

How long does the city want in response?

MS. MINICUCCI: Two weeks, please, your Honor.

THE COURT: All right. Two weeks. According to my little calendar, today's the 12th, so the plaintiffs' brief will be due the 26th. The city's response is due the 9th, and I'll give you a reply, which will be due November 16.

After reviewing those papers, we'll determine what the next steps are.

Anything further from the plaintiffs?

MS. GIBSON: No. Thank you, your Honor.

THE COURT: Anything further from the defendants?

MS. MINICUCCI: Your Honor, defendants would just ask to have more time to respond to the complaint since we've been

served.

THE COURT: When did you all get served?

MS. MINICUCCI: Last week. I believe it was towards the end of the week, but not all the defendants, I believe, have been served.

THE COURT: OK. Why don't we do this. I'm going to stay your time to respond to the complaint. Let's figure out what the plaintiffs exactly have standing to challenge. Then I'll set a date for you to answer, and we'll go forward with the briefing at that point.

MS. MINICUCCI: Thank you, your Honor.

THE COURT: You're welcome.

Anything else from defendants?

MS. MINICUCCI: No.

THE COURT: All right.

MS. MINICUCCI: Thank you, your Honor.

THE COURT: Thanks, everybody.

(Adjourned)

APPENDIX F

MEMO ENDORSED

GEORGIA M. PESTANA
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

AMANDA C. CROUSHORE
Labor and Employment Law Division
Phone: (212) 356-4074
Fax: (212) 356-2438
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October 25, 2021

By ECF

Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square,
New York, NY 10007

Re: Kane, et al. v. de Blasio, et al., Dkt. 21 Civ. 7863

Dear Judge Caproni:

I am an Assistant Corporation Counsel in the office of Georgia M. Pestana, Corporation Counsel for the City of New York, attorneys for the defendants in the above-referenced case. I write in response to plaintiffs' letter filed today, October 25, 2021 (Dkt. 68), seeking a stay of the briefing schedule set by Your Honor on October 12, 2021 (Dkt. 60), pursuant to which plaintiffs' supplemental brief is due tomorrow, October 26, 2021. In addition, plaintiffs ask your honor to stay enforcement of New York City Health Commissioner's Order dated September 28, 2021, which went into force October 1, 2021.

Defendants oppose plaintiffs' application.

First, the supplemental briefing ordered by Your Honor is intended to address "whether Plaintiffs have standing to bring as-applied challenges to the DOE Vaccine Mandate as applied by the Arbitration Awards." (Dkt. 60). In other words, the issue raised goes to whether plaintiffs have standing to bring their as applied challenges *in the case in chief*, not just for the purposes of the preliminary injunction motion, which is the subject of appeal. Accordingly, regardless of the status or outcome of plaintiffs' appeal, the issue of standing still needs to be addressed, separate and apart from the issues that may be raised on appeal.

Moreover, Plaintiffs' request to stay the briefing schedule the day before their brief is due is untimely, and the reasons for delaying in filing it, and their notice of interlocutory appeal, are unstated.

Finally, in asking for the Health Commissioner's Order be stayed until the appeal is decided, plaintiffs are essentially asking for the same relief they were denied when their motion for an injunction was heard; i.e., they are seeking a reversal of the Court's October 12, 2021 ruling. The factors governing the issuance of a stay pending appeal under Rule 62(c) are substantially similar to those used to decide whether to grant a preliminary inunction in the first place. They are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Frye v. Lagerstrom, No. 15 Civ. 5348 (NRB), 2018 U.S. Dist. LEXIS 175509, at *3-4 (S.D.N.Y. Oct. 10, 2018) (citing SEC v. Citigroup Glob. Markets Inc., 673 F.3d 158, 162 (2d Cir. 2012)). Your Honor has already concluded that the relief sought by plaintiffs here do not meet these standards. There is no reason given in plaintiffs' letter explaining why the Court should reach a different conclusion today.

If plaintiffs would instead like to seek an extension of their time to file their supplemental briefing, defendants would not oppose that request.

Respectfully submitted,

/s/ Amanda C. Croushore

Assistant Corporation Counsel

Copies to: All counsel of record (by ECF)

Although the Court agrees that the issue of standing goes to the case-in-chief, the Court finds that the issue of standing is likely to be raised on appeal. Accordingly, the Court finds it most appropriate to STAY this matter pending resolution of the appeal before the Second Circuit. All deadlines are adjourned *sine die*. Plaintiffs must notify the Court of any decision by the Second Circuit within one business day of its issuance.

Plaintiffs' request to stay enforcement of the DOE Vaccine Mandate pending resolution of the appeal is DENIED.

In the future, all requests for adjournment of deadlines must be made at least 48 hours in advance, absent emergency circumstances. *See* Rule 2(C) of the undersigned's Individual Practices in Civil Cases. The Court sees no emergency circumstances here, especially given that Plaintiffs likely knew of their intention to appeal the ruling for several days. Failure to comply with Court rules in the future may result in sanctions.

SO ORDERED.

Valerie Caproni

Date: October 25, 2021

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK and SARAH BUZAGLO,	:	
Plaintiffs,	:	1:21-cv-08773
- against -	:	ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER
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.	:	

Upon the accompanying declaration of Jonathan R. Nelson, Esq., executed on October 27, 2021, with exhibits attached thereto, the additional declarations of Matthew Keil verified on October 26, 2021, John De Luca verified on October 27, 2021, Sasha Delgado verified on October 26, 2021, Dennis Strk verified on October 26, 2021, Sarah Buzaglo verified on October 27, 2021, Christina Martinez verified on October 27, 2021, Ageliki Heliotis, verified on October 26, 2021 Amoura Bryan verified on October 26, 2021, Cassandra Ynocencio verified on October 26, 2021, Cindy Corchado verified on October 26, 2021, Inna Cohen verified on October 26, 2021, Eleni Gerasimou verified on October 26, 2021, and Raquel Ibarrola verified on October 26, 2021, all with the exhibits attached thereto, the supporting memorandum of law, the copy of the complaint, verified on October 27 by John De Luca, hereto annexed, it is:

ORDERED, that the plaintiff has demonstrated good cause for setting an expedited

briefing schedule in this proceeding; and it is further

ORDERED, that the above-named defendants show cause before a motion term of this Court, at Room ___, United States Courthouse, 500 Pearl St, in the City of New York, County of New York, State of New York, on _____, 2021, at _____ in the ____noon thereof, or as soon thereafter as counsel may be heard, why an order should not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the Defendants during the pendency of this action from ;

1. Terminating, separating, or placing on unpaid leave ,or depriving entitlements from, or discontinuing their provision to any persons of their employment, salary and all benefits or impairing the employment relationship in any way of any direct or indirect employee pursuant to any of the following:
    a. the September 15, 2021 Order of the Commissioner of Health and Mental Hygiene to Require Covid-19 Vaccination for Department of Education Employees, Contractors, Visitors, and Others ("Order"), as amended;
    b. the Arbitration Award dated September 10, 2021 issued by Arbitrator Martin F. Scheinman in the Matter of the Arbitration between Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO ("UFT Award");
    c. the Arbitration Award dated September 15, 2021 issued by Arbitrator Martin F. Scheinman in the Matter of the Arbitration between the Board of Education of the City School District of the City of New York and Council of Supervisors and Administrators ("CSA Award");

d. two arbitration awards between District council 37 AFSCME, AFL-CIO ("DC37") and NYC DOE and New York City's Department of Health and Mental Hygiene ("DC37 Awards"); or

e. any substantially similar arbitration award or order affecting persons who are or who have been employed directly or indirectly by the New York City Department of Education (NYC DOE") or in buildings that are owned or controlled or occupied by NYC DOE.

2. Granting such other and further relief as the Court may deem just and proper; and it is further

ORDERED, that sufficient reason having been shown therefore, pending the hearing of plaintiff's application for a preliminary injunction, pursuant to Rule 65, Fed. R. Civ. P., the defendants are enjoined from implementing said Order in any respect, or from discontinuing their provision to any persons of their employment, salary and all benefits pursuant to said Order; and the deadlines and procedures set forth in the UFT Award and similar provisions in the CAS and DC37 Awards and in awards and orders described in section "1.e" above are stayed and it is further

ORDERED, that _____ service of a copy of this order, the verified complaint, the memorandum of law, and the exhibits upon the defendants on or before _____A.M./P.M., on _____, 2021, shall be deemed good and sufficient service thereof.

_____
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK and SARAH BUZAGLO, Plaintiffs, - against - 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.	:	Case No. 1:21-cv-08773 DECLARATION OF JONATHAN ROBERT NELSON, ESQ. IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

I, Jonathan Robert Nelson, Esq., declare as follows:

1. I am an attorney duly admitted to practice law in the State of New York, and a partner at the law firm Nelson Madden Black LLP. I am one of the attorneys representing the plaintiffs in this action.
2. I respectfully submit this Declaration in support of Plaintiffs' Motion for a Preliminary Injunction and Application for a Temporary Restraining Order, and fully incorporate all pleadings and the Memorandum of Law herein.
3. Attached as Exhibit 1 is a true and correct copy of the Department of Health and Mental Hygiene ("DOHMH") Commissioner Dr. Dave A. Chokshi signed order applicable to staff in public healthcare settings, requiring Vax-or-Test, dated July 21, 2021, which my office downloaded from the City of New York's website.
4. Attached as Exhibit 2 is a true and correct copy of the Department of Health and Mental Hygiene ("DOHMH") Commissioner Dr. Dave A. Chokshi signed order, dated August 10,

2021, applicable to staff in residential congregate settings, requiring Vax-or-Test. which my office downloaded from the City of New York's website.

5. Attached as Exhibit 3 is a true and correct copy of the Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors, and Others, dated August 24, 2021 ("Original Mandate"), which my office downloaded from the City of New York's website.
6. Attached as Exhibit 4 is a true and correct copy of the Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors, and Others, dated September 15, 2021, which my office downloaded from the City of New York's website.
7. Attached as Exhibit 5 is a true and correct copy of the Order of the Commissioner of Health and Mental Hygiene Revising the Effective Date for Required COVID-19 Vaccination of Department of Education Employees, Contractors, Visitors, and Others, dated September 28, 2021, which my office downloaded from the City of New York's website.
8. Attached as Exhibit 6 is a true and correct copy of the Arbitration Award dated September 10, 2021 issued by Arbitrator Martin F. Scheinman in the Matter of the Arbitration between Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO ("UFT Award"), which was sent to my office by the Plaintiffs.
9. Attached as Exhibit 7 is a true and correct copy of the Arbitration Award dated September 15, 2021 issued by Arbitrator Martin F. Scheinman in the Matter of the Arbitration between the Board of Education of the City School District of the City of New York and Council of

Supervisors and Administrators ("CSA Award"), which was sent to my office by the Plaintiffs.

10. Attached as Exhibit 8 is a true and correct copy of the September 14, 2021 temporary restraining order issued by Hon. Laurence L. Love, Justice of the Supreme Court of the State of New York, County of New York, in the matter of *New York City Municipal Labor Committee, et al., v. The City of New York, et al.*, No. 158368/2021 (N.Y. Co.). "[v]acating as arbitrary, capricious, and contrary to law the August 24, 2021, Order" and "Enjoining Respondents from implementing the Order" ("September 14 TRO"), which my office downloaded from the New York State Courts Electronic Filing website.

11. Attached as Exhibit 9 is a true and correct copy of the September 29, 2021 Order issued by Hon. Laurence L. Love, Justice of the Supreme Court of the State of New York, County of New York, in the matter of *New York City Municipal Labor Committee, et al., v. The City of New York, et al.*, No. 158368/2021 (N.Y. Co.) vacating the September 14 TRO, which my office downloaded from the New York State Courts Electronic Filing website.

12. Attached as Exhibit 10 is a true and correct copy of August 24, 2021, New York City Department of Education FAQ page, which my office downloaded from the City of New York's website.

13. Attached as Exhibit 11 is a true and correct copy of the New York City Department of Education's September 22, 2021 denial letter of plaintiff Sasha Delgado's application for a religious exemption to the Covid-19 vaccination, which was sent to my office by Sasha Delgado.

I hereby certify that I have made the following efforts to give notice to Defendants' counsel of this emergency application in the following manners: (1) at 11:29 p.m. on October 26, 2021, I emailed notice to Laura Minicucci, Assistant Corporation Counsel at New York City Law Department; and (2) my paralegal, Brandon Babwah, reached out by phone to Ms. Minicucci on at 11:55 a.m. on October 27, 2021, following with an email from Mr. Babwah to Ms. Minicucci containing the relevant papers. Additional notice should not be necessary because of the emergency nature of our application and the broad and far-reaching imminent injury to a multitude of New York City Department of Education employees.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on October 27, 2021.

Respectfully submitted,

Jonathan R. Nelson (JN-8796)

Exhibit “4”

**ORDER OF THE COMMISSIONER
OF HEALTH AND MENTAL HYGIENE
TO REQUIRE COVID-19 VACCINATION FOR
DEPARTMENT OF EDUCATION
EMPLOYEES, CONTRACTORS, VISITORS, AND OTHERS**

WHEREAS, on March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents, and such order remains in effect; and

WHEREAS, on March 25, 2020, the New York City Commissioner of Health and Mental Hygiene declared the existence of a public health emergency within the City to address the continuing threat posed by COVID-19 to the health and welfare of City residents, and such declaration and public health emergency continue to be in effect; and

WHEREAS, pursuant to Section 558 of the New York City Charter (the "Charter"), the Board of Health may embrace in the Health Code all matters and subjects to which the power and authority of the Department of Health and Mental Hygiene (the "Department") extends; and

WHEREAS, pursuant to Section 556 of the Charter and Section 3.01(c) of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health; and

WHEREAS, the U.S. Centers for Disease Control and Prevention ("CDC") reports that new variants of COVID-19, identified as "variants of concern" have emerged in the United States, and some of these new variants which currently account for the majority of COVID-19 cases sequenced in New York City, are more transmissible than earlier variants; and

WHEREAS, the CDC has stated that vaccination is an effective tool to prevent the spread of COVID-19 and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated; and

WHEREAS, the CDC has recommended that school teachers and staff be "vaccinated as soon as possible" because vaccination is "the most critical strategy to help schools safely resume full operations [and] is the leading public health prevention strategy to end the COVID-19 pandemic;" and

WHEREAS, on September 9, 2021, President Joseph Biden announced that staff who work in Head Start programs and in schools run by the Bureau of Indian Affairs and Department of Defense will be required to be vaccinated in order to implement the CDC's recommendations; and

WHEREAS, on August 26, 2021, New York State Department of Health adopted emergency regulations requiring staff of inpatient hospitals and nursing homes to receive the first dose of a vaccine by September 27, 2021, and staff of diagnostic and treatment centers, hospices, home care and adult care facilities to receive the first dose of a vaccine by October 7, 2021; and

WHEREAS, Section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and effective measures to prevent the communication of infectious diseases such as COVID-19, and in accordance with Section 17-109(b), the Department may adopt

vaccination measures to effectively prevent the spread of communicable diseases; and

WHEREAS, the City is committed to safe, in-person learning in all pre-school to grade 12 schools, following public health science; and

WHEREAS the New York City Department of Education ("DOE") serves approximately 1 million students across the City, including students in the communities that have been disproportionately affected by the COVID-19 pandemic and students who are too young to be eligible to be vaccinated; and

WHEREAS, a system of vaccination for individuals working in school settings, including DOE buildings and charter school buildings, will potentially save lives, protect public health, and promote public safety; and

WHEREAS, pursuant to Section 3.01(d) of the Health Code, I am authorized to issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat and a public health emergency has been declared pursuant to such section; and

WHEREAS, on August 24, 2021, I issued an order requiring COVID-19 vaccination for DOE employees, contractors, and others who work in-person in a DOE school setting or DOE building, which was amended on September 12, 2021; and

WHEREAS, unvaccinated visitors to public school settings could spread COVID-19 to students and such individuals are often present in public school settings and DOE buildings;

NOW THEREFORE I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that it is necessary for the health and safety of the City and its residents, do hereby exercise the power of the Board of Health to prevent, mitigate, control and abate the current emergency, to

RESCIND and RESTATE my September 12, 2021 Order relating to COVID-19 vaccination for DOE employees, contractors, visitors, and others; and

I hereby order that:

1. No later than September 27, 2021, or prior to beginning employment, the following individuals must provide proof of vaccination as described below:
    a. DOE staff must provide proof of vaccination to the DOE.
    b. City employees who work in-person in a DOE school setting, DOE building, or charter school setting must provide proof of vaccination to their employer.
    c. Staff of contractors of DOE or the City, as defined below, must provide proof of vaccination to their employer, or if self-employed, to the DOE.
    d. Staff of any charter school serving students up to grade 12, and staff of contractors hired by charter schools co-located in a DOE school setting to work in person in a DOE school setting or DOE building, must provide proof of vaccination to their employer, or if self-employed, to the contracting charter school.

2. An employer to whom staff must submit proof of vaccination status, must securely maintain a record of such submission, either electronically or on paper, and must demonstrate proof of compliance with this Order, including making such records immediately available to the Department upon request.

3. Beginning September 13, 2021, all visitors to a DOE school building must show prior to entering the building that they have:
    a. Been fully vaccinated; or
    b. Received a single dose vaccine, or the second dose of a two-dose vaccine, even if two weeks have not passed since they received the dose; or
    c. Received the first dose of a two-dose vaccine.

4. Public meetings and hearings held in a DOE school building must offer individuals the opportunity to participate remotely in accordance with Part E of Chapter 417 of the Laws of 2021.

5. For the purposes of this Order:

    "Charter school setting" means a building or portion of building where a charter school provides instruction to students in pre-kindergarten through grade 12 that is not collocated in a DOE building.

    "DOE school setting" includes any indoor location where instruction is provided to DOE students in public school pre-kindergarten through grade 12, including but not limited to locations in DOE buildings, and including residences of students receiving home instruction and places where care for children is provided through DOE's LYFE program. DOE school settings include buildings where DOE and charter schools are co-located.

    "DOE staff" means (i) full or part-time employees of the DOE, and (ii) DOE interns (including student teachers) and volunteers.

    "Fully vaccinated" means at least two weeks have passed after an individual received a single dose of a COVID-19 vaccine that only requires one dose, or the second dose of a two-dose series of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization.

    "Proof of vaccination" means proof that an individual:
    a. Has been fully vaccinated;
    b. Has received a single dose vaccine, or the second dose of a two-dose vaccine, even if two weeks have not passed since they received the dose; or
    c. Has received the first dose of a two-dose vaccine, in which case they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

    "Staff of contractors of DOE or the City" means a full or part-time employee, intern or volunteer of a contractor of DOE or another City agency who works in-person in a DOE school

setting, a DOE building, or a charter school, and includes individuals working as independent contractors.

"Visitor" means an individual, not otherwise covered by Paragraph 1 of this Order, who will be present in a DOE school building, except that "visitor" does not include:

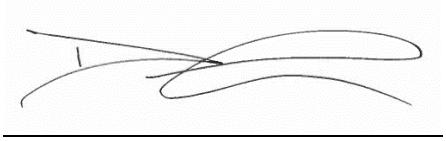
a. Students attending school or school-related activities in a DOE school setting;
b. Parents or guardians of students who are conducting student registration or for other purposes identified by DOE as essential to student education and unable to be completed remotely;
c. Individuals entering a DOE school building for the limited purpose to deliver or pick up 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.

"Works in-person" means an individual spends any portion of their work time physically present in a DOE school setting, DOE building, or charter school setting. It does not include individuals who enter such locations for the limited purpose to deliver or pick up items unless the individual is otherwise subject to this Order. It also does not include individuals present such locations to make repairs at times when students are not present in the building unless the individual is otherwise subject to this Order.

6. Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law.

7. This Order shall be effective immediately and remain in effect until rescinded, subject to the authority of the Board of Health to continue, rescind, alter or modify this Order pursuant to Section 3.01(d) of the Health Code.

Dated: September 15, 2021



Dave A. Chokshi, M.D., MSc
Commissioner

Exhibit “6”

SCHEINMAN
ARBITRATION & MEDIATION SERVICES

September 10, 2021

Via E-Mail Only
Renee Campion, Commissioner
Steven H. Banks, Esq.
New York City Office of Labor Relations
The Office of Labor Relations
22 Cortlandt Street, 14th Floor
New York, NY 10007

Alan M. Klinger, Esq.
Stroock & Stroock & Lavan, L.L.P.
180 Maiden Lane, 33rd Floor
New York, NY 10038

Beth Norton, Esq.
Michael Mulgrew, President
United Federation of Teachers
52 Broadway, 14th Floor
New York, NY 10004

Re: Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO (Impact Bargaining)

Dear Counsel:

Enclosed please find my Award in the above referenced matter.

Thank you.

Sincerely,

Martin F. Scheinman

MFS/sk
BOE.UFT.Impact Bargaining.awd

In the Matter of the Arbitration		
between		
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK		Re: Impact Bargaining
"Department"		
-and-		
UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO		
"Union"		

APPEARANCES

For the Department
Renee Campion, Commissioner of Labor Relations
Steven H. Banks, Esq., First Deputy Commissioner and General Counsel of Labor Relations

For the Union
STROOCK & STROOCK & LAVAN, L.L.P.
Alan M. Klinger, Esq.

Beth Norton, Esq., UFT General Counsel
Michael Mulgrew, UFT President

BEFORE: Martin F. Scheinman, Esq., Arbitrator

BACKGROUND

The Union ("Union" or "UFT") protests the Department of Education's ("Department" or "DOE") failure to reach agreement on the impact of its decision mandating all employees working in Department buildings show proof they started the Covid-19 vaccination protocols by September 27, 2021. The Union contends the Department failed to adequately provide, among other things, for those instances where employees have proof of a serious medical condition making the vaccine a danger to their health, as well as for employees who have a legitimate religious objection to vaccines.

Most of the basic facts are not in dispute.

For those in the New York City ("NYC" or "City") metropolitan area, we are now in the 18th month of the Covid-19 pandemic. During that time, we have seen substantial illness and loss of life. There have been periods of significant improvement and hope, but sadly, we have seen resurgence with the Delta variant. Throughout this period, NYC and its municipal unions have worked collaboratively to provide needed services for the City's 8.8 million residents in as safe an environment as possible. Yet, municipal employees have often borne great risk. The Department and the UFT are no exception. The DOE and the UFT immediately moved to remote instruction and then later a hybrid model of both in-person and remote learning for the 2020-2021 school year. Educators at all levels strove to deliver the best experience possible under strained circumstances. For this

coming school year, both the DOE and the UFT have endeavored to return, as much as possible, to in-person learning. They have developed protocols regarding masking and distancing to effectuate a safe environment for the City's students and educators.

To this end, the Delta resurgence has complicated matters. In recognition of increased risk, there have been various policies implemented at City agencies and other municipal entities. Mayor de Blasio in July 2021 announced a "Vaccine-or-Test" mandate which essentially requires the City workforce, including the UFT's educators, either to be vaccinated or undergo weekly testing for the Covid-19 virus effective September 13, 2021.

Most relevant to this matter, on August 23, 2021, the Mayor and the NYC Commissioner of Health and Mental Hygiene, David A. Chokshi, MD, announced a new policy for those workforces in NYC DOE buildings. Those employees would be subject to a "Vaccine Only" mandate. That is, such employees would need to show by September 27, 2021, they had at least started the vaccination protocol or would not be allowed onto DOE premises, would not be paid for work and would be at risk of loss of job and benefits. This mandate was reflected in an Order of Commissioner Chokshi, dated August 24, 2021. That Order, by its terms, did not expressly provide for exceptions or accommodations for those with medical contraindications to vaccination or sincerely-held religious objections to inoculation. Nor did it address matters of due process with regard to job and benefits protection.

The UFT promptly sought to bargain the impact and implementation of the Vaccine Only mandate. A number of discussions were had by the parties but important matters remained unresolved.

On September 1, 2021, the UFT filed a Declaration of Impasse with the Public Employment Relations Board ("PERB") as to material matters. The City/DOE did not challenge the statement of impasse and PERB appointed me to mediate the matters. Given the exigencies of the imminent start of the school year and the coming of the September 27, 2021, mandate, together with the importance of the issues involved to the workforce, mediations sessions were held immediately on September 2, 3, 4 and 5, 2021, with some days having multiple sessions. Progress was made, and certain tentative understandings were reached, but significant matters remained unresolved. By agreement of the parties, the process moved to arbitration. They asked I serve as arbitrator.[1]

Arbitration sessions were held on September 6 and 7, 2021. During the course of the hearings, both sides were given full opportunity to introduce evidence and argument in support of their respective positions. They did so. Both parties made strenuous and impassioned arguments reflecting their viewpoints on this entire issue.

During the course of these hearings, I made various interim rulings concerning the impact of the "Vaccine Only" mandate. I then

[1] My jurisdiction is limited to the issues raised during impact bargaining and not with regard to the decision to issue the underlying "Vaccine Only" order.

directed the parties to draft language reflecting those rulings. Even though I am very familiar with the language of the current Collective Bargaining Agreement, as well as the parties' relationship since I am a member of their permanent arbitration panel and have served as a fact-finder and mediator during several rounds of bargaining, I concluded the parties are more familiar with Department policy and how leave and entitlements have been administered in accordance with prior agreements. As such, my rulings reflect both the understandings reached during the negotiations prior to mediation, those reached in the mediation process and the parties' agreed upon language in response to my rulings. All are included, herein.

I commend the parties for their seriousness of purpose and diligence in addressing these complicated matters. The UFT made clear it supports vaccination efforts and has encouraged its members to be vaccinated. Nonetheless, as a Union, it owes a duty to its members to ensure their rights are protected. The City/DOE demonstrated recognition of the importance of these issues, particularly with regard to employees' legitimate medical or religious claims. I appreciate both parties' efforts in meeting the tight timeline we have faced and the professionalism they demonstrated serving the citizens of the City and what the million plus students deserved. They have invested immense effort to insure such a serious issue was litigated in such a thoughtful way.

Yet, in the end, it falls to me, as Arbitrator, to arrive at a fair resolution of the matters at hand.

This matter is one of the most urgent events I have been involved with in my forty (40) plus years as a neutral. The parties recognized the complexity of the issues before me, as well as the magnitude of the work that lies ahead to bring this conflict to completion in a timely manner. For this reason, they understood and accepted the scope and complexity of this dispute could not be handled by me alone. They agreed my colleagues at Scheinman Arbitration and Mediation Services ("SAMS") would also be involved.

I want to thank my colleagues at SAMS, especially Barry J. Peek, for their efforts and commitment to implementing the processes to resolve this matter. This undertaking could not be accomplished by any single arbitrator.

Opinion

After having carefully considered the record evidence, and after having the parties respond to countless inquiries. I have requested to permit me to make a final determination, I make the rulings set forth below. While some of the language has been drafted, initially, by the parties in response to my rulings, in the end the language set forth, herein, is mine alone. I hereby issue the following Award:

I. Exemption and Accommodation Requests & Appeal 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 non-pedagogical 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.

Any requests to be considered as part of this process must be submitted via the SOLAS system no later than Monday, September 20, 2021, by 5:00 p.m.

A. Full Medical Exemptions to the vaccine mandate shall only be considered where an employee has a documented contraindication such that an employee cannot receive any of the three (3) authorized vaccines (Pfizer, Moderna, J&J)—with contraindications delineated in CDC clinical

considerations for COVID-19 vaccination. Note that a prior immediate allergic reaction to one (1) type of vaccine will be a precaution for the other types of vaccines, and may require consultation with an allergist.

B. Temporary Medical Exemptions to the vaccine mandate shall only be based on the following valid reasons to defer or delay COVID-19 vaccination for some period:

- Within the isolation period after a COVID-19 infection;
- Within ninety (90) days of monoclonal antibody treatment of COVID-19;
- Treatments for conditions as delineated in CDC clinical considerations, with understanding CDC guidance can be updated to include new considerations over time, and/or determined by a treating physician with a valid medical license responsible for the immunosuppressive therapy, including full and appropriate documentation that may warrant temporary medical exemption for some period of time because of active therapy or treatment (e.g., stem cell transplant, CAR T-cell therapy) that would temporarily interfere with the patient's ability to respond adequately to vaccination;
- Pericarditis or myocarditis not associated with COVID-19 vaccination or pericarditis or myocarditis associated with COVID-19 vaccination.

Length of delay for these conditions may vary, and the employee must get vaccinated after that period unless satisfying the criteria for a Full Medical Exemption described, above.

C. 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 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).

D. There are cases in which, despite an individual having sought and received the full course of the vaccination, he or she is unable to mount an immune response to COVID-19 due to preexisting immune conditions. In these circumstances, each individual case shall be reviewed for potential accommodation. Medical accommodation requests must be documented in writing by a medical doctor.

E. The initial determination of eligibility for an exemption or accommodation shall be made by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee

Relations. These determinations shall be made in writing no later than Thursday, September 23, 2021, and, if denied, shall include a reason for the denial.

F. If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE within one (1) school day of the DOE's issuance of the initial eligibility determination. The request for appeal shall include the reason for the appeal and any additional documentation. Following the filing of the appeal, any supplemental documentation may be submitted by the employee to the Scheinman Arbitration and Mediation Services ("SAMS") within forty eight (48) hours after the filing of the appeal. If the stated reason for denial of a medical exemption or accommodation request is insufficient documentation, the employee may request from the arbitrator and, upon good cause shown, the arbitrator may grant an extension beyond forty eight (48) hours and permit the use of CAR days after September 27, 2021, for the employee to gather the appropriate medical documentation before the appeal is deemed submitted for determination.

G. A panel of arbitrators identified by SAMS shall hear these appeals, and may request the employee or the DOE submit additional documentation. The assigned arbitrator may also request information from City and/or DOE Doctors as part of the review of the appeal documentation. The assigned

arbitrator, at his or her discretion, shall either issue a decision on the appeal based on the documents submitted or hold an expedited (virtual) factual hearing. If the arbitrator requests a factual hearing, the employee may elect to have a union representative present but neither party shall be required to be represented by an attorney at the hearing. The expedited hearing shall be held via Zoom telecommunication and shall consist of brief opening statements, questions from the arbitrator, and brief closing statements. Cross examination shall not be permitted. Any documentation submitted at the arbitrator's request shall be provided to the DOE at least one (1) business day before the hearing or the issuance of the written decision without hearing.

H. Appeal decisions shall be issued to the employee and the DOE no later than Saturday September 25, 2021. Appeal decisions shall be expedited without full Opinion, and final and binding.

I. While an appeal is pending, the exemption shall be assumed granted and the individual shall remain on payroll consistent with Section K below. However, if a larger number of employees than anticipated have a pending appeal as of September 27, 2021, as determined by SAMS, SAMS may award different interim relief consistent with the parties' intent. Those employees who are vaccinated and have applied for an

accommodation shall have the ability to use CAR days while their application and appeal are pending. Should the appeal be granted, these employees shall be reimbursed any CAR days used retroactive to the date of their initial application.

J. The DOE shall cover all arbitration costs from SAMS under this process. To the extent the arbitrator requests additional medical documentation or information from the DOE, or consultation with City and/or DOE Doctors, arranging and paying for such documentation and/or consultation shall be the responsibility of the DOE.

K. An employee who is granted a medical or religious exemption or a medical accommodation under this process and within the specific criteria identified above shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees 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. For those with underlying medical issues granted an accommodation under Section I(D), the DOE will make best efforts to ensure the alternate work setting is appropriate for the employee's medical needs. The DOE shall make best efforts to make these assignments within the same borough as

the employee's current school, to the extent a sufficient number of assignments exist in the borough. Employees so assigned shall be required to submit to COVID testing twice per week for the duration of the assignment.

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. Should either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to SAMS for expedited resolution.

II. Leave

A. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021. Such leave may be unilaterally imposed by the DOE and may be extended at the request of the employee consistent with Section III(B), below. Placement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose.

B. Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes.

C. During such leave without pay, employees shall continue to be eligible for health insurance. As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period.

D. Employees who become vaccinated while on such leave without pay and provide appropriate documentation to the DOE prior to November 30, 2021, shall have a right of return to the same school as soon as is practicable but in no case more than one (1) week following notice and submission of documentation to the DOE.

E. Pregnancy/Parental Leave

i. Any soon-to-be birth mother who starts the third trimester of pregnancy on or before September 27, 2021, (e.g. has a due date no later than December 27, 2021), may commence UFT Parental Leave prior to the child's birth date, but not before September 27, 2021.

ii. No documentation shall be necessary for the early use of Parental Leave, other than a doctor's written assertion the employee is in her third trimester as of September 27, 2021.

iii. Eligible employees who choose to start Parental Leave prior to the child's birth date, shall be required to first use CAR days until either: 1) they exhaust CAR/sick days,

at which point the Parental Leave shall begin, or 2) they give birth, at which point they shall be treated as an approved Parental Leave applicant for all purposes, including their prerogative to use additional CAR days prior to the commencement of Parental Leave.

iv. Eligible employees who have a pregnancy disability or maternity disability outside of the regular maternity period may, in accordance with existing rules, borrow CAR/sick days and use a Grace Period. This eligibility to borrow CAR/sick days does not apply to employees during the regular maternity recovery period if they have opted to use Parental Leave.

v. In the event an eligible employee exhausts CAR/sick days and parental leave prior to giving birth, the employee shall be placed on a leave without pay, but with medical benefits at least until the birth of the child. As applicable, unvaccinated employees may be placed in the leave as delineated in Section II(A).

vi. If not otherwise covered by existing Family Medical Leave Act ("FMLA") or leave eligibility, an employee who takes Parental Leave before the birth of the child shall be eligible to be on an unpaid leave with medical benefits for the duration of the maternity recovery period (i.e., six weeks after birth or eight weeks after a birth via C-Section)

vii. All other eligibility and use rules regarding UFT Parental Leave as well as FMLA remain in place.

III. Separation

A. During the period of September, 28, 2021, through October 29, 2021, any employee who is on leave without pay due to vaccination status may opt to separate from the DOE. In order to separate under this Section and receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. If an employee opts to separate consistent with this Section, the employee shall be eligible to be reimbursed for unused CAR days on a one (1) for one (1) basis at the rate of 1/200th of the employee's salary at departure per day, up to 100 days, to be paid following the employee's separation with documentation including the general waiver and release. Employees who elect this option shall be deemed to have resigned involuntarily effective on the date contained in the general waiver as determined by the DOE, for non-disciplinary reasons. An employee who separates under this Section shall continue to be eligible for health insurance through September 5, 2022, unless they are eligible for health insurance from another source (e.g., a spouse's coverage or another job).

B. During the period of November 1, 2021, through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternately opt to extend the leave through September 5, 2022. In order to extend this leave pursuant to this Section, and continue to receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. Employees who select this option shall continue to be eligible for health insurance through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the DOE before September 5, 2022, shall have a right to return to the same school as soon as is practicable but in no case more than two (2) weeks following notice to the DOE. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned.

C. Beginning December 1, 2021, the DOE shall seek to unilaterally separate employees who have not opted into separation under Sections III(A) and III(B). Except for the express provisions

contained, herein, all parties retain all legal rights at all times relevant, herein.

September 10, 2021.

Martin F. Scheinman, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, MARTIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

September 10, 2021.

Martin F. Scheinman, Esq.
Arbitrator

DOE.UFT.Impact Bargaining.awd

APPENDIX I

Text Order Denying Proposed Order to Show Cause
With Emergency Relief, dated October 28, 2021 ..

10/28/2021		ORDER denying 8 Proposed Order to Show Cause With Emergency Relief. This complaint raises many of the same claims as those raised by plaintiffs in 21-CV-7863, Kane et al v. de Blasio et al. On October 12, 2021, the Court denied plaintiffs' application for a preliminary injunction in that case. See 21-CV-7863, Dkts. 60, 65. For the same reasons as discussed in that matter, Plaintiffs' application for a temporary restraining order and a preliminary injunction in this case is DENIED. SO ORDERED. (HEREBY ORDERED by Judge Valerie E. Caproni) (Text Only Order) (anc) (Entered: 10/28/2021)

APPENDIX J

NELSON MADDEN BLACK LLP

475 Park Avenue South, Suite 2800
New York, New York 10016
Telephone: (212) 382-4300
nelsonmaddenblack.com

November 1, 2021

MEMO ENDORSED

By ECF
Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, NY 10007

Re: *Keil, et al., v. The City of New York, et al., No. 21 Civ. 8773*

Re: *Kane, et al., v. Bill de Blasio, et al.*, No. 21 Civ. 7863

Dear Judge Caproni:

We represent the plaintiffs in the *Keil* lawsuit, referenced above. I write for the purpose of

* consenting to a stay of further proceedings in the District Court on the *Keil* case pending appeal, including on the order to show cause on the issue of consolidation of the *Keil* matter with the *Kane* matter, referenced above, but with the exception of a ruling on our Rule 62(d) application below; and

* requesting an injunction pending appeal pursuant to Rule 62(d).

Consent to Stay Request

By letter dated October 29, 2021, counsel for the Defendants in *Keil* asked this court to stay the matter pending appeal. We agree that the Circuit Court's disposition of Plaintiffs' appellate motion in the *Keil* matter is likely to provide the District Court with guidance that will aid it in deciding the matter on remand, and we therefore consent to the Defendants' request for a stay as expressed in that letter.

While the *Keil* matter has some similarities to the *Kane* matter, it has even more differences. We believe that the briefing, argument and decision in both matters in the Circuit Court will illustrate that the two matters should be considered separately, and judicial efficiency would be served by concentrating all parties' efforts on proceedings in that court for now. If the Court declines to stay proceedings in this Court relating to consolidation, we intend to submit Plaintiffs' reasons for opposition to consolidation in detail to the court on or prior to November 12, 2021, the deadline set forth in the Court's order to show cause filed on October 28, 2021.

Rule 62(d) Application

Pursuant to Rule 62(d), Plaintiffs respectfully request that this Court grant an injunction as requested in our motion papers or, alternatively, a stay of enforcement of Commissioner Chokshi's vaccine mandates dated September 15 and September 28, 2021, pending interlocutory appeal of this Court's October 28, 2021 order denying Plaintiffs' motion for a preliminary injunction. Plaintiffs rely on the papers submitted previously in support of the aforesaid motion, and note that Defendants have clearly shown their intention to fire the Plaintiffs and, on information and belief, thousands of other Department of Education employees who similarly have refused to "elect" either to take voluntary leave without pay or to accept a forced resignation beginning on December 1, 2021.

Respectfully submitted,

/s/ Jonathan R. Nelson
Nelson Madden Black LLP
Counsel for Plaintiffs
By Jonathan Robert Nelson (JN-8796)

cc: All counsel via ECF

21-CV-7863 & 21-CV-8773

The parties' application to stay the matter *Keil, et al. v. The City of New York, et al.,* 21-CV-8773, pending resolution of the appeal before the Second Circuit is GRANTED. All deadlines are adjourned *sine die*. Plaintiffs must notify the Court of any decision by the Second Circuit within one business day of its issuance.

The Court's November 12, 2021 deadline for the parties to show cause why 21-CV-7863 and 21-CV-8773 should not be consolidated pursuant to Rule 42 of the Federal Rules of Civil Procedure, *see* Dkt. 21-CV-7863, Dkt. 71; 21-CV-8773, Dkt. 32, is adjourned *sine die*. The Court will reinstate the deadline upon resolution of the appeals before the Second Circuit in both matters.

Plaintiffs' request in 21-CV-8773 for an injunction or to stay enforcement of the DOE Vaccine Mandate pending resolution of the appeal is DENIED.

The Clerk of Court is respectfully directed to close the open motions at docket entries 37 and 39 in 21-CV-8773.

SO ORDERED.

Valerie Capp~~roni~~ Date: November 1, 2021

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE

APPENDIX K

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 15th day of November, two thousand twenty-one.

Before: Pierre N. Leval,
José A. Cabranes,
Denny Chin,
Circuit Judges.

Michael Kane, William Castro, Margaret Chu, Heather Clark, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Trinidad Smith, Amaryllis Ruiz-Toro,

Plaintiffs-Appellants,

ORDER

v.

21-2678-cv

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,

v.

21-2711-cv

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,

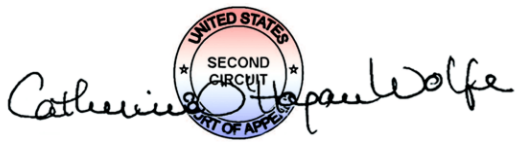
Defendants-Appellees.

The motions of Plaintiffs-Appellants ("Plaintiffs") for an injunction pending appeal having been heard at oral argument on November 10, 2021, and Defendants-Appellees ("Defendants") having represented to this Court that "the City is working toward making an opportunity for reconsideration available more broadly to DOE employee[s] who unsuccessfully sought religious exemptions pursuant to the arbitration award's appeal process," it is hereby

ORDERED that this appeal is expedited and will be heard by a merits panel sitting on November 22, 2021 (the "merits panel"). Pending further order by the merits panel,

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 to the citywide panel 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. The deadline to opt-in to the extended leave program and execute any accompanying waiver shall be stayed for Plaintiffs, 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 by the citywide panel, the plaintiff will receive backpay running from the date they were placed on leave without pay.
6. This order is intended only to provide for temporary interim relief until the matter is considered by the merits panel of this court, which panel may entirely supersede these provisions for interim relief, and the parties are at liberty to advocate to the merits panel for alteration of these provisions. Unless the merits panel has previously entered a superseding order, within two weeks of the conclusion of Plaintiffs' proceedings before the citywide panel, the parties shall inform the merits panel of the result of those proceedings and advise of any further relief being sought.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX L

21-2678-cv; 21-2711-cv
Kane v. de Blasio; Keil v. City of New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2021

(Argued: November 22, 2021 Decided: November 28, 2021)

No. 21-2678

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

Plaintiffs-Appellants,

-v.-

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.

No. 21-2711

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, 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, MEISHA PORTER, in her official capacity as Chancellor of the New York City Department of Education,

Defendants-Appellees.

Before: LIVINGSTON, *Chief Judge*, KEARSE, and LEE, *Circuit Judges*.

In these two cases on appeal, fifteen teachers and school administrators challenge the denial of motions to preliminarily enjoin the enforcement of an order issued by the New York City Commissioner of Health and Mental Hygiene mandating that individuals who work in New York City schools be vaccinated against the COVID-19 virus ("Vaccine Mandate"). Plaintiffs-Appellants challenge the Vaccine Mandate on religious-freedom grounds and principally contend (1) that it is facially infirm under the First Amendment; and (2) that the procedures by which their religious accommodation claims were considered are unconstitutional as applied to them. We reject the Plaintiffs-Appellants' facial challenge but agree that they have established an entitlement to preliminary relief on their as-applied claim. Accordingly, the judgment of the district court is **VACATED** and the case **REMANDED** for further proceedings. Interim relief

ordered by the motions panel pending appeal is continued, with the consent of Defendant-Appellee the City of New York.

FOR PLAINTIFFS-APPELLANTS: In No. 21-2678: SUJATA SIDHU GIBSON, The Gibson Law Firm, Ithaca, NY; In No. 21-2711: BARRY BLACK, Sarah Elizabeth Child, and Jonathan R. Nelson, Nelson Madden Black LLP, New York, NY.

FOR DEFENDANTS-APPELLEES: SUSAN PAULSON, Assistant Corporation Counsel, Richard Paul Dearing, Assistant Corporation Counsel, and Devin Slack, New York City Law Department, New York, NY.

PER CURIAM:

These two cases on appeal, which we heard in tandem, concern the denial of preliminary injunctive relief in connection with an order issued by the New York City Commissioner of Health and Mental Hygiene (the "Commissioner"), mandating that individuals who work in New York City schools be vaccinated against the COVID-19 virus (the "Vaccine Mandate" or "Mandate"). Plaintiffs-Appellants ("Plaintiffs") are fifteen teachers and school administrators who object to receiving the COVID-19 vaccine on religious grounds. Plaintiffs sought, but were denied, religious accommodations. They have sued the City of New York (the "City"), certain officials, and the New York City Department of Education

(collectively, the "Defendants"), challenging both the Vaccine Mandate on its face and the process by which their requests for religious accommodations were denied. The United States District Court for the Southern District of New York (Caproni, *J.*) denied motions for preliminary injunctions in both cases, but a motions panel of this Court, with the consent of the City, thereafter granted Plaintiffs substantial provisional relief pending appeal.

For the reasons set forth herein, we conclude that the Vaccine Mandate does not violate the First Amendment on its face, and we thus agree with the district court to this extent. We nevertheless vacate the district court's orders of October 12 and 28, 2021, denying preliminary relief, and we concur with and continue the interim relief granted by the motions panel as to these fifteen individuals. For the present, Plaintiffs have established their entitlement to preliminary relief on the narrow ground that the procedures employed to assess their religious accommodation claims were likely constitutionally infirm as applied to them. We remand for further proceedings consistent with this opinion.

BACKGROUND

I. Factual Background

On August 24, 2021, the Commissioner issued an order requiring generally that Department of Education ("DOE") and/or City employees or contractors who

work in DOE schools or DOE buildings be vaccinated against the COVID-19 virus.

The Vaccine Mandate provides, in pertinent part, as follows:

> 1. No later than September 27, 2021 or prior to beginning employment, all DOE staff must provide proof to the DOE that:
>
> a. they have been fully vaccinated; or
>
> b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
>
> c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.[1]
>
> …
>
> 5. For the purposes of this Order:
>
> a. "DOE staff" means (i) full or part-time employees of the DOE, and (ii) DOE interns (including student teachers) and volunteers.
>
> b. "Fully vaccinated" means at least two weeks have passed after a person received a single dose of a one-dose series, or the second dose of a two-dose series, of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization.
>
> c. "DOE school setting" includes any indoor location, including but not limited to DOE buildings, where instruction is provided to DOE

[1] The Vaccine Mandate applies the same requirements to "City employees who work in-person in a DOE school setting or DOE building," "[a]ll staff of contractors of DOE and the City who work in-person in a DOE school setting or DOE building, including individuals who provide services to DOE students," and "[a]ll employees of any school serving students up to grade 12 and any [Universal Pre-Kindergarten-3 or -4] program that is located in a DOE building who work in-person, and all contractors hired by such schools or programs to work in-person in a DOE building."

> students in public school kindergarten through grade 12, including residences of pupils receiving home instruction and places where care for children is provided through DOE's [Living for the Young Family Through Education] program.
>
> d. "Staff of contractors of DOE and the City" means a full or part-time employee, intern or volunteer of a contractor of DOE or another City agency who works in-person in a DOE school setting or other DOE building, and includes individuals working as independent contractors.
>
> e. "Works in-person" means an individual spends any portion of their work time physically present in a DOE school setting or other DOE building. It does not include individuals who enter a DOE school setting or other DOE location only to deliver or pickup items, unless the individual is otherwise subject to this Order. It also does not include individuals present in DOE school settings or DOE buildings to make repairs at times when students are not present in the building, unless the individual is otherwise subject to this Order.

Joint App'x 177–79.[2] DOE serves approximately one million students across the City, and the order was consistent with guidance from the U.S. Centers for Disease Control ("CDC") that school teachers and staff should be vaccinated as soon as possible so as to permit schools to resume normal operations safely.

On September 1, 2021, the United Federation of Teachers ("UFT") filed a formal objection to the Vaccine Mandate on the ground that it fails to provide any medical or religious accommodations. After failing to resolve their dispute

[2] The "Joint App'x" is the joint appendix filed by the parties in No. 21-2711.

through mediation, the UFT and the City moved to arbitration. On September 10, an independent arbitrator (the "Arbitrator") issued an award (the "Arbitration Award") setting forth a process and standards ("Accommodation Standards") for determining, as relevant to this appeal, religious accommodations to the Vaccine Mandate.[3]

The Accommodation Standards allowed employees to request a religious accommodation by submitting a request that is "documented in writing by a religious official (e.g., clergy)." Joint App'x 197. 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 online source), or where the objection is personal, political, or philosophical in nature." *Id.*[4]

[3] The Arbitration Award also provides standards for determining medical accommodations to the Vaccine Mandate. Although Plaintiffs challenged these standards below as well, they did not appeal on these issues.

On September 15, the Arbitrator issued a materially identical award resolving a dispute between the City and the Council of Supervisors and Administrators, a labor union for school administrative personnel. Joint App'x 209.

[4] The meaning of the second clause—"where the documentation is readily available (e.g., from an online source)"—is obscure. The parties do not address its meaning in their briefs. The district court and the *Keil* Defendants seem to have interpreted it as a restriction on an employee's ability to meet the Arbitration Award's requirement that a request be "documented in writing by a religious official (e.g., clergy)." *See* Joint App'x 60–61. Under this interpretation, it would be inadequate for an employee to produce "readily available" documentation from a religious official corroborating that employee's religious objections to vaccination. The employee would

The Accommodation Standards further provide that requests "shall be considered for recognized and established religious organizations (e.g., Christian Scientists)." *Id.*

The Arbitration Award establishes a two-step process for resolving a request for a religious accommodation. First, the DOE renders an "initial determination of eligibility for an exemption or accommodation."[5] Joint App'x 197; Defendants Br. 7. Then, if the employee's request is denied, the employee can appeal the DOE's determination to a panel of arbitrators selected by the Arbitrator. The Arbitration Award states that its procedures are to operate "[a]s

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instead be required to produce documentation such as, for example, a letter from a religious official the employee knows personally. While the text of this provision is ambiguous in our view, we adopt the district court's interpretation for purposes of this opinion. The parties are free to argue for a different interpretation before the district court on remand.

[5] At times, the parties appear to use the terms "exemption" and "accommodation" interchangeably. As we use those terms, however, exemptions are different from accommodations. The Vaccine Mandate includes *exemptions* for certain objectively defined categories of people, like delivery workers. Those who are exempted from the Mandate are not subject to its terms. By contrast, employees who *are* subject to the Mandate can request accommodations under Title VII and analogous state and city law. *See infra* at 43–44 (discussing Title VII's requirement to provide reasonable accommodations); *see also We The Patriots USA, Inc. v. Hochul*, 2021 WL 5276624, at *1 (2d Cir. Nov. 12, 2021).

an alternative to any statutory reasonable accommodation process."[6] Joint App'x 194–95. Employees who are granted an accommodation

> shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees 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. at 200.

In addition to setting forth a process for granting religious accommodations, the Arbitration Award scheduled a series of deadlines for employees to comply with the Vaccine Mandate. First, it provided that as to any unvaccinated employee denied an accommodation, the DOE could place the employee on "leave without pay effective September 28, 2021, or upon denial of appeal, whichever [was] later, through November 30, 2021." Joint App'x 201. "During such leave

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[6] Elsewhere, it asserts:

> 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.

Joint App'x 201.

without pay," employees "shall continue to be eligible for health insurance" but "are prohibited from engaging in gainful employment." *Id.* at 202.

From September 28 through October 29, any employee who was on leave without pay "due to vaccination status" could opt to separate from the DOE. *Id.* at 204. Employees who elected to separate were eligible for certain benefits but were required to file "a waiver of [their] rights to challenge [their] involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process." *Id.* Then, from November 1 through November 30, any employee on leave without pay due to vaccination status could "alternately opt to extend the leave through September 5, 2022," during which time they would remain eligible for health insurance. *Id.* at 205. To extend their leave, however, the employees were required to execute "a waiver of [their] rights to challenge [their] voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process." *Id.* "Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned." *Id.* "Beginning December 1, 2021, the DOE shall seek to unilaterally separate employees who have not opted into separation . . . ." *Id.*

On September 15, the Vaccine Mandate was amended to provide: "Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law."[7] Joint App'x 184. The amended Vaccine Mandate also requires "all visitors to a DOE school building" to show proof that they have received at least the first dose of a two-dose vaccine prior to entering any DOE building. *Id.* at 183. The amended Mandate excludes certain groups from the definition of a "visitor," including students, parents (in certain circumstances), deliverymen, repairmen, emergency responders, "[i]ndividuals entering for the purpose of COVID-19 vaccination," "[i]ndividuals who are not eligible to receive a COVID-19 vaccine because of their age," voters, and certain election-related personnel. *Id.* at 184.

II. Procedural History

On September 21 and October 27, 2021, Plaintiffs, fifteen DOE teachers or school administrators who sought and were denied religious accommodations

[7] We observe that this additional language is superfluous as a legal matter, at least as to religious accommodation under Title VII of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000e, *et seq.* The Commissioner, a City official, could not override Title VII, a federal law requiring employers to offer reasonable accommodations that do not result in undue hardship on the employer. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause). Thus, even under the original Vaccine Mandate, DOE employees were legally entitled to request accommodations.

pursuant to the process outlined herein, filed these two lawsuits, *Kane*, 21-cv-7863, and *Keil*, 21-cv-8773. Plaintiffs allege, *inter alia*, the violation of their First Amendment rights. On October 12, the district court denied the *Kane* Plaintiffs' request for a preliminary injunction, ruling principally that Plaintiffs were unlikely to prevail on their claim that the Vaccine Mandate was unconstitutional on its face.[8] On October 28, the district court denied a similar request for a preliminary injunction by the Plaintiffs in *Keil* "[f]or the same reasons discussed in" *Kane* on the ground that the two cases "raise[] many of the same claims . . . ." Joint App'x 8.

On October 25 and 28, 2021, Plaintiffs appealed the district court's denial of their requests for a preliminary injunction and requested an emergency injunction pending appeal. A motions panel heard oral argument on November 10, during which the City conceded that the Accommodation Standards are "constitutionally suspect." The panel then solicited supplemental letter briefing. Each party

[8] A district court in this Circuit denied a preliminary injunction in a different case in which different plaintiffs challenged the same Vaccine Mandate on substantive due process and equal protection grounds. *See Maniscalco v. New York City Dep't of Educ.*, 2021 WL 4344267 (E.D.N.Y. Sept. 23, 2021). A different panel of this Court denied an injunction pending appeal, 2021 WL 4437700 (2d Cir. Sept. 27, 2021), and subsequently affirmed the district court's decision, 2021 WL 4814767 (2d Cir. Oct. 15, 2021) (summary order).

attached to its letter brief a proposed order for relief pending appeal. ECF No. 53 in No. 21-2678, at 5–6; ECF No. 65 in No. 21-2711, at 10–13.

On November 15, 2021, the motions panel issued an order ("Motions Panel Order") largely tracking the City's proposed order and referring the matter to this merits panel.[9] The Motions Panel Order provides: "Pending further order by the merits panel . . . Plaintiffs shall receive fresh consideration of their requests for a religious accommodation." Motions Panel Order ¶ 1. The Order sets forth a process pursuant to which Plaintiffs' requests will be promptly adjudicated "by a central citywide panel," which will adhere to the standards of, *inter alia*, Title VII of the Civil Rights Act of 1964, rather than "the challenged criteria set forth in . . . the arbitration award . . . ." *Id.* ¶ 2. The Motions Panel Order also stays the deadline for Plaintiffs to opt into the extended leave program with any required waiver. *Id.* ¶ 4. It also provides that if a plaintiff's request for religious accommodation is granted by the citywide panel, the plaintiff will receive backpay running from the date the plaintiff was placed on leave without pay. *Id.* ¶ 5.

We heard oral argument on November 22, 2021 and now vacate the district court's decision denying Plaintiffs preliminary injunctive relief. We leave in

[9] The Motions Panel Order is set forth in an Appendix to this Opinion.

place all interim relief ordered by the Motions Panel, thus enjoining the City from terminating Plaintiffs or requiring them to opt into the extended leave program while they are afforded the opportunity to have their religious accommodation requests reconsidered. We remand the case for further proceedings consistent with this opinion.

DISCUSSION

"When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020); *see also We The Patriots USA, Inc. v. Hochul*, No. 21-2179, 2021 WL 5121983, at *20 (2d Cir. Nov. 4, 2021) ("When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge."), *opinion clarified*, 2021 WL 5276624 (2d Cir. Nov. 12, 2021), *application for injunctive relief filed*, No. 21A125 (U.S. Nov. 2, 2021).[10] "We review a district court's denial of a preliminary injunction

[10] Unless otherwise indicated, in quoting cases, all internal quotation marks, alterations, emphases, footnotes, and citations are omitted.

for abuse of discretion, but must assess de novo whether the court proceeded on the basis of an erroneous view of the applicable law." *Agudath*, 983 F.3d at 631.[11]

The "purpose" of a preliminary injunction "is not to award the movant the ultimate relief sought in the suit but is only to preserve the status quo by preventing during the pendency of the suit the occurrence of that irreparable sort of harm which the movant fears will occur." *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 754 (2d Cir. 1977); *see also* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, § 2947 (3d ed. Apr. 2021 update) ("[A] preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits."). "Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

[11] The parties dispute the applicable legal standard. Defendants argue that Plaintiffs seek "to modify the status quo by virtue of a *mandatory* preliminary injunction (as opposed to seeking a *prohibitory* preliminary injunction to maintain the status quo)." *A.H. v. French*, 985 F.3d 165, 176 (2d Cir. 2021). "In this circumstance, the movant must also make a strong showing of irreparable harm and demonstrate a clear or substantial likelihood of success on the merits." *Id.* We need not resolve this dispute because our conclusions would be the same under either standard.

I. Likelihood of Success on the Merits

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST., amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause against the states). "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). The Free Exercise Clause thus protects an individual's private right to religious belief, as well as "the performance of (or abstention from) physical acts that constitute the free exercise of religion." *Cent. Rabbinical Cong. of U.S. & Can. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193 (2d Cir. 2014) (quoting *Smith*, 494 U.S. at 877).

This protection, however, "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Smith*, 494 U.S. at 879. Neutral and generally applicable laws are subject only to rational-basis review. *Cent. Rabbinical Cong.*, 763 F.3d at 193. Laws and government policies that are either non-neutral or not generally applicable, however, are subject to "strict scrutiny," meaning that they must be "narrowly tailored" to serve a

"compelling" state interest. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *see Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) ("A government policy can survive strict scrutiny under the First Amendment's Free Exercise Clause only if it advances interests of the highest order and is narrowly tailored to achieve those interests.").

Here, Plaintiffs make two principal claims: (1) that the Vaccine Mandate is facially unconstitutional; and (2) that even assuming that the Vaccine Mandate is *not* facially unconstitutional, their First Amendment rights were violated by virtue of the procedures set forth in the Arbitration Award, which were used in the evaluation of their accommodation requests. We conclude that Plaintiffs have not shown a likelihood of success on their facial challenge to the Vaccine Mandate. At this juncture, however, they have demonstrated a likelihood of success on their as-applied challenge to the proceedings used in assessing their accommodation requests.

A. Vaccine Mandate

1. Neutrality

The Vaccine Mandate, in all its iterations, is neutral and generally applicable. To determine neutrality, we begin by examining the Mandate's text, "for the minimum requirement of neutrality is that a law not discriminate on its

face." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Facial neutrality alone, however, is not enough. A law that is facially neutral will still run afoul of the neutrality principle if it "targets religious conduct for distinctive treatment." *Id.* at 534, 546. We thus also consider whether there are "subtle departures" from religious neutrality, as well as "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* at 534, 540.

The Vaccine Mandate is neutral on its face. It applies to "all DOE staff," as well as City employees and contractors of DOE and the City who work in DOE school settings. Thus, the Mandate does not single out employees who decline vaccination on religious grounds. Its restrictions apply equally to those who choose to remain unvaccinated for any reason.[12]

[12] The Vaccine Mandate permits both medical and religious accommodations. In that respect, this case is factually different from recent challenges to other vaccine mandates. *See, e.g.*, *We The Patriots*, 2021 WL 5121983, at *1; *Does 1-6 v. Mills*, 16 F.4th 20, 30 (1st Cir. 2021), *application for injunctive relief denied sub nom. Does 1-3 v. Mills*, 2021 WL 5027177 (U.S. Oct. 29, 2021).

Nor do New York City Mayor Bill de Blasio's statements to the media render the Vaccine Mandate non-neutral. Plaintiffs seize on statements the Mayor made at a press conference suggesting that religious adherents should be vaccinated because the Pope supports vaccination and that accommodations to the Mandate will only be afforded to religions with long-standing objections to vaccination. But these statements reflect nothing more than the Mayor's personal belief that religious accommodations will be rare, as well as "general support for religious principles that [he] believes guide community members to care for one another by receiving the COVID-19 vaccine." *We The Patriots*, 2021 WL 5121983, at *10; *see also id.* ("Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers; otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions non-neutral . . . ."). [13] And even

[13] While Mayor de Blasio said that only Christian Scientists and Jehovah's Witnesses could receive religious accommodations, the City has granted accommodations to members of many other faiths. *See* Defendants Br. 12 (noting that "over 100 religious exemptions [have] been granted to employees of more than 20 different faiths[] . . . and individuals whose specific religion is not identifiable" (citing Joint App'x in No. 21-2678, at 758–59)).

assuming, *arguendo*, that the Mayor's statements reflect religious animus, the Mayor did not have a meaningful role in establishing or implementing the Mandate's accommodations process, which was implemented by DOE staff, and later, the Arbitrator. *See id.* ("Governor Hochul's expression of her own religious belief as a moral imperative to become vaccinated cannot reasonably be understood to imply an intent on the part of the State to target those with religious beliefs contrary to hers; otherwise, politicians' frequent use of religious rhetoric to support their positions would render many government actions non-neutral . . . ."); *cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2417–23 (2018) (rejecting Establishment Clause challenge to facially neutral policy based on statements by the president that arguably reflected religious animus).

2. General Applicability

The Vaccine Mandate is also generally applicable. A law may not be generally applicable under *Smith* for either of two reasons: first, "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"; or, second, "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. Plaintiffs argue

that the Vaccine Mandate is not generally applicable on its face because it does not apply to the general public. We disagree.

"[A]n exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons." *We The Patriots*, 2021 WL 5121983, at *14 (quoting *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1187 (10th Cir. 2021)). Rather, there must be some showing that the exemption procedures allow secularly motivated conduct to be favored over religiously motivated conduct. *Id.* Plaintiffs have made no such showing. Instead, as in *We The Patriots*, the Vaccine Mandate provides for objectively defined categories of exemptions — such as those for individuals entering DOE buildings to receive a COVID-19 vaccination or to respond to an emergency — that do not "'invite[]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 141 S. Ct. at 1879 (quoting *Smith*, 494 U.S. at 884); *see also We The Patriots*, 2021 WL 5121983, at *14.

Nor do these exemptions treat secular conduct more favorably than comparable religious conduct. "[G]overnment regulations are not neutral and generally applicable . . . whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

"[W]hether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* Plaintiffs argue that the Vaccine Mandate violates these principles because it exempts certain groups of people (for example, emergency responders). But that argument is unavailing. Viewed through the lens of the City's asserted interest in stemming the spread of COVID-19, these groups are not comparable to the categories of people that the Mandate embraces. While the exempt groups do not come into prolonged daily contact with large groups of students (most of whom are unvaccinated), the covered groups (for example, teachers) inevitably do.

Plaintiffs finally argue that the Vaccine Mandate is not generally applicable because it applies only to DOE employees and contractors. But neither the Supreme Court, our court, nor any other court of which we are aware has ever hinted that a law must apply to all people, everywhere, at all times, to be "generally applicable." As counsel conceded at oral argument, a law can be generally applicable when, as here, it applies to an entire *class* of people. Plaintiffs have not explained why DOE employees and other comparable

employees are not such a class, so we reject their arguments that the law is not generally applicable.

3. Rational Basis Review

Because Plaintiffs have not established, at this stage, that they are likely to succeed in showing that the Vaccine Mandate is not neutral or generally applicable on its face, rational basis review applies. *Cent. Rabbinical Cong.*, 763 F.3d at 193; *see also Fulton*, 141 S. Ct. at 1876 (citing *Smith*, 494 U.S. at 878–82). Rational basis review requires the City to have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal. *See Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third and Fourth Dep'ts, App. Div. of the Sup. Ct. of N.Y.*, 852 F.3d 178, 191 (2d Cir. 2017).

The Vaccine Mandate plainly satisfies this standard. Attempting to safely reopen schools amid a pandemic that has hit New York City particularly hard, the City decided, in accordance with CDC guidance, to require vaccination for all DOE staff as an emergency measure. This was a reasonable exercise of the State's power to act to protect the public health. *See We The Patriots*, 2021 WL 5121983, at *15; *see also Phillips v. City of New York*, 775 F.3d 538, 542–43 (2d Cir. 2015) (holding that New York could constitutionally require all children to be vaccinated

in order to attend school); *Does 1-6*, 16 F.4th at 32 (holding that the vaccine mandate challenged in that case "easily satisfies rational basis review").[14]

B. Arbitration Award and Accommodation Standards

Plaintiffs also contend that the Vaccine Mandate is unconstitutional as applied to them through the Arbitration Award. The City concedes that the Arbitration Award, as applied to Plaintiffs, "may" have been "constitutionally suspect," Defendants Br. 37–38, and its defense of that process is half-hearted at

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[14] Plaintiffs raise a potpourri of other constitutional challenges against the Vaccine Mandate. None is persuasive. The *Kane* Plaintiffs argue that the Mandate violates the Fourteenth Amendment's Equal Protection Clause. "When a free exercise challenge fails, any equal protection claims brought on the same grounds are subject only to rational-basis review." *Does 1-6*, 16 F.4th at 35 (citing, *inter alia*, *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004)). Plaintiffs' Equal Protection Clause challenge to the Mandate fares no better than their First Amendment challenge.

The *Kane* Plaintiffs also contend that the Mandate violates the Supremacy Clause because it prohibits reasonable accommodations under Title VII. They are unlikely to succeed on this claim. *See We The Patriots*, 2021 WL 5121983, at *17 (noting that the law at issue there did not violate Title VII because it did "not *bar* an employer from providing an employee with a reasonable accommodation" (emphasis added)); *Does 1-6*, 16 F.4th at 35 (similar).

For their part, the *Keil* Plaintiffs argue that the Mandate violates their procedural due process rights because it does not offer meaningful standards against which their requests for religious accommodations will be measured. But Plaintiffs' requests will be governed by Title VII and analogous state and city law, and the standards for those claims are well established. *See, e.g.*, *Cosme v. Henderson*, 287 F.3d 152, 157-58 (2d Cir. 2002); *Philbrook v. Ansonia Bd. of Educ.*, 757 F.2d 476, 481 (2d Cir. 1985); *White v. Andy Frain Servs., Inc.*, 629 F. App'x 131, 134 (2d Cir. 2015); *infra* at 43–44. Plaintiffs have therefore failed to demonstrate a likelihood of success on the merits of this claim, too.

best. Indeed, it offers no real defense of the Accommodation Standards at all. The City has also consented to the relief ordered by the Motions Panel, under which the Arbitration Award and its results will be set aside and Plaintiffs will receive *de novo* consideration of their accommodation requests.

We confirm the City's "susp[icion]" that the Arbitration Award procedures likely violated the First Amendment as applied to these Plaintiffs. We emphasize, however, that this determination is exceedingly narrow – simply that Plaintiffs, at this juncture, have sufficiently established a likelihood of success so as to meet this prong of the preliminary injunction standard. Given the City's concessions, and in the interest of providing timely guidance to the parties, we need not and do not address any other constitutional objection to the Arbitration Award that Plaintiffs raise.[15]

[15] Nor do we address certain arguments made by Defendants. In a single sentence in their brief, Defendants suggest that Plaintiffs do not "have standing to launch a direct attack on the terms of awards arising out of arbitrations initiated by their own unions without first alleging a breach of the duty of fair representation." Defendants Br. 35 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009)). But Defendants have not identified any provision in the relevant collective bargaining agreements that "clearly and unmistakably" requires union members, including Plaintiffs, to arbitrate their constitutional claims. *Pyett*, 556 U.S. at 274; *see Fernandez v. Windmill Distrib. Co.*, 159 F. Supp. 3d 351, 360 (S.D.N.Y. 2016); *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981); *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 79–80 (1998). In another single-sentence argument, Defendants suggest that Plaintiffs' unions may be "necessary parties" under Federal Rule of Civil Procedure 19(a)(1)(B)(i). Defendants Br.

1. Neutrality

We conclude, first, that the procedures specified in the Arbitration Award and applied to Plaintiffs are not neutral. The Supreme Court has explained that "the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

We have grave doubts about whether the Accommodation Standards are consistent with this bedrock First Amendment principle. They provide that "[e]xemption requests shall be considered for recognized and established religious organizations" and that "requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation

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35. Defendants, however, failed to raise this argument below and fail to explain *why* the unions would be necessary parties in their brief in this Court.

Given both the City's consent to the interim relief afforded here and the failure to develop these arguments before this Court, we decline to affirm on either ground. *See United States v. Morton*, 993 F.3d 198, 204 n.10 (3d Cir. 2021) ("[J]udges are not like pigs, hunting for truffles buried in the record."). Defendants are free to raise these arguments before the district court on remand, however, given that the procedural context in which this case arises may prove relevant on the merits at a later stage in the proceeding.

is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature." Joint App'x 197.[16] Moreover, Plaintiffs have offered evidence that arbitrators applied the Accommodation Standards to their applications by, for example, telling Plaintiff Keil that his religious beliefs "were merely personal, [because] there are other Orthodox Christians who choose to get vaccinated."[17] *Id.* at 376.

Denying an individual a religious accommodation based on someone else's publicly expressed religious views — even the leader of her faith —runs afoul of the Supreme Court's teaching that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, *or the validity of particular*

[16] As noted above, we find the second clause ambiguous but have adopted the district court's interpretation for purposes of this opinion. *See supra* note 4.

[17] Plaintiffs offered substantial evidence that arbitrators referenced the Accommodation Standards in their hearings. For example, during another hearing, an arbitrator declared that, because a DOE employee's congregation was not opposed to the vaccine, the employee's objection was "personal and not religion-based." Joint App'x 338. The City notes that hearings were not recorded and that given the need to render determinations expeditiously, such determinations were issued without full written opinions to explain them. It cautions that "the record casts serious doubt on plaintiffs' contentions that the challenged criteria in the arbitration awards were controlling in the administrative appeals." Defendants Br. 11. To be clear, it may be that after further factual development, some or even all of Plaintiffs' Free Exercise Clause claims fail on the merits. But at this stage, based on the terms of the Arbitration Award and the numerous affidavits submitted by these fifteen individuals in support of their claims, we conclude that Plaintiffs have established a sufficient likelihood of success on the merits.

litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (emphasis added); *see also Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 833 (1989) (noting that "disagreement among sect members" over whether work was prohibited on the Sabbath had not prevented the Court from finding a free exercise violation based on the claimant's "unquestionably . . . sincere belief that his religion prevented" him from working (citing *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 714 (1981)). Accordingly, we conclude that based on the record developed to date, the Accommodation Standards as applied here were not neutral, triggering the application of strict scrutiny.

2. General Applicability

Nor does it appear that such procedures were generally applicable to all those seeking religious accommodation. In *Smith*, the Supreme Court held that an unemployment compensation system with discretionary, individualized exemptions "lent itself to individualized government assessment of the reasons for the relevant conduct" and was thus not generally applicable. 494 U.S. at 884. So too here.

Plaintiffs have offered evidence that the arbitrators reviewing their requests for religious accommodations had substantial discretion over whether to grant

those requests. Sometimes, arbitrators strictly adhered to the Accommodation Standards. Other times, arbitrators apparently ignored them, such as by granting an exemption to an applicant who identified as a Roman Catholic, even though the Pope has expressed support for vaccination. *Cf. We The Patriots*, 2021 WL 5121983, at *14 (denying a motion for a preliminary injunction where medical exemptions were granted exclusively in accordance with a uniform certification process). In our view, and based on the record to date, Plaintiffs have thus shown that they are likely to succeed on their claim that the Arbitration Award procedures as applied to them were not generally applicable.

3. Strict Scrutiny

Because the accommodation procedures here were neither neutral nor generally applicable, as applied, we apply strict scrutiny at this stage of the proceeding. Under such scrutiny, these procedures are constitutional as applied only if "'narrowly tailored' to serve a 'compelling' state interest." *Roman Cath. Diocese*, 141 S. Ct. at 67 (quoting *Lukumi*, 508 U.S. at 546); *see also Tandon*, 141 S. Ct. at 1296 ("[T]he government has the burden to establish that the challenged law satisfies strict scrutiny."). The Supreme Court has recognized that "[s]temming

the spread of COVID-19" qualifies as "a compelling interest." *Roman Cath. Diocese*, 141 S. Ct. at 67.

The question is thus whether the Arbitration Award's procedures, as implemented and applied to Plaintiffs, were narrowly tailored to serve the government's interest. Narrow tailoring requires the government to demonstrate that a policy is the "least restrictive means" of achieving its objective. *Thomas*, 450 U.S. at 718.

These procedures cannot survive strict scrutiny because denying religious accommodations based on the criteria outlined in the Accommodation Standards, such as whether an applicant can produce a letter from a religious official, is not narrowly tailored to serve the government's interest in preventing the spread of COVID-19. The City offers no meaningful argument otherwise.

II. Irreparable Harm

A. Motions Panel Order

Plaintiffs have also shown that they would suffer irreparable harm absent the relief ordered by the Motions Panel. They have demonstrated that they were denied religious accommodations — pursuant to what the City has conceded was a "constitutionally suspect" process — and were consequently threatened with imminent termination if they did not waive their right to sue. This is sufficient

to show irreparable harm. *See Am. Postal Workers Union v. United States Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985) (noting that "the threat of permanent discharge" can cause irreparable harm in the First Amendment context).[18]

B. Plaintiffs' Request for Broader Relief

Plaintiffs contend that this interim relief does not go far enough. They argue that they are entitled to an injunction immediately reinstating them and

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[18] We do not cast doubt on the well-established principle that "loss of employment 'does not *usually* constitute irreparable injury.'" *Does 1-6*, 16 F.4th at 36 (emphasis added) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)); *see We The Patriots*, 2021 WL 5121983, at *19; *see also, e.g.*, *Plata v. Newsom*, 2021 WL 5410608, at *3 (N.D. Cal. Nov. 17, 2021) (collecting cases in which district courts have concluded that the "choice" between "maintaining . . . employment or taking a vaccine that [employees] do not want . . . does not [cause employees to suffer] irreparable harm that warrants enjoining a vaccine mandate"). *But see BST Holdings, L.L.C. v. OSHA*, 2021 WL 5279381, at *8 (5th Cir. Nov. 12, 2021) (finding irreparable harm where "reluctant individual recipients [were] put to a choice between their job(s) and their jab(s)").

This is an unusual case for two reasons. First, Plaintiffs have demonstrated a likely violation of their First Amendment rights resulting from the manner in which their religious accommodation claims were considered. *Cf. Does 1-3*, 2021 WL 5027177, at *1, *4 (Gorsuch, *J.*, dissenting from the denial of application for injunctive relief) (finding irreparable harm where healthcare workers raised a First Amendment claim and faced termination if they did not comply with vaccine mandate). Second, these very procedures require Plaintiffs to forgo suit to avoid harm and the City has consented to the entry of an injunction which, among other things, will provide for these claims to be promptly reconsidered pursuant to procedures that are not constitutionally infirm. *Cf. Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 512 n.6 (2d Cir. 2005) (noting "particularly stringent standard for irreparable harm" in government personnel cases and observing that preliminary relief is inappropriate where harm could not be vitiated by an interim injunction). Given these facts and the City's concessions, we need not intimate a view as to whether Plaintiffs could show irreparable harm in different circumstances.

granting them backpay pending *de novo* consideration of their requests for religious accommodations. Because Plaintiffs have not shown that they would suffer irreparable harm absent this broader relief, we are not persuaded.

At the outset, we clarify what is at stake at this point in the litigation. The City has committed to providing "fresh consideration" and prompt resolution of Plaintiffs' requests for religious accommodation. Motions Panel Order ¶ 1. Under the Motions Panel Order, the City must adjudicate these requests within two weeks of Plaintiffs' submission of any documents they are permitted (but not required) to submit in support of their accommodation requests. *Id.* ¶ 3. The City may not terminate Plaintiffs or require them to opt-in to the extended leave program (and thereby waive their right to sue) while their requests are pending. *Id.* ¶ 4. The City has also affirmed that Plaintiffs who receive accommodations will be reinstated and receive all back pay and other benefits to which they are entitled. The question before us is thus whether *additional* preliminary relief is required until the City can decide Plaintiffs' renewed requests for a religious accommodation over the next few weeks.

We conclude that no such relief is required. Plaintiffs contend that they will be irreparably harmed if we do not reinstate them during this period. We

disagree. Though Plaintiffs will continue to be on leave without pay while the City reconsiders their requests for religious accommodations, they have not shown that this amounts to an *irreparable* harm in the circumstances here. "In government personnel cases," like this one, "we 'apply a particularly stringent standard for irreparable injury' and pay special attention to whether the interim relief will remedy any irreparable harm that is found." *Mullins v. City of N.Y.*, 307 F. App'x 585, 587–88 (2d Cir. 2009) (quoting *Moore*, 409 F.3d at 512 n.6, in turn quoting *Am. Postal*, 766 F.2d at 721). Thus, we have held that when irreparable harm arises "not from [an] interim discharge but from the threat of permanent discharge" a preliminary injunction is inappropriate because harm would not be "vitiated by an interim injunction." *Moore*, 409 F.3d at 512 n.6 (quoting *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)).

Applying these principles here, Plaintiffs are not entitled to reinstatement while the City reconsiders their requests for religious accommodations. In *Savage*, we held that even an "interim discharge" is insufficient to show irreparable harm in the government employment context. 850 F.2d at 68. It follows that the City's decision to require Plaintiffs to remain on leave without pay for a few additional weeks is inadequate to justify an injunction reinstating them pending

redetermination of their requests for religious accommodations.[19] And under the Motions Panel Order, Plaintiffs will receive backpay if their requests for religious accommodations are granted. Motions Panel Order ¶ 5; s*ee Sampson*, 415 U.S. at 91 (holding that possibility of backpay obviates risk of irreparable harm).

In support of their argument that they are entitled to broader relief, Plaintiffs contend that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). *But cf. Does 1-6*, 16 F.4th at 37 ("Even if, arguendo, these claims [including a First Amendment claim] presumptively cause irreparable harm, we think the state has overcome any such presumption."); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003) ("[W]e have not consistently presumed irreparable harm in cases involving allegations of the abridgement of First Amendment rights.").

We do not gainsay the principle that those who are unable to exercise their First Amendment rights are irreparably injured *per se*. But this principle is not applicable to the present case. The City is not threatening to vaccinate Plaintiffs

[19] This case does not require us to address whether an employer's decision to place its employees on leave without pay for an extended period — *i.e.*, longer than the few weeks required by the Motions Panel Order — could inflict irreparable harm.

against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Plaintiffs instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations. "It is well settled, however, that adverse employment consequences," like the loss of income accompanying a suspension without pay, "are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages." *We The Patriots*, 2021 WL 5121983, at *19 (citing *Sampson*, 415 U.S. at 91–92; *Savage*, 850 F.2d at 68). Because those harms "could be remedied with money damages, and reinstatement is a possible remedy as well," *id.*, they do not justify an injunction reinstating Plaintiffs. *See Savage*, 850 F.2d at 68 ("Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief."); *cf. A.H.*, 985 F.3d at 176 ("In cases alleging constitutional injury, a strong showing of a constitutional deprivation *that results in noncompensable damages* ordinarily warrants a finding of irreparable harm." (emphasis added)).

For that reason, this case is different from other pandemic-era cases that have found irreparable harm based on First Amendment violations. *See, e.g.*, *Roman Cath. Diocese*, 141 S. Ct. at 67–68; *Agudath*, 983 F.3d at 636–37. Those cases involved restrictions on worshippers' rights to attend religious services and so directly prohibited them from freely exercising their religion. *See Agudath*, 983 F.3d at 636 ("The Free Exercise Clause protects both an individual's private right to religious belief and the performance of (or abstention from) physical acts that constitute the free exercise of religion, including assembling with others for a worship service.").

Not so here. Plaintiffs are not required to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable. *See Sampson*, 415 U.S. at 91, 92 n.68 ("[L]oss of income[,] . . . an insufficiency of savings or difficulties in immediately obtaining other employment . . . will not [ordinarily] support a finding of irreparable injury, however severely they may affect a particular individual.").[20]

[20] Plaintiffs' request for backpay fails for an additional reason. Preliminary

III. Public Interest

We briefly address the remaining preliminary injunction factor, the public interest. The public interest weighs in favor of the relief granted by the Motions Panel. To the extent Plaintiffs were denied religious accommodations pursuant to a concededly "constitutionally suspect" process, the public interest favors affording them an opportunity for reconsideration. *See Agudath*, 983 F.3d at 637 ("No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal."). Indeed, the City has not objected to providing that relief, fortifying our conclusion that it serves the public interest. In sum, the relief afforded by the Motions Panel appropriately balances the equities by ensuring that Plaintiffs are not terminated or forced to waive their right to sue as the City reconsiders their requests for religious accommodation while, at the same time, the Vaccine Mandate, which is designed to further the compelling objective of permitting schools fully to reopen, continues in effect.

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injunctions are appropriate only to prevent *prospective* harm until the trial court can decide the case on the merits. Plaintiffs' request for backpay is (as the term *backpay* suggests) entirely retrospective. We would thus deny Plaintiffs' request for backpay at this stage even if Plaintiffs had shown that their economic harms were irreparable.

IV. Plaintiffs' Remaining Arguments

A. "Similarly Situated" Individuals

Plaintiffs also argue that we should order sweeping injunctive relief that extends to thousands of supposedly "similarly situated" nonparties to this litigation. We disagree. To start, the City has represented that it "is making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious [accommodations] pursuant to the arbitration award's appeal process." Defendants Br. 27. "Those employees will be granted the same opportunity" as Plaintiffs "to have their religious accommodation requests considered by the central citywide panel." *Id.* at 27–28. The City also represents that "[w]hile their appeals are pending, these employees will remain on leave-without-pay status and will have seven days after their new appeals are resolved to apply for an extension of this status." *Id.* at 18–19. The City will therefore afford substantially the same relief to these nonparties as has already been ordered by the Motions Panel as regards Plaintiffs.

In any event, we would not grant Plaintiffs' request for sweeping injunctive relief even if this were not the case because as a "general rule, . . . injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765

(1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)); *accord New York Legal Assistance Grp. v. BIA*, 987 F.3d 207, 225 (2d Cir. 2021); *see also United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478 (1995) (teaching that courts should not "provide relief to nonparties when a narrower remedy will fully protect the litigants"); *United States v. Raines*, 362 U.S. 17, 21 (1960) (noting that the judicial power is limited to "adjudg[ing] the legal rights of litigants in actual controversies"); *Hawaii*, 138 S. Ct. at 2427 (Thomas, *J.*, concurring) ("[A]s a general rule, American courts of equity did not provide relief beyond the parties to the case. . . . American courts' tradition of providing equitable relief only to parties was consistent with their view of the nature of judicial power.").[21]

Plaintiffs repeatedly emphasize that they have raised "facial" challenges as if that permits them to obtain class wide relief without obtaining class certification. But we have rejected Plaintiffs' facial challenge to the Vaccine Mandate. We also

[21] *Cf. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, *J.*, concurring in the grant of stay) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit. When a district court orders the government not to enforce a rule against the plaintiffs in the case before it, the court redresses the injury that gives rise to its jurisdiction in the first place. But when a court goes further than that, ordering the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies."); *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("[S]tanding is not dispensed in gross: A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

reject Plaintiffs' attempt to transform their garden-variety "as applied" claims into what are effectively claims on behalf of a class simply by styling them as "facial" challenges. Indeed, Plaintiffs' challenge is an end run around the rules governing class certification. Why, after all, would plaintiffs go to the trouble of demonstrating "numerosity, commonality, typicality, and adequa[cy]" if they can obtain classwide relief as Plaintiffs now propose? *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011).

Relatedly, we do not reject Plaintiffs' theory because they failed to use the words "class action" in the title of their complaint. Rather, Plaintiffs *never moved for class certification*, so no class has been certified. And the rule that injunctive relief should be narrowly tailored to prevent harm to the parties before the court "applies with special force where," as here, "there is no class certification." *California v. Azar*, 911 F.3d 558, 582–83 (9th Cir. 2018); *see id.* ("Injunctive relief generally should be limited to apply only to named plaintiffs where there is no class certification."); *see also Sharpe v. Cureton*, 319 F.3d 259, 273 (6th Cir. 2003) ("While district courts are not categorically prohibited from granting injunctive relief benefitting an entire class in an *individual suit*, such broad relief is rarely justified because injunctive relief should be no more burdensome to the defendant

than necessary to provide complete relief to the plaintiffs." (citing *Yamasaki*, 442 U.S. at 702)); *Meyer v. CUNA Mut. Ins. Soc'y*, 648 F.3d 154, 171 (3d Cir. 2011) (collecting cases in which courts have "found injunctions to be overbroad where their relief amounted to class-wide relief and no class was certified").

Moreover, "[f]acial challenges are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). The Supreme Court has "strong[ly] admon[ished] that a court should adjudicate the merits of an as-applied challenge before reaching a facial challenge to the same statute." *Commodity Trend Serv. v. CFTC*, 149 F.3d 679, 683 (7th Cir. 1998) (citing *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 484–86 (1989)); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985) (refusing to facially invalidate statute because "a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it"); *see, e.g.*, *United States v. Grace*, 461 U.S. 171, 175 (1983) (limiting review to the question of whether a statute was unconstitutional "as applied" in certain contexts, even though plaintiffs raised a facial challenge under the First Amendment). Thus, "it is a proper exercise of judicial restraint for courts to adjudicate as-applied challenges before facial ones in an effort to decide constitutional attacks on the narrowest possible grounds and

to avoid reaching unnecessary constitutional issues." *Commodity Trend Serv.*, 149 F.3d at 690 n.5; *see Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–47 (1936) (Brandeis, *J.*, concurring) (articulating these foundational principles of judicial restraint). Consistent with these well-established principles, we decline to expand the relief ordered by the Motions Panel to cover nonparties to this litigation.[22]

B. Conflict of Interest and Title VII

Plaintiffs finally contend that the interim relief afforded by the Motions Panel is inadequate for two additional reasons. Neither is persuasive.

First, Plaintiffs contend that including lawyers from the Office of the Corporation Counsel on the citywide panel is improper because the Corporation Counsel has a conflict of interest due to its participation in this litigation. We reject this argument. The attorneys are advocates, not parties-in-interest. *See, e.g.*, *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619 (2d Cir. 2004) (rejecting the argument that an agency's "role as [the petitioners'] adversary in litigation prevented it from

[22] The *Kane* Plaintiffs have filed an amended class action complaint in the district court, and the *Keil* Plaintiffs have requested permission to file such a complaint. Without expressing a view as to these amended complaints, we note that remand will permit the district court to consider these complaints in the first instance.

being an impartial administrative adjudicator in the petitioners' administrative action" (citing *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104 (D.C. Cir. 1988)).

Second, the *Keil* Plaintiffs object to the Motions Panel Order's statement that consideration by the citywide panel must comport with Title VII and other applicable state and City law. They argue that the citywide panel must follow the First Amendment. It is, of course, true that the citywide panel must abide by the First Amendment. By ordering the citywide panel's proceedings to abide by other applicable law, the Motions Panel Order does not (and could not) suggest that the First Amendment is somehow inapplicable to those proceedings.

We conclude by noting that while the *Keil* Plaintiffs do not invoke Title VII in their lawsuit, that statute will be highly relevant to their renewed requests for religious accommodations. Under the Supreme Court's decision in *Smith*, the First Amendment likely does not require any religious accommodations whatsoever to neutral and generally applicable laws. *See Shrum v. City of Coweta*, 449 F.3d 1132, 1143 (10th Cir. 2006) (McConnell, *J.*) ("[T]he mere failure of a government employer to accommodate the religious needs of an employee, where the need for accommodation arises from a conflict with a neutral and generally

applicable employment requirement, does not violate the Free Exercise Clause, as that Clause was interpreted in *Smith*.").

In contrast, Title VII requires employers to offer reasonable religious accommodations in certain circumstances. *See We The Patriots*, 2021 WL 5121983, at *17. *See generally* U.S. Equal Employment Opportunity Comm'n, *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* § L *Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates* (last updated Oct. 28, 2021). Title VII does not, however,

> require covered entities to provide the accommodation that [an employee] prefer[s]—in this case, a blanket religious exemption allowing them to continue working at their current positions unvaccinated. To avoid Title VII liability for religious discrimination, . . . an employer must offer a reasonable accommodation that does not cause the employer an undue hardship. Once any reasonable accommodation is provided, the statutory inquiry ends.

We The Patriots, 2021 WL 5121983, at *17. In providing religious accommodations, a government employer must abide by the First Amendment.

As we have explained, and based only on the record developed to date, Plaintiffs have demonstrated a likelihood of success on their claim that as applied to them, the City's process for implementing the Vaccine Mandate via the Arbitration Award offended the First Amendment. But we do not suggest that

Plaintiffs are in fact entitled to their preferred religious accommodations — or *any* religious accommodation, for that matter — under Title VII (or the First Amendment). Our decision is narrow. We conclude only that the interim relief put in place by the Motions Panel should continue so that Plaintiffs, with the consent of the City, are afforded an opportunity to have their accommodation requests promptly reconsidered.

To the extent Plaintiffs raise other objections to the process by which their requests for accommodations will be adjudicated by the citywide panel, those objections are best addressed by the district court on remand. Plaintiffs are free to renew their First Amendment (and other) objections before the district court.

CONCLUSION

For the foregoing reasons, we VACATE the district court's order denying preliminary injunctive relief. Further, we ENJOIN Defendants consistent with the terms of the Motions Panel Order. This injunction will remain in place during reconsideration of Plaintiffs' renewed requests for religious accommodations. Within two weeks of the conclusion of Plaintiffs' proceedings before the citywide panel, the parties shall inform the district court (rather than this merits panel) of the result of those proceedings and advise of any further relief being sought.

Finally, we REMAND the case to the district court for further proceedings consistent with this opinion, making clear that the district court may alter the terms of the preliminary relief we have ordered or set them aside, as circumstances and further development of the record may require.

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

APPENDIX

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 14th day of November, two thousand twenty-one.

Before: Pierre N. Leval,
José A. Cabranes,
Denny Chin,
Circuit Judges.

Michael Kane, William Castro, Margaret Chu, Heather Clark, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Trinidad Smith, Amaryllis Ruiz-Toro,

Plaintiffs-Appellants,

ORDER

v.

21-2678-cv

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,

v.

21-2711-cv

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.

The motions of Plaintiffs-Appellants ("Plaintiffs") for an injunction pending appeal having been heard at oral argument on November 10, 2021, and Defendants-Appellees ("Defendants") having represented to this Court that "the City is working toward making an opportunity for reconsideration available more broadly to DOE employee[s] who unsuccessfully sought religious exemptions pursuant to the arbitration award's appeal process," it is hereby

ORDERED that this appeal is expedited and will be heard by a merits panel sitting on November 22, 2021 (the "merits panel"). Pending further order by the merits panel,

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 to the citywide panel 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. The deadline to opt-in to the extended leave program and execute any accompanying waiver shall be stayed for Plaintiffs, 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 by the citywide panel, the plaintiff will receive backpay running from the date they were placed on leave without pay.
6. This order is intended only to provide for temporary interim relief until the matter is considered by the merits panel of this court, which panel may entirely supersede these provisions for interim relief, and the parties are at liberty to advocate to the merits panel for alteration of these provisions. Unless the merits panel has previously entered a superseding order, within two weeks of the conclusion of Plaintiffs' proceedings before the citywide panel, the parties shall inform the merits panel of the result of those proceedings and advise of any further relief being sought.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX M

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 28th day of November, two thousand twenty-one.

Before: Debra Ann Livingston,
Chief Judge,
Amalya L. Kearse,
Eunice C. Lee,
Circuit Judges.

Matthew Keil, John De Luca, Sasha Delgado, Dennis Strk, 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, Meisha Porter, in her Official Capacity as Chancellor of the New York City Department of Education,

Defendants - Appellees.

JUDGMENT

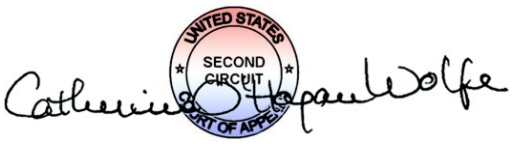
Docket No. 21-2711

The appeal in the above captioned case from an order of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that order of the district court is VACATED. The Defendants are ENJOINED consistent with the terms of the November 14, 2021 Motions Panel Order. The case is REMANDED for further proceedings consistent with this opinion, making clear that the district court may alter the terms of the preliminary relief we have ordered or set them aside, as circumstances and further development of the record may require.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX N

GIBSON LAW FIRM, PLLC
SUJATA S. GIBSON, ESQ.
408 W Martin Luther King, Jr. St.
Ithaca, NY 14850

NELSON MADDEN BLACK LLP
BARRY BLACK, ESQ.
475 Park Ave. S., Suite 2800
New York, NY 10016

December 11, 2021

VIA ECF
Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square, New York, NY 10007

Re: *Kane v. de Blasio* Docket 21 civ 7863
Keil v. City of New York Docket 21 civ 8773

Dear Judge Caproni:

Plaintiffs in *Kane v de Blasio* (21-CV-7863) and *Keil v. City of New York* (21-CV-8773) jointly hereby report to the Court that the proceedings before the Citywide panel have concluded.

By this letter motion, and upon all prior papers submitted in this matter to this Court and the Second Circuit Court of Appeals, incorporated herein by reference, Plaintiffs respectfully and jointly request that this Court grant Plaintiffs an emergency injunction pursuant to Fed. R. Civ. Pro. 65(a). The basic new facts are in the attached declarations from counsel, incorporated by reference along with exhibits into this letter motion. Essentially, the Plaintiffs, having only hours earlier timely completed their submissions to the citywide panel for renewed consideration, were promptly and summarily denied any relief on Friday, December 10, 2021, with no explanation and no adequate process afforded.

Plaintiffs further request this Court to provisionally certify a class pursuant to Fed. R. Civ. Pro. 23 to ensure that any preliminary injunctive relief afforded is provided to all similarly situated DOE employees. For the same reasons that Plaintiffs acknowledge consolidation of the two matters is appropriate, provisional class certification is likely required. Common questions of law and fact predominate, and strict scrutiny is appropriate for all DOE employees who have been subjected to the unconstitutional policies adopted by the DOE. Defendants have not applied relief consistently, and many DOE employees similarly situated to the named Plaintiffs were entirely denied the opportunity for a "fresh review" and simply informed that they would be terminated. Upon information and belief, Defendants have issued only summary denials to those who were allowed to reapply and intend to arbitrarily issue similar summary denials to all or most of the rest shortly.

To avoid inconsistent adjudication with respect to individual proposed class members that would establish incompatible standards of conduct for the Defendants, Plaintiffs hereby request that this Court issue an order provisionally certifying a class encompassing all DOE employees

who assert a religious objection to the vaccine mandate, pending the Court's review of the motion papers concurrently filed herewith on a briefing schedule to be proposed jointly with opposing counsel on or before the deadline set forth by this Court last Friday.

For all of the arguments and reasons already set forth in Plaintiffs' motion papers for injunctive relief filed in this Court and before the Second Circuit Court of Appeals, and upon their renewed First Amendment and other objections before this Court, Plaintiffs and all similarly situated DOE employees require and should be afforded an injunction ordering their immediate reinstatement pending resolution of this litigation.

As early as Monday, December 13, and through Thursday, December 16, the various Plaintiffs must be vaccinated in violation of their sincerely-held religious beliefs or possibly face various penalties including the loss of health insurance and other benefits. We respectfully request this Court issue a decision on this letter motion no later than December 13, 2021 at 10 a.m. to avoid further irreparable harm.

Wherefore, Plaintiffs' jointly respectfully ask that this Court issue an order:

1) Enjoining enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation; and
2) Provisionally certifying a class of all DOE employees who assert religious objections to the vaccine mandate; and
3) Ordering the Defendants to immediately reinstate Plaintiffs and all proposed Class members to their original positions prior to the enforcement of the vaccine mandate.

Respectfully Submitted,

/s/ Barry Black
Counsel for *Keil* Plaintiffs

/s/ Sujata S. Gibson
Counsel for *Kane* Plaintiffs

Cc: All counsel via ECF

TELEPHONE: (607) 327-4125 EMAIL: SUJATA@GIBSONFIRM.LAW

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Kane, et al. Plaintiffs, vs. de Blasio, et al. Defendants.	DECLARATION OF SUJATA S. GIBSON Civil Action No. 1:21-cv-07863

STATE OF NEW YORK)
) ss.:
COUNTY OF TOMPKINS)

SUJATA GIBSON, an attorney admitted *pro hac vice* to practice before this Court, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am the attorney for the Plaintiffs in the *Kane v. de Blasio* case and am fully familiar with the facts and circumstances of this case.
2. I make this declaration in support of Plaintiffs' joint motion with the *Keil v. City of New York* Plaintiffs to lift the stay imposed by the district court and for emergency injunctive relief pending resolution of this litigation.
3. On November 29, 2021, all Plaintiffs in the *Kane v de Blasio* case timely submitted their applications for "fresh review" from the "citywide panel" in accordance with the Second Circuit Court of Appeals' instructions.

4. Plaintiffs objected to this relief as inadequate to address the violations of their first amendment rights, as acknowledged by the Second Circuit.
5. The "fresh look" did not define any criteria or procedural safeguards to ensure that appropriate injunctive relief was afforded. Rather, it was a sham process conducted by a biased panel of Defendants' employees and the lawyers who represent them in this case, who, as part of their ethical obligation to their client, *cannot* provide an unbiased review.
6. Plaintiffs clarified, through counsel, that they submit these applications under objection and do not waive any rights, remedies or other relief arising out of their constitutional claims litigated in this action.
7. On December 8, 2021, at 2:57pm, opposing counsel emailed me and counsel for *Keil v. The City of New* York a request for further information from each Plaintiff, to be submitted *to her* on or before December 10, 2021 for use in determining whether to grant religious accommodations to Plaintiffs. A true and accurate copy of this email is attached hereto as **Exhibit 1**.
8. Shortly before noon on December 10, 2021, *Keil* counsel and I timely submitted Plaintiffs' supplemental materials.
9. Almost immediately, Plaintiffs began receiving their summary auto-generated denials. Attached hereto as **Exhibit 2** are the auto-generated responses.
10. As evidenced by the denials, no explanation was provided for why the Plaintiffs were denied, and no real thought went into the review.
11. All Plaintiffs have sincere religious objections to the vaccine mandate as defined by standards governing Title VII and the First Amendment to the United States Constitution, and all Plaintiffs can be easily and safely accommodated as

evidenced by the declarations of public health experts filed in their original motions for injunctive relief (ECF 18 and 19) and by the great weight of the scientific evidence, which shows that COVID-19 vaccines are for personal protection and cannot stop spread of COVID-19 in any meaningful way.

12. Attached hereto as **Exhibit 3** is a true and accurate copy of a recent Harvard study found that "there appears to be no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases." Subramanian S V and Akhil Kumar. "Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States." *European Journal of Epidemiology*, 1-4. 30 Sep. 2021, doi: 10.1007/s10654-021-00808-07.

13. This study, and many others, affirm what the experts were and are prepared to testify about and what is consensus in the scientific community at this point: herd immunity cannot be achieved with the available COVID-19 vaccines, COVID-19 is going to be endemic, and everyone or substantially everyone is going to eventually get COVID-19, whether they are vaccinated or not, and allowing reasonable religious accommodation will not meaningfully impact the spread of COVID-19 in New York City schools.

14. As another example of studies supporting these well-established scientific conclusions, attached hereto is a letter published in the Lancet with citations to other recent studies confirming that vaccinated people still spread COVID-19 at substantially the same levels as unvaccinated. **Exhibit 4**. Günter Kampf, "The epidemiological relevance of the COVID-19-vaccinated population is increasing."

The Lancet Regional Health - Europe, Volume 11, 2021, 100272, ISSN 2666-7762, https://doi.org/10.1016/j.lanepe.2021.100272.

15. Data from the New York City Department of Education website also confirms that the vaccine mandate has had no discernable impact on the percentage of teachers and staff actively infected with COVID-19.

16. Before the unvaccinated teachers and staff were excluded on October 4, 2021, there were approximately 55 staff members infected with COVID-19 among all DOE staff (vaccinated and unvaccinated). A true and accurate copy of an article reporting the numbers of infected staff before the vaccine mandate took effect is attached hereto as **Exhibit 5** (available at https://gothamist.com/news/55-doe-employees-test-positive-for-coronavirus-as-city-announces-situation-room-for-schools).

17. Today, there are 125 active infections among the fully vaccinated NYC DOE staff. Attached hereto as **Exhibit 6** is a true and accurate copy of the NYC DOE daily Covid case map, showing infection rates as broken up between students and staff as of December 10, 2021, available at https://www.schools.nyc.gov/school-life/health-and-wellness/covid-information/daily-covid-case-map.

18. While the vaccine mandate has had no impact on infection rates in the NYC schools, exclusion of these teachers has had a significant impact on the children and has created a staffing crisis that harms the community.

19. Attached hereto as **Exhibit 7** is a true and accurate copy of the PIX11 News publication on October 6, 2021, by James Ford entitled *NYC DOE employees reassigned over vaccine mandates say students, schools are shortchanged*

available at https://pix11.com/news/local-news/nyc-doe-employees-reassigned-over-vaccine-mandates-say-students-schools-are-shortchanged/

20. Attached hereto as **Exhibit 8** is a true and accurate copy of an article published October 11, 2021 available at https://newyorkschooltalk.org/2021/10/nyc-vaccine-mandate-doesnt-stop-teachers-protesting-or-parents-debating/

21. Mayor de Blasio admitted that he was persuaded by Pope Francis that religious objection to vaccines are invalid, and unimportant. Attached hereto as **Exhibit 9** is a true and accurate copy of a transcript of Mayor de Blasio's statements to the press indicating an intention to discriminated against employees with personally held religious beliefs.

22. Mayor de Blasio has a history of "overstepping the lines of secular government" and "blurring the lines of church and state" in openly implementing the Pope's agenda in New York City. Attached hereto as **Exhibit 10** is a true and accurate copy of an article published in Gothamist, reporting on these concerns, available at, https://www.gothamgazette.com/government/5903-in-pope-francis-de-blasio-finds-ultimate-validator.

23. Mayor de Blasio also has a history of disregarding and failing to accommodate religious needs he does not agree with when making and implementing COVID-19 restrictions (or making exceptions for COVID-19 policies). Attached hereto as Exhibit 11 is a true and accurate copy of an article published by the Catholic News Agency, available at, https://www.catholicnewsagency.com/news/44753/nyc-mayor-de-blasio-protests-essential-but-not-religion.

24. Upon information and belief, the source of the belief being information provided to me by potential class members who wish to join this suit, the Citywide panel

has issued summary denials to most if not all other similarly situated class members who have received decisions thus far.

25. Many proposed class members were not even allowed to apply at all.

26. Plaintiffs and similarly situated DOE employees are in a crisis. I receive a daily flood of calls, emails and inquiries from people who are being daily injured by having to choose between faith and job.

27. Universally, they express the same urgent plea – they are running out of time and cannot continue to avoid violating their faith much longer. They need urgent relief now.

Dated: December 11, 2021

Respectfully Submitted,

/s/ Sujata S. Gibson
Sujata Gibson
Attorney for the *Kane* Plaintiffs

Sujata Gibson

From: Sujata Gibson
Sent: Friday, December 10, 2021 12:05 PM
To: Paulson, Susan (Law)
Cc: Sarah Child
Subject: FW: Kane/Keil: Request for Information from Citywide Panel

Good Afternoon Susan,
I wanted to note that we join in the *Keil* plaintiffs disclaimer about the new application process and stress that in submitting the materials as directed by the court to do, *Kane* plaintiffs do not waive any claims or arguments either.

Kind Regards,
Sujata

Sujata S. Gibson. Esq.
The Gibson Law Firm, PLLC
407 N. Cayuga Street, Suite 201
Ithaca, New York 14850
Phone: (607) 327-4125

From: Sarah Child
Sent: Friday, December 10, 2021 11:59 AM
To: Paulson, Susan (Law) <spaulson@law.nyc.gov>
Cc: Barry Black <bblack@nelsonmaddenblack.com>; Jonathan Nelson <jnelson@nelsonmaddenblack.com>
Subject: RE: Kane/Keil: Request for Information from Citywide Panel

Ms. Paulson,

Attached please find the *Keil* plaintiffs' responses to the questions from the Panel. Please note that we deem this submission unnecessary under the law. Accordingly, no such argument or legal position is waived by this submission.

Best,

Sarah E. Child, Esq.
Nelson Madden Black LLP
475 Park Avenue South, Suite 2800
New York, NY 10016
www.NelsonMaddenBlack.com
212-382-4300 main
212-382-4306 direct
212-382-4319 fax

From: Paulson, Susan (Law) <spaulson@law.nyc.gov>
Sent: Wednesday, December 8, 2021 3:01 PM
To: Sarah Child <schild@nelsonmaddenblack.com>; Jonathan Nelson <jnelson@nelsonmaddenblack.com>
Cc: Barry Black <bblack@nelsonmaddenblack.com>; Sujata Gibson <sujata@gibsonfirm.law>; Brandon Babwah <bbabwah@nelsonmaddenblack.com>
Subject: FW: Kane/Keil: Request for Information from Citywide Panel
Importance: High

Adding Ms. Child and Mr. Nelson.

Susan Paulson
Senior Counsel | Appeals Division
New York City Law Department
100 Church Street
New York, New York 10007
(212) 356-0821 | spaulson@law.nyc.gov

From: Paulson, Susan (Law)
Sent: Wednesday, December 8, 2021 2:57 PM
To: bblack@nelsonmaddenblack.com; Brandon Babwah <bbabwah@nelsonmaddenblack.com>; Sujata Gibson <sujata@gibsonfirm.law>
Cc: 'Dearing, Richard (Law)' <Rdearing@law.nyc.gov>; Slack, Devin (Law) <dslack@law.nyc.gov>
Subject: Kane/Keil: Request for Information from Citywide Panel
Importance: High

Counsel,

I just received the following communication from the Citywide Panel requesting additional information from your clients concerning their religious accommodation requests. In order to adhere to the schedule set by the Second Circuit, the Panel has requested this information by noon on Friday, December 10.

You may forward the responses to me, in one document, or I can provide you with a DOE email address to which you may submit the documents. Please advise.

The Citywide Appeals Panel are currently in the process of reviewing the various appeals from the employees in the Kane and Keil cases. After speaking with the appeals panel, there are some aspects of the requests that are unclear and we would like some additional information from the appellants to help us better understand the nature of the employee's request. We would like to know:

1) *Whether the employee has taken any vaccinations previously.*
2) *For employees who stated they have a personal religious aversion to foreign or other impermissible substances entering their body, some letters are vague as to what substances the employee is referring to. We would like each employee to please describe this with more clarity, including describing any other commonly used medicines, food/drink and other substances they consider foreign/impermissible or that violate their religious belief.*
3) *For the employees who claim that they cannot take the vaccination because it was developed and/or tested using derivative fetal cells that the employee is concerned may have been the result of an abortion, we would like to know if the employees take medications such as ibuprofen and acetaminophen, or any other medications that were similarly developed or tested using fetal cell derivative lines.*

We would also like to give each employee the opportunity to let us know about any other occasion the employee has acted in accordance with the cited belief outside the context of a COVID-19 vaccination, to the extent it was not previously provided in the documentation already submitted.

We understand that based on previous discussions with their counsel, all such requests and communications must be sent through counsel. I would ask that you convey this to counsel to pass along to their clients and provide an appropriate response for our review.

Given the schedule of the Second Circuit, we would like to have the responses by noon on Friday.

Best,

Susan
Susan Paulson
Senior Counsel | Appeals Division
New York City Law Department
100 Church Street
New York, New York 10007
(212) 356-0821 | spaulson@law.nyc.gov

APPENDIX O

GIBSON LAW FIRM, PLLC
SUJATA S. GIBSON, ESQ.
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Ithaca, NY 14850

NELSON MADDEN BLACK LLP
BARRY BLACK, ESQ.
475 Park Ave. S., Suite 2800
New York, NY 10016

December 11, 2021

VIA ECF
Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square, New York, NY 10007

Re: *Kane v. de Blasio* Docket 21 civ 7863
Keil v. City of New York Docket 21 civ 8773

Dear Judge Caproni:

Plaintiffs in *Kane v de Blasio* (21-CV-7863) and *Keil v. City of New York* (21-CV-8773) jointly hereby report to the Court that the proceedings before the Citywide panel have concluded.

By this letter motion, and upon all prior papers submitted in this matter to this Court and the Second Circuit Court of Appeals, incorporated herein by reference, Plaintiffs respectfully and jointly request that this Court grant Plaintiffs an emergency injunction pursuant to Fed. R. Civ. Pro. 65(a). The basic new facts are in the attached declarations from counsel, incorporated by reference along with exhibits into this letter motion. Essentially, the Plaintiffs, having only hours earlier timely completed their submissions to the citywide panel for renewed consideration, were promptly and summarily denied any relief on Friday, December 10, 2021, with no explanation and no adequate process afforded.

Plaintiffs further request this Court to provisionally certify a class pursuant to Fed. R. Civ. Pro. 23 to ensure that any preliminary injunctive relief afforded is provided to all similarly situated DOE employees. For the same reasons that Plaintiffs acknowledge consolidation of the two matters is appropriate, provisional class certification is likely required. Common questions of law and fact predominate, and strict scrutiny is appropriate for all DOE employees who have been subjected to the unconstitutional policies adopted by the DOE. Defendants have not applied relief consistently, and many DOE employees similarly situated to the named Plaintiffs were entirely denied the opportunity for a "fresh review" and simply informed that they would be terminated. Upon information and belief, Defendants have issued only summary denials to those who were allowed to reapply and intend to arbitrarily issue similar summary denials to all or most of the rest shortly.

To avoid inconsistent adjudication with respect to individual proposed class members that would establish incompatible standards of conduct for the Defendants, Plaintiffs hereby request that this Court issue an order provisionally certifying a class encompassing all DOE employees

who assert a religious objection to the vaccine mandate, pending the Court's review of the motion papers concurrently filed herewith on a briefing schedule to be proposed jointly with opposing counsel on or before the deadline set forth by this Court last Friday.

For all of the arguments and reasons already set forth in Plaintiffs' motion papers for injunctive relief filed in this Court and before the Second Circuit Court of Appeals, and upon their renewed First Amendment and other objections before this Court, Plaintiffs and all similarly situated DOE employees require and should be afforded an injunction ordering their immediate reinstatement pending resolution of this litigation.

As early as Monday, December 13, and through Thursday, December 16, the various Plaintiffs must be vaccinated in violation of their sincerely-held religious beliefs or possibly face various penalties including the loss of health insurance and other benefits. We respectfully request this Court issue a decision on this letter motion no later than December 13, 2021 at 10 a.m. to avoid further irreparable harm.

Wherefore, Plaintiffs' jointly respectfully ask that this Court issue an order:

1) Enjoining enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation; and
2) Provisionally certifying a class of all DOE employees who assert religious objections to the vaccine mandate; and
3) Ordering the Defendants to immediately reinstate Plaintiffs and all proposed Class members to their original positions prior to the enforcement of the vaccine mandate.

Respectfully Submitted,

/s/ Barry Black
Counsel for *Keil* Plaintiffs

/s/ Sujata S. Gibson
Counsel for *Kane* Plaintiffs

Cc: All counsel via ECF

TELEPHONE: (607) 327-4125 EMAIL: SUJATA@GIBSONFIRM.LAW

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Matthew Keil, et al. Plaintiffs, vs. The City of New York, et al. Defendants.	DECLARATION OF BARRY BLACK Civil Action No. 1:21-cv-07863

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

BARRY BLACK, an attorney admitted to practice before this Court, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am the attorney for the Plaintiffs in *Keil v. The City of New York* and am fully familiar with the facts and circumstances of this case.
2. I make this declaration in support of Plaintiffs' joint motion with the *Kane v. de Blasio* Plaintiffs to lift the stay imposed by the district court and for emergency injunctive relief pending resolution of this litigation.
3. On November 29, 2021, all Plaintiffs in *Keil v. The City of New York* timely submitted their applications for "fresh review" by the "citywide panel" in accordance with the Second Circuit Court of Appeals' instructions.
4. Plaintiffs objected to this relief as inadequate to address the violations of their first amendment rights, as acknowledged by the Second Circuit.

5. The "fresh look" did not define any criteria or procedural safeguards to ensure that appropriate injunctive relief was afforded. Rather, it was a sham process conducted by a biased panel of Defendants' employees and the lawyers who represent them in this case, who, as part of their ethical obligation to their client, *cannot* provide an unbiased review.
6. Plaintiffs clarified, through counsel, that they submitted these applications under objection and did not waive any rights, remedies or other relief arising out of their constitutional claims litigated in this action.
7. On December 8, 2021, at 2:57pm, opposing counsel emailed me and counsel for *Kane v. de Blasio* a request for further information from each Plaintiff, to be submitted *to her* on or before December 10, 2021 for use in determining whether to grant religious accommodations to Plaintiffs. A true and accurate copy of this email is attached hereto as **Exhibit 1**.
8. Shortly before noon on December 10, 2021, *Kane* counsel and I timely submitted Plaintiffs' supplemental materials, a true and accurate copy of which is attached hereto as **Exhibit 2.**
9. Almost immediately, Plaintiffs began receiving their summary auto-generated denials. Attached hereto as **Exhibit 3** are the auto-generated responses.
10. As evidenced by the denials, no explanation was provided for why the Plaintiffs were denied, and no real thought went into the review.
11. Plaintiff Matthew Keil's denial was emailed to him Wednesday, December 8, though he did not complete his submission until Friday, December 10.
12. Upon information and belief, Plaintif Sarah Buzaglo learned on December 6, that her position as a Department of Education classroom teacher was filled by a full-

time replacement teacher by November 30, if not sooner. By December 6, Plaintiff Buzaglo confirmed that the replacement teacher had already announced to the class that she will be the class's teacher until the end of the year.

Dated: December 11, 2021

Respectfully Submitted,

/s/ Barry Black
Barry Black
Attorney for the *Keil* Plaintiffs

Sujata Gibson

From: Sujata Gibson
Sent: Friday, December 10, 2021 12:05 PM
To: Paulson, Susan (Law)
Cc: Sarah Child
Subject: FW: Kane/Keil: Request for Information from Citywide Panel

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I wanted to note that we join in the *Keil* plaintiffs disclaimer about the new application process and stress that in submitting the materials as directed by the court to do, *Kane* plaintiffs do not waive any claims or arguments either.

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Attached please find the *Keil* plaintiffs' responses to the questions from the Panel. Please note that we deem this submission unnecessary under the law. Accordingly, no such argument or legal position is waived by this submission.

Best,

Sarah E. Child, Esq.
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Importance: High

Adding Ms. Child and Mr. Nelson.

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The Citywide Appeals Panel are currently in the process of reviewing the various appeals from the employees in the Kane and Keil cases. After speaking with the appeals panel, there are some aspects of the requests that are unclear and we would like some additional information from the appellants to help us better understand the nature of the employee's request. We would like to know:

1) *Whether the employee has taken any vaccinations previously.*
2) *For employees who stated they have a personal religious aversion to foreign or other impermissible substances entering their body, some letters are vague as to what substances the employee is referring to. We would like each employee to please describe this with more clarity, including describing any other commonly used medicines, food/drink and other substances they consider foreign/impermissible or that violate their religious belief.*
3) *For the employees who claim that they cannot take the vaccination because it was developed and/or tested using derivative fetal cells that the employee is concerned may have been the result of an abortion, we would like to know if the employees take medications such as ibuprofen and acetaminophen, or any other medications that were similarly developed or tested using fetal cell derivative lines.*

We would also like to give each employee the opportunity to let us know about any other occasion the employee has acted in accordance with the cited belief outside the context of a COVID-19 vaccination, to the extent it was not previously provided in the documentation already submitted.

We understand that based on previous discussions with their counsel, all such requests and communications must be sent through counsel. I would ask that you convey this to counsel to pass along to their clients and provide an appropriate response for our review.

Given the schedule of the Second Circuit, we would like to have the responses by noon on Friday.

Best,

Susan
Susan Paulson
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APPENDIX P

MEMO ENDORSED

GIBSON LAW FIRM, PLLC
SUJATA S. GIBSON, ESQ.
408 W Martin Luther King, Jr. St.
Ithaca, NY 14850

NELSON MADDEN BLACK LLP
BARRY BLACK, ESQ.
475 Park Ave. S., Suite 2800
New York, NY 10016

December 11, 2021

VIA ECF
Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square, New York, NY 10007

Re: *Kane v. de Blasio* Docket 21 civ 7863
Keil v. City of New York Docket 21 civ 8773

Dear Judge Caproni:

Plaintiffs in *Kane v de Blasio* (21-CV-7863) and *Keil v. City of New York* (21-CV-8773) jointly hereby report to the Court that the proceedings before the Citywide panel have concluded.

By this letter motion, and upon all prior papers submitted in this matter to this Court and the Second Circuit Court of Appeals, incorporated herein by reference, Plaintiffs respectfully and jointly request that this Court grant Plaintiffs an emergency injunction pursuant to Fed. R. Civ. Pro. 65(a). The basic new facts are in the attached declarations from counsel, incorporated by reference along with exhibits into this letter motion. Essentially, the Plaintiffs, having only hours earlier timely completed their submissions to the citywide panel for renewed consideration, were promptly and summarily denied any relief on Friday, December 10, 2021, with no explanation and no adequate process afforded.

Plaintiffs further request this Court to provisionally certify a class pursuant to Fed. R. Civ. Pro. 23 to ensure that any preliminary injunctive relief afforded is provided to all similarly situated DOE employees. For the same reasons that Plaintiffs acknowledge consolidation of the two matters is appropriate, provisional class certification is likely required. Common questions of law and fact predominate, and strict scrutiny is appropriate for all DOE employees who have been subjected to the unconstitutional policies adopted by the DOE. Defendants have not applied relief consistently, and many DOE employees similarly situated to the named Plaintiffs were entirely denied the opportunity for a "fresh review" and simply informed that they would be terminated. Upon information and belief, Defendants have issued only summary denials to those who were allowed to reapply and intend to arbitrarily issue similar summary denials to all or most of the rest shortly.

To avoid inconsistent adjudication with respect to individual proposed class members that would establish incompatible standards of conduct for the Defendants, Plaintiffs hereby request that this Court issue an order provisionally certifying a class encompassing all DOE employees

who assert a religious objection to the vaccine mandate, pending the Court's review of the motion papers concurrently filed herewith on a briefing schedule to be proposed jointly with opposing counsel on or before the deadline set forth by this Court last Friday.

For all of the arguments and reasons already set forth in Plaintiffs' motion papers for injunctive relief filed in this Court and before the Second Circuit Court of Appeals, and upon their renewed First Amendment and other objections before this Court, Plaintiffs and all similarly situated DOE employees require and should be afforded an injunction ordering their immediate reinstatement pending resolution of this litigation.

As early as Monday, December 13, and through Thursday, December 16, the various Plaintiffs must be vaccinated in violation of their sincerely-held religious beliefs or possibly face various penalties including the loss of health insurance and other benefits. We respectfully request this Court issue a decision on this letter motion no later than December 13, 2021 at 10 a.m. to avoid further irreparable harm.

Wherefore, Plaintiffs' jointly respectfully ask that this Court issue an order:

1) Enjoining enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation; and
2) Provisionally certifying a class of all DOE employees who assert religious objections to the vaccine mandate; and
3) Ordering the Defendants to immediately reinstate Plaintiffs and all proposed Class members to their original positions prior to the enforcement of the vaccine mandate.

Respectfully Submitted,

/s/ Barry Black
Counsel for *Keil* Plaintiffs

/s/ Sujata S. Gibson
Counsel for *Kane* Plaintiffs

Cc: All counsel via ECF

Any response by Defendants is due no later than **Monday, December 13, 2021 at 2:30 P.M.** Defendants must include in their response whether they object to the consolidation of 21-CV-7863 and 21-CV-8773 pursuant to Rule 42 of the Federal Rules of Civil Procedure.

SO ORDERED.

Valerie Caproni

Date: December 12, 2021

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE

TELEPHONE: (607) 327-4125 EMAIL: SUJATA@GIBSONFIRM.LAW

APPENDIX Q

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO, Plaintiffs, -against- 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.	:	21-CV-7863 (VEC)
MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, Plaintiffs, -against- THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, MEISHA PORTER, Defendants.	:	21-CV-8773 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on October 12, 2021, the Court denied a motion by Plaintiffs in *Kane et al. v. de Blasio, et al.*, 21-CV-7863 (the "*Kane* Plaintiffs") for a preliminary injunction seeking to enjoin Defendants from enforcing the City's vaccine mandate against employees of the New

York City Department of Education ("DOE") with sincere religious objections to the vaccine, 21-CV-7863, Dkt. 60;

WHEREAS on October 25, 2021, the *Kane* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-7863, Dkt. 67;

WHEREAS on October 25, 2021, the Court stayed the *Kane* matter pending resolution of Plaintiffs' appeal to the Second Circuit, 21-CV-7863, Dkt. 70;

WHEREAS on October 28, 2021, the Court denied a motion by Plaintiffs in *Keil et al. v. City of New York, et al.*, 21-CV-8773 (the "*Keil* Plaintiffs") for a temporary restraining order and preliminary injunction that raised arguments similar to those raised by the *Kane* Plaintiffs, 21-CV-8773, Oct. 28, 2021 text entry;

WHEREAS on October 28, 2021, the *Keil* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-8773, Dkt. 33;

WHEREAS on November 1, 2021, the Court stayed the *Keil* matter pending resolution of the Plaintiffs' appeal to the Second Circuit, 21-CV-8773, Dkt. 40;

WHEREAS on November 14, 2021, the Second Circuit motions panel entered an interim order (the "Motions Panel Order") requiring Defendants to provide the named Plaintiffs in both cases with the opportunity for reconsideration of their requests for religious accommodation by a central citywide panel (the "Citywide Panel"), 21-CV-7863, Dkt. 77 at 47–48; 21-CV-8773, Dkt. 43 at 47–48;

WHEREAS the Second Circuit heard the two appeals in tandem and, on November 28, 2021, entered an opinion on the merits of the appeals, 21-CV-7863, Dkt. 77; 21-CV-8773, Dkt. 43;

WHEREAS the Second Circuit vacated the Undersigned's orders denying preliminary injunctive relief and enjoined the Defendants consistent with the Motions Panel Order, *id.* at 45;[1]

WHEREAS the Second Circuit ordered the injunction to remain in place during the reconsideration of Plaintiffs' requests for religious accommodations by the Citywide Panel and required the parties to inform the Undersigned of the results of those proceedings within two weeks of their conclusion, *id.*;

WHEREAS the Second Circuit remanded the case to the Undersigned for further proceedings consistent with its opinion and instructed the Undersigned that she may alter the terms of the preliminary relief, "as circumstances and further development of the record may require," *id.* at 46;

WHEREAS on November 30, 2021, the Second Circuit issued mandates remanding the cases to the Undersigned, 21-CV-7863, Dkt. 81; 21-CV-8773, Dkt. 48;

WHEREAS on November 30, 2021, the Court continued the stay in the two cases pending the parties' report to the Court within two weeks of the conclusion of Plaintiffs' proceedings before the Citywide Panel, 21-CV-7863, Dkt. 80; 21-CV-8773, Dkt. 47;

WHEREAS on December 11, 2021, Plaintiffs in both cases filed a joint letter motion informing the Court that the proceedings before the Citywide Panel have concluded, 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1;

WHEREAS counsel for the *Kane* Plaintiffs provided copies of the decisions of the Citywide Panel as to eight of the ten Plaintiffs named in *Kane*, 21-CV-7863, Dkt. 85-3;[2]

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[1] Like the Undersigned, the Second Circuit rejected the Plaintiffs' facial challenge to the vaccine mandate. *See* Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 2, 17–24. Because Plaintiffs' current application focuses on their as applied challenges, the Court does not discuss Plaintiffs' facial challenges to the vaccine mandate.

[2] The Citywide Panel approved the request of William Castro, one of the named Plaintiffs in *Kane* matter, although the e-mail approving his request, oddly, also states that he did not meet the criteria for an accommodation.

WHEREAS counsel for the *Keil* Plaintiffs provided copies of the decisions as to all five named Plaintiffs, whose requests for religious accommodations were denied, 21-CV-8773, Dkt. 50-4;

WHEREAS Plaintiffs in both matters seek (1) a preliminary injunction "enjoining enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation;" (2) provisional certification of "a class of all DOE employees who assert religious objections to the vaccine mandate;" and (3) an order requiring "Defendants to immediately reinstate Plaintiffs and all proposed Class members to their original positions prior to the enforcement of the vaccine mandate," 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2;

WHEREAS on December 13, 2021, Defendants responded in opposition to Plaintiffs' requests, 21-CV-7863, Dkt. 87; 21-CV-8773, Dkt. 52, and the Plaintiffs replied in support of their requests, 21-CV-7863, Dkt. 88; 21-CV-8773, Dkt. 53;

WHEREAS no party opposes consolidation of these two cases pursuant to Rule 42 of the Federal Rules of Civil Procedure, 21-CV-7863, Dkt. 85 at 1, Dkt. 87 at 1; 21-CV-8773, Dkt. 50 at 1, Dkt. 52 at 1;

WHEREAS to be entitled to a preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2) that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction; (3) that the balance of hardships tips in Plaintiffs' favor; and (4) that an

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Decisions, 21-CV-7863, Dkt. 85-3 at 6. In its response, Defendants clarified that Mr. Castro's request had been approved. City's Resp., 21-CV-7863, Dkt. 87 at 3.

Plaintiffs' counsel did not provide any information about the status of the requests of the two remaining named Plaintiffs in *Kane*, Robert Gladding and Amaryllis Ruiz-Toro. Decisions, 21-CV-7863, Dkt. 85-3. It appears, however, that their applications were both denied. City's Resp. at 3 (noting that with the exception of Mr. Castro, each of Plaintiffs' applications has been denied).

injunction is in the public interest, *see Capstone Logistics Holdings, Inc. v. Navarrete*, 736 F. App'x 25, 25–26 (2d Cir. 2018);[3] and

WHEREAS to be entitled to class certification, Plaintiffs must satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure (numerosity, commonality, typicality, and adequacy of representation) and of Rule 23(b) of the Federal Rules (question of law or fact common to class members predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy), *see* Fed. R. Civ. P. 23; *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017).

IT IS HEREBY ORDERED that this Court's stay of both cases is lifted and Plaintiffs' application for a preliminary injunction is DENIED. "A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quotation omitted). A harm alleged to be irreparable must be "one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Id.* (internal citation omitted). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005).

Plaintiffs have neither attempted to nor have they demonstrated irreparable harm. As a threshold matter, Plaintiffs' letter motion seeking an injunction cites no case law and makes very few arguments generally and as to irreparable harm specifically. In the Second Circuit's opinion

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[3] That burden is even higher when a party seeks "a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (cleaned up). To meet that higher burden, a party seeking a mandatory injunction must show a "clear or substantial likelihood of success on the merits." *Doninger v. Neihoff*, 527 F.3d 41, 47–48 (2d Cir. 2008) (cleaned up).

The Court takes no position on whether Plaintiffs are seeking a mandatory or prohibitive preliminary injunction. The Court need not resolve that question because, for the reasons discussed *infra*, the Court's conclusions are the same under either standard.

entering an injunction pending the review by the Citywide Panel, the Second Circuit found that Plaintiffs would suffer irreparable harm absent the relief ordered by the Motions Panel. Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 30–31. But in reaching that conclusion, the Second Circuit made clear that it was not casting "doubt on the well-established principle that loss of employment does not usually constitute irreparable injury." *Id.* at 31 n.18 (cleaned up) (collecting cases). The Second Circuit found that principle did not apply given the facts before it because: (1) Plaintiffs had demonstrated a likely violation of their First Amendment rights resulting from the procedure implemented by the arbitration awards; and (2) the City had consented to the entry of an injunction that would allow Plaintiffs' claims to be reconsidered promptly pursuant to procedures that are not constitutionally infirm. *Id.*

Although Plaintiffs' current request for injunctive relief incorporated "all prior papers submitted in this matter to this Court and the Second Circuit Court of Appeals," *see* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1, nowhere in any submission do Plaintiffs address whether the factors on which the Second Circuit relied in finding irreparable harm remain applicable. The Court concludes that they do not. The Motions Panel Order required that fresh consideration of Plaintiffs' requests for religious accommodation be considered pursuant 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." Second Circuit Opinion at 48. The Order further clarified that the consideration "shall not be governed by the challenged criteria set forth in Section IC of the arbitration award for United Federation of Teachers members." *Id.* Accordingly, given that the criteria in the arbitration awards were not being used and given that the City has appeared to have completed its reconsiderations of Plaintiffs' claims and is opposing the injunctive relief sought, neither factor that the Second Circuit relied on in finding irreparable harm continues to apply.

Instead, the Second Circuit's well-reasoned point that Plaintiffs had not proven irreparable harm with respect to their request for reinstatement and backpay applies to their current request for injunctive relief. As the Second Circuit explained:

> The City is not threatening to vaccinate Plaintiffs against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Plaintiffs instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations. "It is well settled, however, that adverse employment consequences," like the loss of income accompanying a suspension without pay, "are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294–95 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021) (citing *Sampson v. Murray*, 415 U.S. 61, 91–92 (1974); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)). Because those harms "could be remedied with money damages, and reinstatement is a possible remedy as well," *id.*, they do not justify an injunction reinstating Plaintiffs. *See Savage*, 850 F.2d at 68 ("Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief.") . . . .
>
> For that reason, this case is different from other pandemic-era cases that have found irreparable harm based on First Amendment violations. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67– 68 (2020); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636–37 (2d Cir. 2020). Those cases involved restrictions on worshippers' rights to attend religious services and so directly prohibited them from freely exercising their religion. *See Agudath*, 983 F.3d at 636 ("The Free Exercise Clause protects both an individual's private right to religious belief and the performance of (or abstention from) physical acts that constitute the free exercise of religion, including assembling with others for a worship service.").
>
> Not so here. Plaintiffs are not required to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable. *See Sampson*, 415 U.S. at 91, 92 n.68, ("[L]oss of income[,] ... an insufficiency of savings or difficulties in immediately obtaining other employment ... will not [ordinarily] support a finding of irreparable injury, however severely they may affect a particular individual.").

Second Circuit Opinion at 34–36 (cleaned up).

Although Plaintiffs do not provide much explanation about the supposed irreparable harm that they will suffer without injunctive relief, they do complain that they now have the choice

either to be vaccinated or "possibly [to] face various penalties including the loss of health insurance and other benefits." Letter Requests, 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2. Additionally, in the emails denying the named Plaintiffs' requests for accommodations, the Citywide Panel[4] informed the applicants whose appeals were denied that they "now have three business days from the date of this notice to submit proof of vaccination" and "[i]f [they] do not do so, [they] will be placed on leave without pay." Decisions, 21-CV-7863, Dkt. 85-3 (emphasis omitted); Decisions, 21-CV-8773, Dkt. 50-4 (emphasis omitted). Accordingly, the only alleged harm is economic, and it can be remedied by money damages, were the Plaintiffs to prevail on the merits of the litigation. In short, Plaintiffs are not entitled to injunctive relief because they have not demonstrated irreparable harm.

But even had Plaintiffs proven irreparable harm, they have not shown a likelihood of success on the merits. The Court has almost no information about the process before the Citywide Panel.[5] Although Plaintiffs' counsel in both cases have submitted declarations in which they assert that the Plaintiffs submitted their applications for review by the Citywide Panel on November 29, 2021, *see* Gibson Decl., Dkt. 85-1 ¶ 3; Black Decl., Dkt. 50-1 ¶ 3, no one bothered to provide copies of those applications to the Court.[6] Additionally, only the *Keil* Plaintiffs provided copies of the supplemental materials provided to the Citywide Panel on December 10, 2021, in response to a request from the Panel for additional information. *See* Supp. Materials, 21-CV-8773, Dkt. 50-3. With so few facts before the Court, Plaintiffs have not

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[4] The Citywide Panel appears to refer to itself as the "City of New York Reasonable Accommodation Appeals Panel." *See* Decisions, 21-CV-7863, Dkt. 85-3; Decisions, 21-CV-8773, Dkt. 50-4.

[5] The City represented that written decisions from the Panel as to each of the Plaintiffs are forthcoming and will be provided promptly to Plaintiffs' counsel once received. City Resp. at 2 n.1

[6] The letter motion for injunctive relief was not accompanied by an affidavit from any Plaintiff.

shown that the Citywide Panel's process was not neutral and rational.[7] *See also* Second Circuit Opinion at 48 (requiring the Citywide Panel to consider the requests pursuant 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). Because Plaintiffs have not established, at least at this stage, that the process used by the Citywide Panel was not neutral or generally applicable, rational basis review applies. *See* Second Circuit Opinion at 23 (collecting cases). For the same reasons that the Second Circuit and the Undersigned found the vaccine mandate to be rational on its face, the Court has no facts before it on which it could conclude that the Citywide Panel's process was irrational in any way or infected with hostility to religion. *See id.* at 23–24 (finding that requiring vaccination for all DOE staff, in line with CDC guidance, was a reasonable exercise of the State's power to act to protect public health); *see also* Denial of Preliminary Injunction, 21-CV-7863, Dkt. 65 at 65–66 (finding that the order represents a rational policy decision about how to best protect children during a global pandemic (citing *Maniscalco v. New York City Dep't of Educ.*, 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021)).

Additionally, both sets of Plaintiffs provided the Court with the Citywide Panel's request for supplemental information from the named Plaintiffs. *See* Email Chain, 21-CV-7863, Dkt. 85-2 at 2; Email Chain, 21-CV-8773, Dkt. 50-2 at 2. The Panel requested that each named Plaintiff provide additional information about (1) whether the employee has previously been vaccinated, (2) other substances that the employee considers foreign or impermissible and that violate the employee's religious beliefs; (3) whether the employee takes other medications developed or tested using fetal cell derivative lines; and (4) other occasions that the employee

[7] The *Kane* Plaintiffs do provide three exhibits with quotations from or purported information about Mayor de Blasio. *See* Ex. 8, Dkt. 85-10 (transcript from a press conference held on September 23, 2021); Ex. 9, Dkt. 85-11 (media article from 2015); Ex. 10, Dkt. 85-12 (media article from June 2020). But none of those exhibits discusses the Citywide Panel or the criteria it used to evaluate Plaintiffs' requests for religious accommodations; nor could they as they all predate the establishment of the Citywide Panel in November 2021.

has acted in accordance with the employee's cited religious beliefs outside the COVID-19 context. *Id.*

It appears that such information is geared towards developing a factual basis for reaching a conclusion as to whether any particular Plaintiff's beliefs are sincerely held and religious in nature,[8] both of which are permissible inquiries and questions of fact. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . ."); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987) (finding that "although the Sherrs [were] clearly genuinely opposed to immunization, the heart of their opposition does not in fact lie in theological considerations [and accordingly,] their claims of a sincerely religious basis for their objections to inoculation are not credible"). Without additional facts about the Citywide Panel, about the information each Plaintiff provided it, and about its decisions to deny Plaintiffs' applications, Plaintiffs have not proven that they are likely to prevail in their argument that the Panels' decisions are constitutionally or otherwise suspect. In short, Plaintiffs have not shown that they are likely to succeed on the merits.

Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits,[9] their motion for a preliminary injunction is DENIED. With no basis for a preliminary

[8] The Court expects to have more clarity about the bases for the Citywide Panel's denials of the Plaintiffs' applications for religious accommodations once the Panel issues written decisions.

[9] Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits, the Court need not consider whether Plaintiffs have made an adequate showing with respect to the two remaining factors — that the balance of hardships tips in their favor and that an injunction is in the public interest.

injunction, the Court also denies Plaintiffs' motion that Defendants be ordered to immediately reinstate them to their original positions prior to the enforcement of the vaccine mandate.[10]

IT IS FURTHER ORDERED that Plaintiffs' motion to certify a class of all DOE employees who assert religious objections to the vaccine mandate is DENIED without prejudice because it is premature. As a threshold matter, the operative complaint in neither case includes class allegations. The *Kane* Plaintiffs filed an amended complaint as a putative class action, *see* First Am. Compl. ("FAC"), 21-CV-7863, Dkt. 74, but they did so without leave of Court and despite the fact that the Court had stayed these proceedings. *See* Order, 21-CV-7863, Dkt. 75 (ordering the *Kane* Plaintiffs to show cause why the FAC should not be stricken given that Plaintiffs did not have leave of Court to file the pleading). The Court has yet to resolve that issue. *See* Endorsement, Dkt. 80 (noting that the "Court will address the issue of Plaintiffs' first amended complaint once the stay has been lifted").[11] And with respect to the *Keil* Plaintiffs, they sought leave to file a First Amended Complaint, but later withdrew their request. *See* Letter, 21-CV-8773, Dkt. 41 (seeking leave); Letter, Dkt. 45 (withdrawing request); Endorsement, Dkt. 47

[10] In their reply in support of their motion, the *Keil* Plaintiffs argue that the Second Circuit's preliminary injunction entered on November 28, 2021 is still in effect. *See* Reply, Dkt. 53 at 2 ("This Court has the power to modify the injunction, but it has not done so, and until this Court or the Circuit Court modifies the injunction, it remains in place by its own terms."). The Court disagrees. The Second Circuit ordered that the "injunction will remain in place during reconsideration of Plaintiffs' renewed requests for religious accommodations." Second Circuit Opinion at 45. As Plaintiffs acknowledge, at least as to them, "the proceedings before the Citywide panel have concluded." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1. Accordingly, the Second Circuit's injunction is no longer in place.

[11] The Court questions whether the FAC filed by the *Kane* Plaintiffs was procedurally proper. Plaintiffs claim that they filed the FAC as a matter of course pursuant to Rule 15 of the Federal Rules of Civil Procedure. *See* Letter, Dkt. 76 at 1. But Rule 15(a)(1) allows a Plaintiff to amend its pleading once as a matter of course within 21 days of serving it or 21 days after service of a responsive pleading. Fed. R. Civ. P. 15. Plaintiffs served their original complaint on October 7, 2021, making any amended pleading due by October 28, 2021. *See* Executed Summons, 21-CV-7863, Dkts., 40–42. The FAC was filed more than two weeks after that deadline, on November 16, 2021. FAC, 21-CV-7863, Dkt. 74. Additionally, as no responsive pleading has been filed, the 21-day clock has not yet started running. Plaintiffs contend that this means "there is no basis for objecting to an amendment as a matter of course." Letter, Dkt. 79 at 1. Plaintiffs fail to cite any caselaw to support that proposition. In any event, as the Court has not yet ruled on the issue, the operative complaint remains the original complaint at docket entry 1.

(granting Plaintiffs' application to withdraw their request). Accordingly, the operative complaint in the *Keil* matter is the original complaint, which does not include class allegations. Moreover, neither of the operative complaints, nor the invalid First Amended Complaint in *Kane*, nor the First Amended Complaint that was proposed but then withdrawn in *Keil* contains *any* factual allegations regarding the Citywide Panel, the decisions from which Plaintiffs now appear to be challenging — and may want to challenge on a class-wide basis.

Additionally, no adequately supported motion for class certification has actually been filed. The *Kane* Plaintiffs filed a request for leave to file a motion for class certification, *see* Request, Dkt. 83, which the Court denied because the Citywide Panel had not reached its decisions at the time the request was made, *see* Endorsement, Dkt. 84.[12] The *Keil* Plaintiffs have not filed any requests related to class certification beyond the letter request at issue in this order.

Without an operative complaint containing class allegations and a proposed class definition,[13] and without a fully briefed motion for class certification, it is premature to certify a class.[14] There are difficult questions of commonality, typicality, and predominance and without

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[12] The Court has every intention of ordering Plaintiffs to file a consolidated amended complaint that will, hopefully, put in one place the factual allegations on which they base their individual claims and, if they so choose, class claims. *See* Endorsement, 21-CV-7863, Dkt. 84 (requiring the parties inform the Court whether they are requesting leave to file amended complaints and to propose a briefing schedule on any motion for class certification).

[13] It is not entirely clear whether these Plaintiffs can allege a single class. All of the named Plaintiff pursued appeals through the Citywide Panel, so they would have standing to complain about what happened during that review. Plaintiffs' counsel's letters, however, seem to suggest that they envision a class that includes any employee of DOE who asserts a religious objection to the COVID-19 vaccine, even if the person did not ever apply to the DOE for an exemption. *See* Reply, 21-CV-8773, Dkt. 53 at 2 ("[The City's position] ignores the many members of the proposed class who were either denied the opportunity to submit an appeal to [the Citywide Panel], or who declined to do so given the patently unconstitutional framework for [the Citywide Panel] appeals, or who declined to submit initial applications to the DOE because of the unconstitutional standards put in place for the application process by the arbitration orders.").

[14] Plaintiffs request that the Court "issue an order provisionally certifying a class," "pending the Court's review of the motion papers filed herewith on a briefing schedule to be proposed jointly with opposing counsel on or before the deadline set by this Court last Friday." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1–2; Letter Request, 21-CV-8773, Dkt. 50 at 1–2. But Plaintiffs cite no case law — and the Court is aware of none — that

full briefing and facts, the Court is not well placed to make such a decision. Accordingly, the Court denies Plaintiffs' request for provisional certification of a class of all DOE employees who assert religious objections to the vaccine mandate. Because the Court has not certified the class, it lacks the power to order Defendants to take action regarding persons beyond the named Plaintiffs. Accordingly, Plaintiffs request that all proposed class members be reinstated to their original positions prior to the enforcement of the vaccine mandate is DENIED.

IT IS FURTHER ORDERED that 21-CV-7863 and 21-CV-8773 are CONSOLIDATED pursuant to Rule 42 of the Federal Rules of Civil Procedure. No party disputes that consolidation is proper in this case. *See* Letter Request, 21-CV-7863, Dkt. 85 at 1; City Resp., 21-CV-7863, Dkt. 87 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1; City Resp., 21-CV-8773, Dkt. 52 at 1. Accordingly, given the overlap between the two cases, the Court finds that consolidation is appropriate.[15]

The Clerk of Court is respectfully directed to consolidate 21-CV-7863 and 21-CV-8773 and designate 21-CV-7863 as the lead case. The Clerk is further directed to close the open motions at 21-CV-7863, Dkt. 85 and 21-CV-8773, Dkt. 50.

SO ORDERED.

Date: December 14, 2021
New York, New York

VALERIE CAPRONI
United States District Judge

supports the conclusion that there is such a thing as a "provisional class certification" outside the settlement context or that a "provisional" class certification requires less proof than class certification.

[15] The *Kane* Plaintiffs argue that because Defendants support consolidation given the common questions of fact and law between the two cases, it "makes no sense" that those same Defendants oppose class certification. Reply, 21-CV-7863, Dkt. 88 at 1. But the *Kane* Plaintiffs ignore that consolidation pursuant to Rule 42 and class certification pursuant to Rule 23 serve two different purposes and involve two different legal standards.

APPENDIX R

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO, Plaintiffs, -against- 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.	:	21-CV-7863 (VEC)
MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, Plaintiffs, -against- THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, MEISHA PORTER, Defendants.	:	21-CV-8773 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on October 12, 2021, the Court denied a motion by Plaintiffs in *Kane et al. v. de Blasio, et al.*, 21-CV-7863 (the "*Kane* Plaintiffs") for a preliminary injunction seeking to enjoin Defendants from enforcing the City's vaccine mandate against employees of the New

York City Department of Education ("DOE") with sincere religious objections to the vaccine, 21-CV-7863, Dkt. 60;

WHEREAS on October 25, 2021, the *Kane* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-7863, Dkt. 67;

WHEREAS on October 25, 2021, the Court stayed the *Kane* matter pending resolution of Plaintiffs' appeal to the Second Circuit, 21-CV-7863, Dkt. 70;

WHEREAS on October 28, 2021, the Court denied a motion by Plaintiffs in *Keil et al. v. City of New York, et al.*, 21-CV-8773 (the "*Keil* Plaintiffs") for a temporary restraining order and preliminary injunction that raised arguments similar to those raised by the *Kane* Plaintiffs, 21-CV-8773, Oct. 28, 2021 text entry;

WHEREAS on October 28, 2021, the *Keil* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-8773, Dkt. 33;

WHEREAS on November 1, 2021, the Court stayed the *Keil* matter pending resolution of the Plaintiffs' appeal to the Second Circuit, 21-CV-8773, Dkt. 40;

WHEREAS on November 14, 2021, the Second Circuit motions panel entered an interim order (the "Motions Panel Order") requiring Defendants to provide the named Plaintiffs in both cases with the opportunity for reconsideration of their requests for religious accommodation by a central citywide panel (the "Citywide Panel"), 21-CV-7863, Dkt. 77 at 47–48; 21-CV-8773, Dkt. 43 at 47–48;

WHEREAS the Second Circuit heard the two appeals in tandem and, on November 28, 2021, entered an opinion on the merits of the appeals, 21-CV-7863, Dkt. 77; 21-CV-8773, Dkt. 43;

WHEREAS the Second Circuit vacated the Undersigned's orders denying preliminary injunctive relief and enjoined the Defendants consistent with the Motions Panel Order, *id.* at 45;[1]

WHEREAS the Second Circuit ordered the injunction to remain in place during the reconsideration of Plaintiffs' requests for religious accommodations by the Citywide Panel and required the parties to inform the Undersigned of the results of those proceedings within two weeks of their conclusion, *id.*;

WHEREAS the Second Circuit remanded the case to the Undersigned for further proceedings consistent with its opinion and instructed the Undersigned that she may alter the terms of the preliminary relief, "as circumstances and further development of the record may require," *id.* at 46;

WHEREAS on November 30, 2021, the Second Circuit issued mandates remanding the cases to the Undersigned, 21-CV-7863, Dkt. 81; 21-CV-8773, Dkt. 48;

WHEREAS on November 30, 2021, the Court continued the stay in the two cases pending the parties' report to the Court within two weeks of the conclusion of Plaintiffs' proceedings before the Citywide Panel, 21-CV-7863, Dkt. 80; 21-CV-8773, Dkt. 47;

WHEREAS on December 11, 2021, Plaintiffs in both cases filed a joint letter motion informing the Court that the proceedings before the Citywide Panel have concluded, 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1;

WHEREAS counsel for the *Kane* Plaintiffs provided copies of the decisions of the Citywide Panel as to eight of the ten Plaintiffs named in *Kane*, 21-CV-7863, Dkt. 85-3;[2]

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[1] Like the Undersigned, the Second Circuit rejected the Plaintiffs' facial challenge to the vaccine mandate. *See* Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 2, 17–24. Because Plaintiffs' current application focuses on their as applied challenges, the Court does not discuss Plaintiffs' facial challenges to the vaccine mandate.

[2] The Citywide Panel approved the request of William Castro, one of the named Plaintiffs in *Kane* matter, although the e-mail approving his request, oddly, also states that he did not meet the criteria for an accommodation.

WHEREAS counsel for the *Keil* Plaintiffs provided copies of the decisions as to all five named Plaintiffs, whose requests for religious accommodations were denied, 21-CV-8773, Dkt. 50-4;

WHEREAS Plaintiffs in both matters seek (1) a preliminary injunction "enjoining enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation;" (2) provisional certification of "a class of all DOE employees who assert religious objections to the vaccine mandate;" and (3) an order requiring "Defendants to immediately reinstate Plaintiffs and all proposed Class members to their original positions prior to the enforcement of the vaccine mandate," 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2;

WHEREAS on December 13, 2021, Defendants responded in opposition to Plaintiffs' requests, 21-CV-7863, Dkt. 87; 21-CV-8773, Dkt. 52, and the Plaintiffs replied in support of their requests, 21-CV-7863, Dkt. 88; 21-CV-8773, Dkt. 53;

WHEREAS no party opposes consolidation of these two cases pursuant to Rule 42 of the Federal Rules of Civil Procedure, 21-CV-7863, Dkt. 85 at 1, Dkt. 87 at 1; 21-CV-8773, Dkt. 50 at 1, Dkt. 52 at 1;

WHEREAS to be entitled to a preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2) that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction; (3) that the balance of hardships tips in Plaintiffs' favor; and (4) that an

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Decisions, 21-CV-7863, Dkt. 85-3 at 6. In its response, Defendants clarified that Mr. Castro's request had been approved. City's Resp., 21-CV-7863, Dkt. 87 at 3.

Plaintiffs' counsel did not provide any information about the status of the requests of the two remaining named Plaintiffs in *Kane*, Robert Gladding and Amaryllis Ruiz-Toro. Decisions, 21-CV-7863, Dkt. 85-3. It appears, however, that their applications were both denied. City's Resp. at 3 (noting that with the exception of Mr. Castro, each of Plaintiffs' applications has been denied).

injunction is in the public interest, *see Capstone Logistics Holdings, Inc. v. Navarrete*, 736 F. App'x 25, 25–26 (2d Cir. 2018);[3] and

WHEREAS to be entitled to class certification, Plaintiffs must satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure (numerosity, commonality, typicality, and adequacy of representation) and of Rule 23(b) of the Federal Rules (question of law or fact common to class members predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy), *see* Fed. R. Civ. P. 23; *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017).

IT IS HEREBY ORDERED that this Court's stay of both cases is lifted and Plaintiffs' application for a preliminary injunction is DENIED. "A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quotation omitted). A harm alleged to be irreparable must be "one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Id.* (internal citation omitted). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005).

Plaintiffs have neither attempted to nor have they demonstrated irreparable harm. As a threshold matter, Plaintiffs' letter motion seeking an injunction cites no case law and makes very few arguments generally and as to irreparable harm specifically. In the Second Circuit's opinion

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[3] That burden is even higher when a party seeks "a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (cleaned up). To meet that higher burden, a party seeking a mandatory injunction must show a "clear or substantial likelihood of success on the merits." *Doninger v. Neihoff*, 527 F.3d 41, 47–48 (2d Cir. 2008) (cleaned up).

The Court takes no position on whether Plaintiffs are seeking a mandatory or prohibitive preliminary injunction. The Court need not resolve that question because, for the reasons discussed *infra*, the Court's conclusions are the same under either standard.

entering an injunction pending the review by the Citywide Panel, the Second Circuit found that Plaintiffs would suffer irreparable harm absent the relief ordered by the Motions Panel. Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 30–31. But in reaching that conclusion, the Second Circuit made clear that it was not casting "doubt on the well-established principle that loss of employment does not usually constitute irreparable injury." *Id.* at 31 n.18 (cleaned up) (collecting cases). The Second Circuit found that principle did not apply given the facts before it because: (1) Plaintiffs had demonstrated a likely violation of their First Amendment rights resulting from the procedure implemented by the arbitration awards; and (2) the City had consented to the entry of an injunction that would allow Plaintiffs' claims to be reconsidered promptly pursuant to procedures that are not constitutionally infirm. *Id.*

Although Plaintiffs' current request for injunctive relief incorporated "all prior papers submitted in this matter to this Court and the Second Circuit Court of Appeals," *see* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1, nowhere in any submission do Plaintiffs address whether the factors on which the Second Circuit relied in finding irreparable harm remain applicable. The Court concludes that they do not. The Motions Panel Order required that fresh consideration of Plaintiffs' requests for religious accommodation be considered pursuant 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." Second Circuit Opinion at 48. The Order further clarified that the consideration "shall not be governed by the challenged criteria set forth in Section IC of the arbitration award for United Federation of Teachers members." *Id.* Accordingly, given that the criteria in the arbitration awards were not being used and given that the City has appeared to have completed its reconsiderations of Plaintiffs' claims and is opposing the injunctive relief sought, neither factor that the Second Circuit relied on in finding irreparable harm continues to apply.

Instead, the Second Circuit's well-reasoned point that Plaintiffs had not proven irreparable harm with respect to their request for reinstatement and backpay applies to their current request for injunctive relief. As the Second Circuit explained:

> The City is not threatening to vaccinate Plaintiffs against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Plaintiffs instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations. "It is well settled, however, that adverse employment consequences," like the loss of income accompanying a suspension without pay, "are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294–95 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021) (citing *Sampson v. Murray*, 415 U.S. 61, 91–92 (1974); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)). Because those harms "could be remedied with money damages, and reinstatement is a possible remedy as well," *id.*, they do not justify an injunction reinstating Plaintiffs. *See Savage*, 850 F.2d at 68 ("Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief.") . . . .
>
> For that reason, this case is different from other pandemic-era cases that have found irreparable harm based on First Amendment violations. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67– 68 (2020); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636–37 (2d Cir. 2020). Those cases involved restrictions on worshippers' rights to attend religious services and so directly prohibited them from freely exercising their religion. *See Agudath*, 983 F.3d at 636 ("The Free Exercise Clause protects both an individual's private right to religious belief and the performance of (or abstention from) physical acts that constitute the free exercise of religion, including assembling with others for a worship service.").
>
> Not so here. Plaintiffs are not required to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable. *See Sampson*, 415 U.S. at 91, 92 n.68, ("[L]oss of income[,] ... an insufficiency of savings or difficulties in immediately obtaining other employment ... will not [ordinarily] support a finding of irreparable injury, however severely they may affect a particular individual.").

Second Circuit Opinion at 34–36 (cleaned up).

Although Plaintiffs do not provide much explanation about the supposed irreparable harm that they will suffer without injunctive relief, they do complain that they now have the choice

either to be vaccinated or "possibly [to] face various penalties including the loss of health insurance and other benefits." Letter Requests, 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2. Additionally, in the emails denying the named Plaintiffs' requests for accommodations, the Citywide Panel[4] informed the applicants whose appeals were denied that they "now have three business days from the date of this notice to submit proof of vaccination" and "[i]f [they] do not do so, [they] will be placed on leave without pay." Decisions, 21-CV-7863, Dkt. 85-3 (emphasis omitted); Decisions, 21-CV-8773, Dkt. 50-4 (emphasis omitted). Accordingly, the only alleged harm is economic, and it can be remedied by money damages, were the Plaintiffs to prevail on the merits of the litigation. In short, Plaintiffs are not entitled to injunctive relief because they have not demonstrated irreparable harm.

But even had Plaintiffs proven irreparable harm, they have not shown a likelihood of success on the merits. The Court has almost no information about the process before the Citywide Panel.[5] Although Plaintiffs' counsel in both cases have submitted declarations in which they assert that the Plaintiffs submitted their applications for review by the Citywide Panel on November 29, 2021, *see* Gibson Decl., Dkt. 85-1 ¶ 3; Black Decl., Dkt. 50-1 ¶ 3, no one bothered to provide copies of those applications to the Court.[6] Additionally, only the *Keil* Plaintiffs provided copies of the supplemental materials provided to the Citywide Panel on December 10, 2021, in response to a request from the Panel for additional information. *See* Supp. Materials, 21-CV-8773, Dkt. 50-3. With so few facts before the Court, Plaintiffs have not

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[4] The Citywide Panel appears to refer to itself as the "City of New York Reasonable Accommodation Appeals Panel." *See* Decisions, 21-CV-7863, Dkt. 85-3; Decisions, 21-CV-8773, Dkt. 50-4.

[5] The City represented that written decisions from the Panel as to each of the Plaintiffs are forthcoming and will be provided promptly to Plaintiffs' counsel once received. City Resp. at 2 n.1

[6] The letter motion for injunctive relief was not accompanied by an affidavit from any Plaintiff.

shown that the Citywide Panel's process was not neutral and rational.[7] *See also* Second Circuit Opinion at 48 (requiring the Citywide Panel to consider the requests pursuant 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). Because Plaintiffs have not established, at least at this stage, that the process used by the Citywide Panel was not neutral or generally applicable, rational basis review applies. *See* Second Circuit Opinion at 23 (collecting cases). For the same reasons that the Second Circuit and the Undersigned found the vaccine mandate to be rational on its face, the Court has no facts before it on which it could conclude that the Citywide Panel's process was irrational in any way or infected with hostility to religion. *See id.* at 23–24 (finding that requiring vaccination for all DOE staff, in line with CDC guidance, was a reasonable exercise of the State's power to act to protect public health); *see also* Denial of Preliminary Injunction, 21-CV-7863, Dkt. 65 at 65–66 (finding that the order represents a rational policy decision about how to best protect children during a global pandemic (citing *Maniscalco v. New York City Dep't of Educ.*, 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021)).

Additionally, both sets of Plaintiffs provided the Court with the Citywide Panel's request for supplemental information from the named Plaintiffs. *See* Email Chain, 21-CV-7863, Dkt. 85-2 at 2; Email Chain, 21-CV-8773, Dkt. 50-2 at 2. The Panel requested that each named Plaintiff provide additional information about (1) whether the employee has previously been vaccinated, (2) other substances that the employee considers foreign or impermissible and that violate the employee's religious beliefs; (3) whether the employee takes other medications developed or tested using fetal cell derivative lines; and (4) other occasions that the employee

[7] The *Kane* Plaintiffs do provide three exhibits with quotations from or purported information about Mayor de Blasio. *See* Ex. 8, Dkt. 85-10 (transcript from a press conference held on September 23, 2021); Ex. 9, Dkt. 85-11 (media article from 2015); Ex. 10, Dkt. 85-12 (media article from June 2020). But none of those exhibits discusses the Citywide Panel or the criteria it used to evaluate Plaintiffs' requests for religious accommodations; nor could they as they all predate the establishment of the Citywide Panel in November 2021.

has acted in accordance with the employee's cited religious beliefs outside the COVID-19 context. *Id.*

It appears that such information is geared towards developing a factual basis for reaching a conclusion as to whether any particular Plaintiff's beliefs are sincerely held and religious in nature,[8] both of which are permissible inquiries and questions of fact. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . ."); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987) (finding that "although the Sherrs [were] clearly genuinely opposed to immunization, the heart of their opposition does not in fact lie in theological considerations [and accordingly,] their claims of a sincerely religious basis for their objections to inoculation are not credible"). Without additional facts about the Citywide Panel, about the information each Plaintiff provided it, and about its decisions to deny Plaintiffs' applications, Plaintiffs have not proven that they are likely to prevail in their argument that the Panels' decisions are constitutionally or otherwise suspect. In short, Plaintiffs have not shown that they are likely to succeed on the merits.

Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits,[9] their motion for a preliminary injunction is DENIED. With no basis for a preliminary

[8] The Court expects to have more clarity about the bases for the Citywide Panel's denials of the Plaintiffs' applications for religious accommodations once the Panel issues written decisions.

[9] Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits, the Court need not consider whether Plaintiffs have made an adequate showing with respect to the two remaining factors — that the balance of hardships tips in their favor and that an injunction is in the public interest.

injunction, the Court also denies Plaintiffs' motion that Defendants be ordered to immediately reinstate them to their original positions prior to the enforcement of the vaccine mandate.[10]

IT IS FURTHER ORDERED that Plaintiffs' motion to certify a class of all DOE employees who assert religious objections to the vaccine mandate is DENIED without prejudice because it is premature. As a threshold matter, the operative complaint in neither case includes class allegations. The *Kane* Plaintiffs filed an amended complaint as a putative class action, *see* First Am. Compl. ("FAC"), 21-CV-7863, Dkt. 74, but they did so without leave of Court and despite the fact that the Court had stayed these proceedings. *See* Order, 21-CV-7863, Dkt. 75 (ordering the *Kane* Plaintiffs to show cause why the FAC should not be stricken given that Plaintiffs did not have leave of Court to file the pleading). The Court has yet to resolve that issue. *See* Endorsement, Dkt. 80 (noting that the "Court will address the issue of Plaintiffs' first amended complaint once the stay has been lifted").[11] And with respect to the *Keil* Plaintiffs, they sought leave to file a First Amended Complaint, but later withdrew their request. *See* Letter, 21-CV-8773, Dkt. 41 (seeking leave); Letter, Dkt. 45 (withdrawing request); Endorsement, Dkt. 47

[10] In their reply in support of their motion, the *Keil* Plaintiffs argue that the Second Circuit's preliminary injunction entered on November 28, 2021 is still in effect. *See* Reply, Dkt. 53 at 2 ("This Court has the power to modify the injunction, but it has not done so, and until this Court or the Circuit Court modifies the injunction, it remains in place by its own terms."). The Court disagrees. The Second Circuit ordered that the "injunction will remain in place during reconsideration of Plaintiffs' renewed requests for religious accommodations." Second Circuit Opinion at 45. As Plaintiffs acknowledge, at least as to them, "the proceedings before the Citywide panel have concluded." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1. Accordingly, the Second Circuit's injunction is no longer in place.

[11] The Court questions whether the FAC filed by the *Kane* Plaintiffs was procedurally proper. Plaintiffs claim that they filed the FAC as a matter of course pursuant to Rule 15 of the Federal Rules of Civil Procedure. *See* Letter, Dkt. 76 at 1. But Rule 15(a)(1) allows a Plaintiff to amend its pleading once as a matter of course within 21 days of serving it or 21 days after service of a responsive pleading. Fed. R. Civ. P. 15. Plaintiffs served their original complaint on October 7, 2021, making any amended pleading due by October 28, 2021. *See* Executed Summons, 21-CV-7863, Dkts., 40–42. The FAC was filed more than two weeks after that deadline, on November 16, 2021. FAC, 21-CV-7863, Dkt. 74. Additionally, as no responsive pleading has been filed, the 21-day clock has not yet started running. Plaintiffs contend that this means "there is no basis for objecting to an amendment as a matter of course." Letter, Dkt. 79 at 1. Plaintiffs fail to cite any caselaw to support that proposition. In any event, as the Court has not yet ruled on the issue, the operative complaint remains the original complaint at docket entry 1.

(granting Plaintiffs' application to withdraw their request). Accordingly, the operative complaint in the *Keil* matter is the original complaint, which does not include class allegations. Moreover, neither of the operative complaints, nor the invalid First Amended Complaint in *Kane*, nor the First Amended Complaint that was proposed but then withdrawn in *Keil* contains *any* factual allegations regarding the Citywide Panel, the decisions from which Plaintiffs now appear to be challenging — and may want to challenge on a class-wide basis.

Additionally, no adequately supported motion for class certification has actually been filed. The *Kane* Plaintiffs filed a request for leave to file a motion for class certification, *see* Request, Dkt. 83, which the Court denied because the Citywide Panel had not reached its decisions at the time the request was made, *see* Endorsement, Dkt. 84.[12] The *Keil* Plaintiffs have not filed any requests related to class certification beyond the letter request at issue in this order.

Without an operative complaint containing class allegations and a proposed class definition,[13] and without a fully briefed motion for class certification, it is premature to certify a class.[14] There are difficult questions of commonality, typicality, and predominance and without

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[12] The Court has every intention of ordering Plaintiffs to file a consolidated amended complaint that will, hopefully, put in one place the factual allegations on which they base their individual claims and, if they so choose, class claims. *See* Endorsement, 21-CV-7863, Dkt. 84 (requiring the parties inform the Court whether they are requesting leave to file amended complaints and to propose a briefing schedule on any motion for class certification).

[13] It is not entirely clear whether these Plaintiffs can allege a single class. All of the named Plaintiff pursued appeals through the Citywide Panel, so they would have standing to complain about what happened during that review. Plaintiffs' counsel's letters, however, seem to suggest that they envision a class that includes any employee of DOE who asserts a religious objection to the COVID-19 vaccine, even if the person did not ever apply to the DOE for an exemption. *See* Reply, 21-CV-8773, Dkt. 53 at 2 ("[The City's position] ignores the many members of the proposed class who were either denied the opportunity to submit an appeal to [the Citywide Panel], or who declined to do so given the patently unconstitutional framework for [the Citywide Panel] appeals, or who declined to submit initial applications to the DOE because of the unconstitutional standards put in place for the application process by the arbitration orders.").

[14] Plaintiffs request that the Court "issue an order provisionally certifying a class," "pending the Court's review of the motion papers filed herewith on a briefing schedule to be proposed jointly with opposing counsel on or before the deadline set by this Court last Friday." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1–2; Letter Request, 21-CV-8773, Dkt. 50 at 1–2. But Plaintiffs cite no case law — and the Court is aware of none — that

full briefing and facts, the Court is not well placed to make such a decision. Accordingly, the Court denies Plaintiffs' request for provisional certification of a class of all DOE employees who assert religious objections to the vaccine mandate. Because the Court has not certified the class, it lacks the power to order Defendants to take action regarding persons beyond the named Plaintiffs. Accordingly, Plaintiffs request that all proposed class members be reinstated to their original positions prior to the enforcement of the vaccine mandate is DENIED.

IT IS FURTHER ORDERED that 21-CV-7863 and 21-CV-8773 are CONSOLIDATED pursuant to Rule 42 of the Federal Rules of Civil Procedure. No party disputes that consolidation is proper in this case. *See* Letter Request, 21-CV-7863, Dkt. 85 at 1; City Resp., 21-CV-7863, Dkt. 87 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1; City Resp., 21-CV-8773, Dkt. 52 at 1. Accordingly, given the overlap between the two cases, the Court finds that consolidation is appropriate.[15]

The Clerk of Court is respectfully directed to consolidate 21-CV-7863 and 21-CV-8773 and designate 21-CV-7863 as the lead case. The Clerk is further directed to close the open motions at 21-CV-7863, Dkt. 85 and 21-CV-8773, Dkt. 50.

SO ORDERED.

Date: December 14, 2021
New York, New York

VALERIE CAPRONI
United States District Judge

supports the conclusion that there is such a thing as a "provisional class certification" outside the settlement context or that a "provisional" class certification requires less proof than class certification.

[15] The *Kane* Plaintiffs argue that because Defendants support consolidation given the common questions of fact and law between the two cases, it "makes no sense" that those same Defendants oppose class certification. Reply, 21-CV-7863, Dkt. 88 at 1. But the *Kane* Plaintiffs ignore that consolidation pursuant to Rule 42 and class certification pursuant to Rule 23 serve two different purposes and involve two different legal standards.

APPENDIX S

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MEMO ENDORSED

December 16, 2021

By ECF
Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, NY 10007

Re: *Keil, et al., v. The City of New York, et al., No. 21 Civ. 8773*
Kane, et al., v. Bill de Blasio, et al., No. 21 Civ. 7863

Dear Judge Caproni:

Pursuant to Rule 62(d), Plaintiffs jointly request that this Court grant an injunction as requested in our recent motion papers or, alternatively, a stay of enforcement of Commissioner Chokshi's vaccine mandates dated September 15 and September 28, 2021 against Plaintiffs and the proposed class identified below, pending interlocutory appeal of this Court's December 14, 2021 order denying Plaintiffs' motion for a preliminary injunction, which Plaintiffs have appealed to the Court of Appeals.

Plaintiffs rely on the papers submitted previously in support of the aforesaid motion and in prior proceedings in this Court and in the Court of Appeals and note that Defendants alerted Plaintiffs that they must either waive their right to continue this litigation or face permanent termination on December 28, 2021. Thousands of other similarly situated DOE employees face the same harm. Each day represents fresh ongoing irreparable harm, as Plaintiffs and their colleagues are forced to choose between their faith and their job, in violation of the First Amendment. Loss of such First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 US 347, 373 (1976).

The "fresh consideration" did not serve to protect Plaintiffs. This Court was empowered by the Second Circuit to revise the injunctive relief to ensure that Plaintiffs can continue this litigation without continued harm to their basic constitutional rights, such as is presented by the daily coercion to waive their right to sue that they face now.

Plaintiffs bring to the Court's attention the summary denials by the citywide panel of Plaintiffs' appeals, without as much as feigning the provision of a substantive basis for such denials. Only upon Plaintiffs' letter motion dated December 11, 2021 at 8:29 PM, pointing out this blatant shortcoming,

did Defendants at 4:27:15 PM on December 13, 2021, provide apparent cover via an email containing purported "summaries of the reason for the decision in each appeal," *Ex. A*, which did nothing to change the fact that the actual denials were summarily issued.

These post-hoc justifications also show that, in violation of the Second Circuit's order, Defendants did not apply standards provided by Title VII or the New York State or New York City Human Rights Laws. Instead, they reused the unconstitutional arbitration standards, by affirming that applicants' religious beliefs were sincere, but unconstitutionally defining their beliefs as "not religious" because they are personally held. This discriminatory standard does not even comply with EEOC guidelines, leave aside the more stringent guidelines governing the New York State and City statutes.

The fresh consideration process does not deprive Plaintiffs of their right to have this case reviewed under strict scrutiny. A state actor's assessment of religious exemption applications under Title VII's "reasonable accommodation" standard by its very nature renders the relevant law not generally applicable. "Like the good cause provision in Sherbert," the vaccine mandate "incorporates a system of individual exemptions, made available" at Defendants' "sole discretion," giving rise to strict scrutiny. *Fulton v. City of Phila.*, ___US___ , ___, 141 S Ct 1868, 1878 (2021). The First Amendment requires government actors engaging in religious exemption determinations to meet its heightened standards; no act of Congress can have the effect of diminishing those sacrosanct standards.

Moreover, as previously argued, the DOE Mandate itself is neither neutral nor generally applicable. It was implemented through an admittedly unconstitutional policy, and it is not generally applicable since it does not apply to the general public. Indeed, various mandates have been imposed upon other New York City departments, agencies and groups which impose different penalties for noncompliance-or none at all. In this context, we respectfully submit herewith numerous other vaccine mandates that have been issued by Defendants, each specially applicable to a distinct portion of the general population, and each to be enforced by rules that are inconsistent with each other and with the rules that are applicable to the proposed class of New York City Department of Education employees who oppose the DOE COVID-19 vaccine mandate for religious reasons – requiring strict scrutiny of Defendants' actions. *Ex. B*.

For all the reasons set forth above, Plaintiffs respectfully request that this Court grant an injunction or, alternatively, a stay of enforcement of Commissioner Chokshi's vaccine mandates, pending interlocutory appeal of this Court's December 14, 2021, order denying Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

/s/ Jonathan R. Nelson
Counsel for Keil Plaintiffs

/s/ Sujata S. Gibson
Counsel for Kane Plaintiffs

cc: All counsel via ECF

Plaintiffs' application for a stay of enforcement of the DOE Vaccine Mandate pending their appeal to the Second Circuit pursuant to Rule 62(d) of the Federal Rules of Civil Procedure is DENIED for the same reasons the Court denied the application for injunctive relief. *See* Order, Dkt. 90.

Both parties have attempted to file amended complaints as a matter of course pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure. *See* 21-CV-7863, Dkt. 74; 21-CV-8773, Dkt. 56. Courts are split on the question of whether amended complaints filed as a matter of course more than 21 days after service of the initial complaint but before a responsive pleading or Rule 12(b), (e), or (f) motion have been served are considered timely. *See Doe #1 v. Syracuse Univ.*, 335 F.R.D. 356, 358-59 (N.D.N.Y. 2020) (reviewing the court split).

But that question is moot in this matter. The Court has consolidated 21-CV-7863 and 21-CV-8773. *See* Order, Dkt. 90 at 13. Accordingly, the appropriate next step is for the Plaintiffs in both cases to file one consolidated amended complaint that incorporates allegations and claims as to the Citywide Panel and any class allegations, as Plaintiffs find appropriate. The consolidated amended complaint is due no later than **Friday, January 7, 2022**.

In addition to the consolidated amended complaint, by no later than **Friday, January 7, 2022**, the parties must file a joint letter addressing the following:

1. The status of the administrative proceedings before the Citywide Panel as to other DOE employees who have unsuccessfully sought religious exemptions. *See* Appendix, Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 47.
2. A proposed briefing schedule on Plaintiffs' motion for class certification.
3. Whether Defendants plan to challenge Plaintiffs' standing to pursue their as applied challenges, and if so, a proposed briefing schedule on the subject with Defendants filing the opening brief. *See* Second Circuit Opinion at 25-26 n.15; Order, 21-CV-7863, Dkt. 60 at 1-2.
4. Whether either party is seeking a stay in discovery and if so, on what basis.
5. Whether the parties believe a Rule 16 conference should be scheduled or whether there are threshold issues to be resolved first.
6. Any other information that parties believe may assist the Court in advancing these cases to resolution.

If the parties cannot agree on a joint proposal with respect to any of the topics listed above, they should include their respective positions as to that issue. This Order supersedes the Court's endorsement at docket entry 84.

The Court has consolidated these two matters and designated 21-CV-7863 as the lead case. *See* Order, Dkt. 90 at 13. Accordingly, the parties are ordered henceforth to make filings only in 21-CV-7863.

The Clerk of Court is respectfully directed to close the open motions at 21-CV-7863, Dkt. 92 and 21-CV-8773, Dkt. 57.

SO ORDERED.

Valerie Caproni

Date: December 17, 2021

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE

APPENDIX T

GIBSON LAW FIRM, PLLC
Sujata S. Gibson, Esq.
408 W Martin Luther King, Jr. St.
Ithaca, NY 14850

NELSON MADDEN BLACK LLP
Jonathan R. Nelson, Esq.
475 Park Ave. S., Suite 2800
New York, NY 10016

MEMO ENDORSED

December 16, 2021

By ECF
Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square
New York, NY 10007

Re: *Keil, et al., v. The City of New York, et al., No. 21 Civ. 8773*
Kane, et al., v. Bill de Blasio, et al., No. 21 Civ. 7863

Dear Judge Caproni:

Pursuant to Rule 62(d), Plaintiffs jointly request that this Court grant an injunction as requested in our recent motion papers or, alternatively, a stay of enforcement of Commissioner Chokshi's vaccine mandates dated September 15 and September 28, 2021 against Plaintiffs and the proposed class identified below, pending interlocutory appeal of this Court's December 14, 2021 order denying Plaintiffs' motion for a preliminary injunction, which Plaintiffs have appealed to the Court of Appeals.

Plaintiffs rely on the papers submitted previously in support of the aforesaid motion and in prior proceedings in this Court and in the Court of Appeals and note that Defendants alerted Plaintiffs that they must either waive their right to continue this litigation or face permanent termination on December 28, 2021. Thousands of other similarly situated DOE employees face the same harm. Each day represents fresh ongoing irreparable harm, as Plaintiffs and their colleagues are forced to choose between their faith and their job, in violation of the First Amendment. Loss of such First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 US 347, 373 (1976).

The "fresh consideration" did not serve to protect Plaintiffs. This Court was empowered by the Second Circuit to revise the injunctive relief to ensure that Plaintiffs can continue this litigation without continued harm to their basic constitutional rights, such as is presented by the daily coercion to waive their right to sue that they face now.

Plaintiffs bring to the Court's attention the summary denials by the citywide panel of Plaintiffs' appeals, without as much as feigning the provision of a substantive basis for such denials. Only upon Plaintiffs' letter motion dated December 11, 2021 at 8:29 PM, pointing out this blatant shortcoming,

did Defendants at 4:27:15 PM on December 13, 2021, provide apparent cover via an email containing purported "summaries of the reason for the decision in each appeal," *Ex. A*, which did nothing to change the fact that the actual denials were summarily issued.

These post-hoc justifications also show that, in violation of the Second Circuit's order, Defendants did not apply standards provided by Title VII or the New York State or New York City Human Rights Laws. Instead, they reused the unconstitutional arbitration standards, by affirming that applicants' religious beliefs were sincere, but unconstitutionally defining their beliefs as "not religious" because they are personally held. This discriminatory standard does not even comply with EEOC guidelines, leave aside the more stringent guidelines governing the New York State and City statutes.

The fresh consideration process does not deprive Plaintiffs of their right to have this case reviewed under strict scrutiny. A state actor's assessment of religious exemption applications under Title VII's "reasonable accommodation" standard by its very nature renders the relevant law not generally applicable. "Like the good cause provision in Sherbert," the vaccine mandate "incorporates a system of individual exemptions, made available" at Defendants' "sole discretion," giving rise to strict scrutiny. *Fulton v. City of Phila.*, ___US___ , ___, 141 S Ct 1868, 1878 (2021). The First Amendment requires government actors engaging in religious exemption determinations to meet its heightened standards; no act of Congress can have the effect of diminishing those sacrosanct standards.

Moreover, as previously argued, the DOE Mandate itself is neither neutral nor generally applicable. It was implemented through an admittedly unconstitutional policy, and it is not generally applicable since it does not apply to the general public. Indeed, various mandates have been imposed upon other New York City departments, agencies and groups which impose different penalties for noncompliance-or none at all. In this context, we respectfully submit herewith numerous other vaccine mandates that have been issued by Defendants, each specially applicable to a distinct portion of the general population, and each to be enforced by rules that are inconsistent with each other and with the rules that are applicable to the proposed class of New York City Department of Education employees who oppose the DOE COVID-19 vaccine mandate for religious reasons – requiring strict scrutiny of Defendants' actions. *Ex. B*.

For all the reasons set forth above, Plaintiffs respectfully request that this Court grant an injunction or, alternatively, a stay of enforcement of Commissioner Chokshi's vaccine mandates, pending interlocutory appeal of this Court's December 14, 2021, order denying Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

/s/ Jonathan R. Nelson
Counsel for Keil Plaintiffs

/s/ Sujata S. Gibson
Counsel for Kane Plaintiffs

cc: All counsel via ECF

Plaintiffs' application for a stay of enforcement of the DOE Vaccine Mandate pending their appeal to the Second Circuit pursuant to Rule 62(d) of the Federal Rules of Civil Procedure is DENIED for the same reasons the Court denied the application for injunctive relief. *See* Order, Dkt. 90.

Both parties have attempted to file amended complaints as a matter of course pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure. *See* 21-CV-7863, Dkt. 74; 21-CV-8773, Dkt. 56. Courts are split on the question of whether amended complaints filed as a matter of course more than 21 days after service of the initial complaint but before a responsive pleading or Rule 12(b), (e), or (f) motion have been served are considered timely. *See Doe #1 v. Syracuse Univ.*, 335 F.R.D. 356, 358-59 (N.D.N.Y. 2020) (reviewing the court split).

But that question is moot in this matter. The Court has consolidated 21-CV-7863 and 21-CV-8773. *See* Order, Dkt. 90 at 13. Accordingly, the appropriate next step is for the Plaintiffs in both cases to file one consolidated amended complaint that incorporates allegations and claims as to the Citywide Panel and any class allegations, as Plaintiffs find appropriate. The consolidated amended complaint is due no later than **Friday, January 7, 2022**.

In addition to the consolidated amended complaint, by no later than **Friday, January 7, 2022**, the parties must file a joint letter addressing the following:

1. The status of the administrative proceedings before the Citywide Panel as to other DOE employees who have unsuccessfully sought religious exemptions. *See* Appendix, Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 47.
2. A proposed briefing schedule on Plaintiffs' motion for class certification.
3. Whether Defendants plan to challenge Plaintiffs' standing to pursue their as applied challenges, and if so, a proposed briefing schedule on the subject with Defendants filing the opening brief. *See* Second Circuit Opinion at 25-26 n.15; Order, 21-CV-7863, Dkt. 60 at 1-2.
4. Whether either party is seeking a stay in discovery and if so, on what basis.
5. Whether the parties believe a Rule 16 conference should be scheduled or whether there are threshold issues to be resolved first.
6. Any other information that parties believe may assist the Court in advancing these cases to resolution.

If the parties cannot agree on a joint proposal with respect to any of the topics listed above, they should include their respective positions as to that issue. This Order supersedes the Court's endorsement at docket entry 84.

The Court has consolidated these two matters and designated 21-CV-7863 as the lead case. *See* Order, Dkt. 90 at 13. Accordingly, the parties are ordered henceforth to make filings only in 21-CV-7863.

The Clerk of Court is respectfully directed to close the open motions at 21-CV-7863, Dkt. 92 and 21-CV-8773, Dkt. 57.

SO ORDERED.

Valerie Caproni

Date: December 17, 2021

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE

APPENDIX U

MEMO ENDORSED

GEORGIA M. PESTANA
Corporation Counsel

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

AMANDA C. CROUSHORE
Labor and Employment Law Division
Phone: (212) 356-4074
Fax: (212) 356-2438
Email: acrousho@law.nyc.gov

December 23, 2021

By ECF

Hon. Valerie E. Caproni
United States District Court
Southern District of New York
Thurgood Marshall Courthouse
40 Foley Square,
New York, NY 10007

Re: Kane, et al. v. de Blasio, et al., Dkt. 21 Civ. 7863 (Lead Case)
Keil, et al. v. The City of New York, et al., Dkt. 21 Civ. 8773

Dear Judge Caproni:

I am an Assistant Corporation Counsel in the office of Georgia M. Pestana, Corporation Counsel for the City of New York, attorneys for the defendants in the above-referenced case. I write to seek clarification from the Court on the parties' next deadline, in light of the Second Circuit's December 21, 2021 Order granting in part and denying in part plaintiffs' emergency motions to enjoin enforcement of the COVID-19 vaccine mandate on DOE employees and contractors. *See* Dkt. 94. The Second Circuit indicated in its Order that its motions panel will be hearing plaintiffs' motion on Tuesday, January 18, 2022, and ordered that pending a decision from the motions panel, plaintiffs' deadlines relating to whether to opt-in to the DOE's leave program shall be stayed, and no steps shall be taken to terminate plaintiffs.

In light of the Second Circuit's Order and the fact that the motions panel will be hearing plaintiffs' appeal on January 18, 2022, defendants request clarification regarding whether the parties should still plan to file a joint letter on January 7, 2022, as ordered by the Court on

December 17, 2021 (Dkt. 93), or whether that is now moot and/or should be held in abeyance pending the Second Circuit's ruling on plaintiffs' appeal.

Respectfully submitted,

/s/ Amanda Croushore

Assistant Corporation Counsel

This matter is not currently stayed. The January 7, 2022 deadline for the filing of the consolidated amended complaint and the joint letter (Dkt. 93) remains in effect. If any of the parties believe a stay is appropriate, they are welcome to file a motion requesting the case be stayed pending resolution of the appeal. Any such motion must indicate whether the other parties consent *vel non* to the entry of a stay.

SO ORDERED.

Date: December 23, 2021

HON. VALERIE CAPRONI
UNITED STATES DISTRICT JUDGE

APPENDIX V

NELSON MADDEN BLACK LLP

475 Park Avenue South, Suite 2800
New York, New York 10016
Telephone: (212) 382-4300
nelsonmaddenblack.com

February 1, 2022

Jonathan R. Nelson (212) 382-4301
jnelson@nelsonmaddenblack.com

Hon. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals
for the Second Circuit
40 Foley Square
New York, NY 10007

Re: *Keil v. New York City*, No. 21-3043
Re: *Kane v. de Blasio,* No. 21-3047

Dear Madame Clerk:

I write on behalf of appellants in both the *Keil* and *Kane* appeals, referenced above, to inform the Court of new developments in the matter and respectfully to ask the Honorable Court to issue its decision as soon as possible.

On January 18, 2022, the parties argued appellants' emergency motions before Circuit Judges Kearse, Walker and Sullivan, sitting as a motions panel of the Court. Although the panel suggested that the Court might refer the case to an expedited merits panel hearing, the panel has not yet rendered a decision on the emergency motions. An initial *Status quo* injunction issued on December 21, 2021 remains in place.

A new development has arisen that changes the *status quo ante* and causes us to write to you. Over the past several days, the Appellees have sent letters to DOE employees notifying them that they will be terminated effective February 11, 2022 for non-compliance with the Mandate. *See, e.g.,* Exhibit A submitted herewith.

None of the named individual appellants in *Keil* or *Kane* have received the letters in question, and their vaccine compliance requirements were stayed by the Court's December 21, 2021 order. However, the DOE employees who have received the letters are, on information and belief, members of the Class that has been proposed in the parties' Consolidated Complaint, namely, employees who have religious objections to the vaccination mandate and who either declined to submit religious exemption applications under clearly unconstitutional standards or who declined to appeal exemption denial decisions under the same standards. Such persons's religious objections have not been considered under standards that are not "constitutionally suspect." The DOE's exemption procedures expressly excluded them from any opportunity to receive a fair and lawful adjudication of their religious objections to vaccination.

We wish to inform that court that employees of other City departments have also received notices that their employment will be terminated effective February 11, 2022 for non-compliance with other specific vaccine mandates that apply to them. *See, e.g.,* Exhibits B (Sanitation

Department) and C (Fire Department), submitted herewith. We also attach a just-published news article with additional information (Exhibit D).

We respectfully ask the Court to expedite its decision on Appellants' motion and to enjoin the DOE from terminating employment or insurance for all DOE employees for non-compliance with the Mandate, not just the named Appellants.

Respectfully submitted,

/s/ Jonathan R. Nelson
Jonathan Robert Nelson
Attorney for *Keil* appellants

cc: All Counsel (via ECF)

NYCDOE

DO **Division of Human Resources** 3:20 PM

Dear DOE Employee,

You have previously received notice regarding your failure to comply with the New York City Health Commissioner's Order requiring vaccination of all New York City Department of Education staff. Compliance with that Order is a condition of employment. Since you have not complied with the Order and have not chosen to extend your leave without pay, despite notice and an opportunity to do so, your employment with the New York City Department of Education is terminated, effective February 11, 2022. Please note that your health insurance coverage through the City will also cease upon termination.

You must return all DOE-issued equipment and materials, including your ID, to your supervisor. Information about COBRA will be mailed separately to you at the address on file in NYCAPS. Your school and/or office will be notified of your termination as well.

If you believe you are receiving this notification in error, please email LWOPquestions@schools.nyc.gov no later than February 2, 2022.

Thank you for your service to the New York City Department of Education.

Sincerely,

NYCDOE Division of Human Resources

Good afternoon,

You have been placed on Leave Without Pay status due to your noncompliance with the Order of the Commissioner of Health and Mental Hygiene dated October 20, 2021 that all City employees provide proof of receipt of a COVID-19 vaccine. Additionally, you have elected not to continue health benefits coverage while on Leave Without Pay status through June 30, 2022, pursuant to an agreement between your union and the City. **Please be advised that your position with DSNY will be terminated if you do not submit proof of receipt of a COVID-19 vaccine by 5:00pm on February 11, 2022.**

Compliance with this requirement is a condition of your continued employment with the City. Failure to provide proof of vaccination by February 11, 2022 will result in the termination of your employment with DSNY. For information regarding where you can receive a COVID-19 vaccine, please visit https://vaccinefinder.nyc.gov/.

Please submit proof of receipt of a COVD-19 vaccine as soon as possible, but no later than by 5:00pm on February 11, 2022. If DSNY does not receive your proof of receipt of a COVD-19 vaccine by this date and time, your employment will be terminated.

Please note that a letter was mailed to you via

NEW YORK CITY DEPARTMENT OF SANITATION

sanitation

Edward Grayson Commissioner

EMPLOYEE EXTENDED LWOP WAIVER

I, _____, have been placed on Leave Without Pay by the New York City Department of Sanitation (DSNY) effective on the date of _____. I hereby opt to extend my Leave Without Pay through June 30, 2022. I understand that by executing this waiver I will remain on Leave Without Pay through June 30, 2022 and, during this time, will be eligible for health benefits. I also understand that in the event I come into compliance with the October 20, 2021 order issued by the Commissioner of the Department of Health and Mental Hygiene mandating that all City employees be vaccinated against COVID-19, and seek to return from Leave Without Pay, I must inform DSNY before June 30, 2022 of my intent to return. Once I notify DSNY of my intent to return, I have a right to return to the same work location as soon as is practicable but in no case more than two weeks following my notice of intent to return. I understand that if I have not returned from Leave Without Pay before June 30, 2022, I will be deemed to have voluntarily resigned effective June 30, 2022. As a condition of my extension of Leave Without Pay, I agree not to file any action or proceeding against the City of New York or DSNY or any and all past or present officials, employees or representatives of the City of New York challenging my placement on Leave Without Pay and, if applicable, my resignation from the City of New York and do hereby acknowledge, release and discharge the City of New York and DSNY from all liability, claims, demands, causes of action, obligations, damages and grievances that arise out of my employment with the City of New York, including, but not limited to, any claim or right related to my placement on Leave Without Pay and/or resignation.

For Employees Currently Age Forty (40) and Older Only: If I am currently age forty (40) or older, I acknowledge that in accordance with the Older Workers Benefit Protection Act: (i) I enter into this waiver voluntarily and with full understanding and knowledge of its consequences; (ii) I have been advised by the DSNY to consult with an attorney prior to executing this agreement and release; (iii) I have been provided with the opportunity to have at least a twenty-one (21) day period to review and consider whether to sign this Severance Agreement and Release; and (iv) I have been advised that I have seven (7) days following execution to revoke it (the "Revocation Period"). This Severance Agreement and Release will not be effective and enforceable until the Revocation Period has expired. Such revocation shall only be effective if an originally executed written notice of revocation is delivered to DSNY on or before 5:00 p.m. on the seventh day after execution of this waiver. If so revoked, this waiver shall be deemed to be void and have no force or effect.

_____
Employee Name (Print)

_____
Employee Signature

_____
Reference Number

_____
Date

🔴 65-2 #8 of 2022: Vaccine Mandate and Termination

View this email in your browser

#8 of 2022 | January 30th

Vaccine Mandate and Termination

The UFA has been informed that the Mayor is moving forward with termination of members who are non-compliant with the vaccine mandate. From what we have been told and NOTHING IS OFFICIAL AT THIS TIME- (as this notification came via phone call), if you currently fall within these three groups, you are at risk for termination;

1. If you are currently unvaccinated and have never filled out an RA.
2. You have filled out an RA; it has been denied ; you have further appealed and your appeal has been denied.
3. Probationary firefighters who have only submitted proof of 1st shot .

You will be terminated on February 11, 2022, if you have not received your 1st shot (2nd shot for Member's on probation). We expect the Department to release more information tomorrow .

An emergency meeting will be scheduled with delegates and LWOP members later this week whether in person or zoom based on availability.

The UFA still has lawsuits pending; part of these lawsuits are in relation to the termination aspect of the original vaccine mandate. We are consulting with the lawyers to see if additional legal action is possible, and we will get back to you with more information as soon as possible.

This is a PRELIMINARY 6-52 and we WILL have more information tomorrow as updates become available.

Fraternally,

Vincent Speciale
Recording Secretary

Andrew Ansbro
President

65-2

An Official Communication from the Uniformed Firefighters Association

IAFF Local 94 - AFL CIO

#9 of 2022 | February 1st

Termination Emails

It has come to our attention that last night, the Fire Department mistakenly emailed termination notices to members that should not have received them. The Department is in the process of correcting this error.

Members who have submitted a Reasonable Accommodation (RA) request that have not yet received a notice of a decision for their pending RA request are not facing termination at this time. Additionally, members who have submitted an appeal after receiving a denial of their RA request and have not yet received a decision regarding their appeal are not facing termination at this time.

Currently, members are facing termination if:

- If you are currently unvaccinated and have never submitted a RA request.
- You have filled out an RA, it has been denied, you have further appealed the decision, and your appeal has been denied.

The UFA is in the process of scheduling a Zoom meeting with delegates and LWOP members this Friday, February 4, 2022. Meeting details will be announced on an upcoming communication. Upon receiving the list from the Department, we will attempt to reach out to each member facing termination.

Fraternally,

Vincent Speciale
Recording Secretary

Andrew Ansbro
President

Our mailing address is:
Uniformed Firefighters Association
204 E 23rd St
New York, NY 10010-4628

NYPD

NYC's Unvaccinated Workforce Faces Feb. 11 Termination Without Proof of Shots

Unvaccinated city workers are staring at a February deadline to get vaccinated or face the chopping block

By **Myles Miller** and **Andrew Siff** • Published January 31, 2022 • Updated on January 31, 2022 at 6:14 pm

Getty Images

Police, firefighters, and other New York City employees face their final deadline to get vaccinated against COVID-19 or be terminated come Feb. 11.

That deadline was announced Monday, months after the city's health commissioner issued an order that all municipal employees receive their vaccination series in order to work.

Any city workers staring down next month's cutoff was to be given notice by Monday, according to memos obtained by News 4.

The Feb. 11 applies to two groups: new hires who have not submitted proof of a second vaccine dose, if required to complete their series, and unvaccinated employees currently on unpaid leave who did not request to continue receiving health benefits past June.

“My number one job is to keep this city safe — that includes getting New York City vaccinated. City workers are leaders and have led the way on vaccinations. More than 90 percent of employees are fully vaccinated and that number is increasing every day," a statement from Mayor Eric Adams read.

New city employees brought on after Aug. 2 needed a full vaccination series as a condition of their employment, and were given 45 days to do so. There are roughly less than 1,000 "new hires" that have not met this requirement, according to city officials.

The other group, those on leave without pay and did not remain on health benefits as negotiated by the unions, are slightly less than 3,000 in size.

News

8 HOURS AGO

NYC Comes Together to Mourn Again at Public Wake for Slain NYPD Officer Wilbert Mora

18 HOURS AGO

Dog Walking on NYC Sidewalk Is Electrocuted by Metal Grate — a Tragic Reminder for Pet Owners

News of the deadline came first from within the NYPD after a memo written to NYPD sergeants warned of the approaching deadline.

"It has come to our attention that The Mayor has decided to move forward with terminating employees who have failed to get vaccinated," Sergeants Benevolent Association President Vincent Vallelong wrote to sergeants.

The union president warned NYPD members in his memo those who did not get vaccinated and failed to obtain a medical or religious exemption would be on the chopping block.

Excluded from that division of officers are those who filed for an exemption, or filed for an appeal, and have not received a final determination, Vallelong said. Those officers must still regularly test and wear a mask.

NBC New York's Romney Smith reports.

The union president told his members that on Monday the NYPD intends to notify all officers on unpaid leave, as well as newly hired officers who have not provided proof of a second dose (if taking a Moderna of Pfizer vaccination series), that they have until the February deadline to comply.

Veteran officers will also need to show proof of a second dose in their vaccination series, the memo warns. Vallelong said the deadline to show that proof has not been announced.

"Every avenue has been exhausted by Law Enforcement and others across the country in the courts, we have lost at every turn," Vallelong concludes his message. "With this in mind, I ask you to take the proper steps to ensure that whatever decision you make is best for you and your families."

On Sunday, Mayor Eric Adams boasted about the city's progress in combatting one of the most contagious variants, as well as boosting citywide vaccination numbers. During his weekend briefing, the mayor announced 75% of all New Yorkers have completed their initial vaccination series.

This article tagged under:

NYPD • NEW YORK CITY • COVID-19 PANDEMIC • VACCINATION

APPENDIX W

S.D.N.Y. – N.Y.C.
21-cv-7863
21-cv-8773
Caproni, J.

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 3rd day of February, two thousand twenty-two.

Present:

Amalya L. Kearse,
John M. Walker, Jr.,
Richard J. Sullivan,
Circuit Judges.

Matthew Keil, John De Luca, Sasha Delgado,
Dennis Strk, Sarah Buzaglo,

Plaintiffs-Appellants,

v. 21-3043

The City of New York, Board of Education of the City School District of New York, David Chokshi, in his official capacity as 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.

Michael Kane, William Castro, Margaret Chu, Heather Clark, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Trinidad Smith, Amaryllis Ruiz-Toro,

Plaintiffs-Appellants,

v. 21-3047

Eric Adams, in his official capacity as Mayor of the City

of New York,* David Chokshi, in his official capacity as Health Commissioner of the City of New York, New York City Department of Education,

Defendants-Appellees.

Plaintiffs-Appellants move for injunctions pending appeal. Upon due consideration, it is hereby ORDERED that the motions are DENIED.

Appellants are New York City Department of Education employees who object to the New York City Commissioner of Health and Mental Hygiene's mandate requiring individuals who work in New York City public schools to be vaccinated against the COVID-19 virus. Appellants have filed two suits in the Southern District of New York challenging the facial constitutionality of the vaccine mandate and the procedures used to determine whether a Department of Education employee qualifies for a religious exemption to the mandate. *See Kane v. de Blasio,* Case No. 21-cv-7863; *Keil v. City of New York*, Case No. 21-cv-8773. In October 2021, Appellants moved for preliminary injunctions that would prevent the enforcement of the vaccine mandate. The district court denied Appellants' motions for preliminary injunctions, ruling principally that they were unlikely to prevail on their claim that the vaccine mandate was unconstitutional on its face. *See Kane v. De Blasio*, 19 F.4th 152, 162 (2d Cir. 2021). Appellants promptly appealed the denial of their preliminary injunctions and sought an injunction pending appeal in this Court. *Id.* The district court then stayed each matter pending resolution of Appellants' appeals. On November 15, 2021, a motions panel issued an injunction pending appeal that ordered Appellees to give Appellants' applications for religious exemptions "fresh consideration" using different standards than had previously been applied to their applications. *Id.* at 176–77. A merits panel heard oral argument a week later, and issued an opinion on November 28, 2021, holding that the vaccine mandate was not unconstitutional on its face, *see id.* at 166, but that the procedures that had been used to determine whether an employee qualified for a religious exemption to the mandate were unconstitutional, *see id.* at 169. Accordingly, the merits panel kept in place the motions panel's injunction, vacated the district court's denial of Appellants' motions for preliminary injunctions, and remanded the case to the district court for further proceedings. *Id.* at 176.

Following the remand to the district court, Appellants submitted new applications for religious exemptions to a newly created panel constituted for this purpose ("the Citywide Panel"). On December 8, 2021, counsel for Appellees sent an email to Appellants' counsel requesting each Appellant submit further information regarding his request for a religious exemption by December 10, 2021. Appellants provided that additional information on December 10. Later that day, all but one of Appellants' applications were denied without explanation. Those denials stated that Appellants had three business days from the date of the denial to submit proof of vaccination or they would be placed on leave without pay.

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* Though former Mayor Bill de Blasio was initially named as a defendant in this suit, Mayor Eric Adams is automatically substituted as a party pursuant to Federal Rule of Appellate Procedure 43(c)(2).

The next day, Appellants filed a joint letter-motion for a preliminary injunction in the district court, requesting that the court (1) enjoin enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination; (2) provisionally certify a class of all Department of Education employees who assert religious objections to the vaccine mandate; and (3) order Appellees to immediately reinstate Appellants and all proposed class members to the positions they held prior to the enforcement of the vaccine mandate. *See Kane*, Case No. 21-cv-7863, Doc. No. 85 at 2 ("Joint Prelim. Inj. Mot."). That letter was a page-and-a-half long and had attached to it fifty-nine pages of sundry exhibits – including a declaration of counsel for the Appellants, the denials of Appellants' exemption requests, two public health articles regarding the relationship between the percentage of population vaccinated and new COVID-19 cases, a smattering of news stories about COVID-19 and New York City, a "Daily COVID Case Map" from December 10, 2021, and a transcript from a press conference Mayor Bill de Blasio gave on September 23, 2021. *See generally id.* The letter did not say what relevance these exhibits had to the vaccine mandate or to the procedure employed by the Citywide Panel to determine whether Appellants qualified for a religious exemption. On December 14, 2021, the district court issued an order denying Appellants' motion for a preliminary injunction, Appellants' motion for class certification as premature, and Appellants' request for an order reinstating Appellants and proposed class members; the district court also lifted its prior stay of both cases and consolidated the cases. *See Kane*, Case No. 21-cv-7863, Doc. No. 90 ("Order Denying Plaintiffs' Prelim. Inj. Mot.").

Appellants promptly appealed the denials of their preliminary injunctions and filed a motion for an emergency injunction pending appeal that would prevent enforcement of the vaccine mandate against all religious objectors and would temporarily reinstate any employee who was suspended or terminated due to a religious objection to the vaccine mandate. The motion was temporarily granted in a more limited form on December 21, 2021, when a one-judge order directed that no further steps be taken to terminate any Appellant's employment for noncompliance with the vaccine mandate until a full motions panel could hear oral argument on January 18, 2022. The one-judge order did not require Appellees to reinstate Appellants, and it did not grant relief with respect to any non-parties. Having now reviewed the parties' filings and heard oral argument, we – the full motions panel – conclude that Appellants cannot meet their high burden of establishing that they are entitled to an injunction pending appeal.

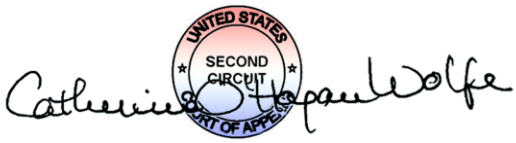
A party seeking an injunction must establish (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor," and (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because we review a district court's denial of a preliminary injunction for abuse of discretion, *see Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009), a likelihood of success on the merits for the purposes of Appellants' motions requires Appellants to show that it is likely that the merits panel will find that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, *cf. Roman Catholic Diocese of Brooklyn v. Cuomo*, --- U.S. ----, ----, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring) (clarifying that, for an injunction pending appeal, the relevant likelihood of success is the likelihood of a successful merits appeal). While "a preliminary injunction is an extraordinary remedy never awarded as of right," *Winter*, 555 U.S. at 24, an injunction pending appeal requires

even more, because it "grants judicial intervention that has been withheld" by the lower court, *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). Accordingly, an injunction pending appeal should be granted "only in the most critical and exigent circumstances, . . . where the legal rights at issue are indisputably clear." *Id.* (internal quotation marks and citations omitted); *see also Agudath Israel of America v. Cuomo*, 980 F.3d 222, 226 (2d Cir. 2020).

Appellants have not shown the requisite likelihood that the district court abused its discretion in denying their joint motion for a preliminary injunction. Once again, Appellants requested that the district court "[e]njoin[] enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation." Joint Prelim. Inj. Mot. at 2. But this Court has already held that Appellants are unlikely to succeed on their claim that the vaccine mandate as a whole is unconstitutional, *see Kane*, 19 F.4th at 166, and Appellants have offered no new facts or arguments that would change that analysis. To the extent that Appellants seek a more limited injunction challenging the constitutionality of the Citywide Panel's procedure for assessing religious exemptions, Appellants simply failed to carry their burden before the district court. After Appellants' requests for religious exemptions were denied by the Citywide Panel, they rushed into the district court and filed a page-and-a-half letter motion requesting a preliminary injunction. *See* Joint Prelim. Inj. Mot. That letter motion offered no legal argument for why the district court should grant Appellants a preliminary injunction; it merely incorporated by reference Appellants' prior filings in the district court and in this Court. *Id.* at 2. But those prior filings all addressed the religious accommodation standards that were in effect before this Court issued its November 28, 2021 order, which directed that Appellants' requests for religious exemptions be given "fresh consideration" under new standards for evaluating exemption requests. *Kane*, 19 F.4th at 176. The injunction issued in that order, which remained in effect during and after the reconsideration of Appellants' requests, directed the parties to "inform the district court . . . of the results of those proceedings" within two weeks of the Citywide Panel's decisions. *Id.* Despite that generous timeline, Appellants filed their motion for a preliminary injunction the day after the Citywide Panel issued its decisions and provided the district court with "almost no information about the process before the Citywide Panel" or the standards the Citywide Panel used to assess Appellants' applications for religious exemptions. *Kane*, Case No. 21-cv-7863, Doc. No. 90 at 8. Given that the filings before the district court fail to even describe the process and rules used to assess Appellants' applications – let alone pinpoint their alleged deficiencies – it is unlikely that the merits panel will hold that Appellants carried their burden below. We therefore DENY the motion for an injunction pending appeal.

At oral argument on January 18, 2022, the parties consented to expediting these appeals. Accordingly, IT IS HEREBY ORDERED THAT these appeals are expedited and will be heard by a merits panel sitting on February 24, 2022 consistent with a briefing schedule established by the Clerk of Court after consultation with the parties. IT IS FURTHER ORDERED THAT the Clerk of Court shall consolidate these appeals for all further proceedings.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit