No. 25-126

In the Supreme Court of the United States

MICHAEL KANE, et al.,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

As the New York City Department of Education prepared to reopen schools in the fall of 2021, school employees had to get vaccinated against Covid-19 or obtain an accommodation. In this action brought by employees who sought (and in some cases received) a religious accommodation, the United States Court of Appeals for the Second Circuit found that an independent labor arbitrator's accommodation standards disfavored personal religious beliefs, were subject to strict scrutiny, and likely violated the First Amendment. The court thus ordered defendants to afford petitioners fresh consideration of their requests by different actors under different standards. The court later found that petitioners failed to plausibly allege that defendants systematically departed from the court-ordered process, but the court reinstated the claims of two plaintiffs who plausibly alleged that their personal religious beliefs were improperly discounted. The question presented is:

Did the Second Circuit adhere to the bedrock principle that personal religious beliefs and orthodox religious beliefs are entitled to equal protection?

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INTRODUCTION

In the fall of 2021, New York City was preparing to reopen public schools for in-person instruction for the first time since the onset of Covid-19. Consistent with federal authorities' guidance that vaccination was "the most critical strategy to help schools safely resume full operations," employees of the New York City Department of Education who worked in school settings were required to get vaccinated against Covid-19 or receive an accommodation.

Petitioners brought this First Amendment action against the City of New York and the Department of Education, challenging the religious accommodation standards established by an independent labor arbitrator as disfavoring personal religious beliefs over orthodox beliefs. On appeal to the United States Court of Appeals for the Second Circuit, everyone—petitioners, defendants, and the court—agreed that the arbitrator's standards should not stand.

The City and the Department of Education did not defend the independent labor arbitrator's standards on appeal, agreeing they were constitutionally suspect. And the Second Circuit held that the arbitrator's standards ran up against the "bedrock First Amendment principle" that personal religious beliefs are entitled to equal protection as orthodox

beliefs. So after subjecting the arbitrator's standards to strict scrutiny, the court held that the arbitrator's standards were likely unconstitutional, and ordered defendants to give petitioners' religious accommodation requests fresh consideration under entirely different standards—the undeniably neutral accommodation standards supplied by Title VII—and by an entirely different body—members of an ad hoc citywide panel convened to manage the flood of accommodation requests by municipal employees.

After a series of missteps by petitioners, the case returned to the Second Circuit on petitioners' First Amendment challenge to the citywide panel process. On this appeal, the court found that petitioners failed to plausibly allege that the citywide panel had systematically departed from the neutral accommodation standards of Title VII. But the court did reinstate two plaintiffs' as-applied claims, finding that those plaintiffs were different in that they plausibly alleged that their specific requests may have been wrongly denied (one by an arbitrator, the other by the citywide panel) on the basis that their beliefs were too personal or idiosyncratic. Those as-applied claims remain pending before the district court.

Certiorari should be denied for three basic reasons. *First*, the central conceit of the petition is misplaced. Petitioners posit that the Second Circuit

endorsed discrimination against personal religious beliefs, but a fair assessment of the court's rulings shows the exact opposite. Not only did the court find that the independent labor arbitrator's standards were likely unconstitutional because they disfavored personal religious beliefs, but the court also reinstated the as-applied claims of some plaintiffs because it found that their personal religious beliefs may have been improperly discounted. In this case and in others, the Second Circuit has emphatically rejected discrimination against personal religious beliefs—refuting the premise of the petition.

Second, the circuit splits alleged in the petition are imaginary. To conjure a split, petitioners ignore or brush away the significance of what the Second Circuit actually did here, with the court first setting aside the arbitrator's standards after applying strict scrutiny, and later reinstating some plaintiffs' as-applied claims for consideration as to whether their personal religious beliefs were not afforded their due. All this aligns with the approach taken by other circuits. What petitioners call a circuit split in actuality reduces to their case-specific disagreement with the court's finding that their complaint failed to marshal sufficient non-conclusory allegations that the citywide panel systematically deviated from Title VII's neutral accommodation standards. This fact-based disagreement is not cert-worthy.

Third, this case is a poor vehicle for a variety of reasons: there are overlapping claims still being litigated in the district court; petitioners seek to press in this Court arguments that they either failed to develop or affirmatively undermined in the lower courts; and petitioners have created a collateral estoppel nightmare by simultaneously litigating parallel actions in federal and state court. The petition should be denied.

STATEMENT

A. The vaccination requirement and the independent labor arbitrator's flawed religious accommodation standards

The Covid-19 pandemic, an unprecedented chapter in our nation's recent history, presented profound challenges for public schools, because school employees have extended contact with children and coworkers in enclosed spaces. As schools considered fully reopening in the fall of 2021, the CDC called vaccination "the most critical strategy to help schools safely resume full operations," recommending that educators and other staff be "vaccinated as soon as possible" (*see* Pet. App. 400a).

Consistent with that guidance, shortly after a vaccine for people aged 16 or older received full regulatory approval, the City's health commissioner

required public school employees to be vaccinated or excluded from schools (Pet. App. 398a-405a). Soon, the commissioner required all City employees to be vaccinated (2d Cir. 22-1801 ECF No. 125 at 4-5).

Thousands of religious accommodation requests from public school employees came in almost immediately. *See Matter of Lynch v. Bd. of Educ.*, 221 A.D.3d 456, 458 (N.Y. App. Div. 2023). With the school year rapidly approaching, a teachers' union initiated arbitration on the accommodation process (*see* Pet. App. 410a). When the parties reached an impasse, an independent labor arbitrator not affiliated with the City established a process for requesting and evaluating expedited requests for religious and medical accommodations (Pet. App. 406a-424a).

Under the arbitrator's process, any employee denied an accommodation by the Department of Education could appeal to one of a number of independent arbitrators, who themselves were not affiliated with the City (Pet. App. 432a). Those arbitrators were supposed to consider various criteria, including whether the employee was a member of a recognized and established religious organization, whether the employee had a letter from clergy, and whether a religious leader from the employee's faith had spoken publicly in favor of vaccination (Pet. App. 430a-431a).

Sometimes the arbitrators handling appeals applied these standards and sometimes they did not (Pet. App. 121a). The arbitrators granted religious accommodations to employees of more than 20 different faiths, including employees identifying as Roman Catholic, Jewish, Buddhist, Baptist, Muslim, Christian, Evangelical Christian, Orthodox Christian, Jew following Christ, Sabbath Day Adventist, Esin Orisa Ibile, Greek Orthodox, Church of God (Seventh Day), Universal Life Church, Krishna, Apostolic Pentecostal, and Kemetic, as well as Christian Scientists, Seventh Day Adventists, and individuals whose specific religion was not identifiable (2d Cir. 22-1801 ECF No. 125 at 7-8).

B. This litigation and the Second Circuit's order granting petitioners fresh consideration of their religious accommodation requests

After the vaccination requirement took effect, petitioners commenced this First Amendment action challenging the independent labor arbitrator's religious accommodation standards, among other things (Pet. App. 41a-42a). The district court denied petitioners' motion for a preliminary injunction (Pet. App. 42a). On appeal to the Second Circuit, the City and the Department of Education did not defend the independent arbitrator's religious accommodation

standards, agreeing that they were at minimum constitutionally suspect (Pet. App. 42a-43a).

The Second Circuit concluded that the independent labor arbitrator's accommodation standards were neither neutral nor generally applicable (Pet. App. 117a-121a). On the one hand, the standards explicitly gave preference to established religions; on the other hand, the arbitrators did not consistently apply this preference (Pet. App. 120a-121a). For example, petitioner Amaryllis Ruiz-Toro was granted an accommodation by an arbitrator, even though she is a member of a "minority church" (Pet. App. 22a n.4), not a "recognized and established religious organization" (Pet. App. 431a). And petitioner Sarah Buzaglo was denied an accommodation by an arbitrator, even though she is an Orthodox Jew and provided a supporting letter from her rabbi (Pet. App. 278a, 287a).

Applying strict scrutiny, the Second Circuit found that the arbitrator's standards likely violated the First Amendment (Pet. App. 121a-122a). As preliminary relief, the court ordered defendants to afford petitioners fresh consideration of their religious accommodation requests under different standards: those supplied by Title VII (Pet. App. 137a-140a), as petitioners themselves had suggested would be appropriate (2d Cir. 21-2678 ECF No. 42 at 5 n.2; No.

68 at 29-30).[1] The court also required petitioners' religious accommodation requests to be evaluated by a different set of actors; rather than arbitrators, appeals would be reviewed by City employees who were members of an ad hoc body known as the City of New York Reasonable Accommodation Appeals Panel (the "Citywide Panel") (Pet. App. 138a-139a). Defendants extended this offer of fresh consideration to all Department of Education employees who unsuccessfully sought religious accommodations under the arbitrator's process (Pet. App. 129a).

The Citywide Panel was originally created to help manage the thousands upon thousands of accommodation requests made by other municipal employees (*see* 2d Cir. 22-1801 ECF No. 126 at SA5). For both those employees and school-district employees such as petitioners, accommodation requests were resolved by a three-person panel drawn from a pool of representatives (*id*. at SA7). For religious accommodations, each panel consisted of representatives from the Commission on Human Rights, the Department of Citywide Administrative Services, and the Law Department (*id*. at SA9).

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[1] The court also incorporated the standards of Title VII's state and local counterparts: the New York State Human Rights Law and the New York City Human Rights Law (Pet. App. 139a).

Implementing the preliminary relief ordered by the Second Circuit, the Citywide Panel reviewed petitioners' accommodation requests (*see* Pet. App. 7a), though five petitioners did not avail themselves of this opportunity. One (Amaryllis Ruiz-Toro) had already been granted an accommodation by an arbitrator and four (Joan Giammarino, Carolyn Grimando, Benedict Loparrino, and Trinidad Smith) did not comply with the procedures for requesting review from the Citywide Panel (Pet. App. 41a n.10-11). In addition, one plaintiff (Natasha Solon) elected to get vaccinated and return to work instead of seeking fresh consideration (Pet. App. 27a). Moreover, one petitioner (William Castro) was granted a religious accommodation by the Citywide Panel following a fresh review (Pet. App. 187a).

C. Petitioners' several ill-conceived demands for emergency relief

No sooner had this additional review by the Citywide Panel been completed than petitioners filed a conclusory letter motion for injunctive relief (*see* 2d Cir. 22-1801 ECF No. 125 at 12). As the district court observed, petitioners cited no supporting case law or facts to support their claim that the Citywide Panel's procedures were unconstitutional (*id.*). And petitioners neglected to provide the district court with the Citywide Panel's summaries

describing the grounds for its decisions. The court thus advised petitioners that the way forward was for them to file an amended complaint incorporating allegations that actually addressed the proceedings before the Citywide Panel (*id.* at 13).

Instead, petitioners again requested injunctive relief from the Second Circuit and plowed forward with an appeal. *See Keil v. City of N.Y.*, No. 21-3043, 2022 U.S. App. LEXIS 5791, at *2 (2d Cir. Mar. 3, 2022) (summary order). The court affirmed, finding that petitioners' "hastily drafted one-and-a-half page" letter motion "advanced virtually no legal arguments … that concern the Citywide Panel process," failed to supply "highly pertinent evidence," and "presented almost no information regarding the Panel's process," much less evidence "that the Citywide Panel's process was irrational in any way or infected with hostility to religion." *Id.* at *9, *11. The court found that, because the Citywide Panel was not applying the labor arbitrator's standards, the arguments petitioners advanced were "largely irrelevant" at this juncture. *Id.* at *4-*5.

Thereafter, the Department of Education notified petitioners that, if they chose not to either opt-in to an extended leave without pay program or get vaccinated and return to work, their employment would be terminated (*see* 2d Cir. 21-3043 ECF No. 132; 2d

Cir. 21-3047 ECF No. 121). After unsuccessfully seeking a writ of injunction from this Court (Docket No. 21A398), petitioners filed an amended complaint, which defendants moved to dismiss (*see* Pet. App. 46a). Two weeks later, petitioners again moved for a preliminary injunction (*see id.*). The district court denied petitioners' motion and dismissed the complaint, finding that petitioners failed to state a plausible claim for relief under the First Amendment and declining to exercise supplemental jurisdiction over their state-law claims (Pet. App. 31a-72a).

Petitioners again unsuccessfully moved for injunctive relief from the Second Circuit (2d Cir. 22-1876, ECF No. 79).[2] And, for a second time, they also unsuccessfully sought a writ of injunction from this Court (Docket No. 22A389). In the meantime, the facts on the ground continued to evolve. By early 2023, 99% of public school employees and 80% of all City residents had been fully vaccinated against Covid-19 (Pet. App. 449a-451a). Recognizing the fundamentally changed circumstances, in February

[2] By this point, the Second Circuit had consolidated the appeal in this case with the appeal of the denial of injunctive relief in the companion case that petitioners' counsel had brought in the Eastern District of New York on behalf of a separate set of City-employee plaintiffs. *See New Yorkers for Religious Liberty v. City of N.Y.*, No. 22-cv-00752 (E.D.N.Y.).

2023, the City lifted the Covid-19 vaccination requirement (*id.*). Vaccination against Covid-19 is no longer a condition of employment at the Department of Education or other City agencies (*id.*).

D. The Second Circuit's most recent decision affirming the dismissal of some claims and reinstating others

On petitioners' third appeal, the Second Circuit affirmed the denial of petitioners' motion for injunctive relief, finding that their request for recission of the vaccine requirement was moot and the harm they alleged from the loss of employment was compensable, not irreparable (Pet. App. 12a-17a).[3]

The court also affirmed the dismissal of petitioners' facial First Amendment challenge to the Citywide Panel process, finding that petitioners "offered no more than conclusory allegations that the Citywide Panel was applying unconstitutional standards or was infected with religious animus" (Pet. App. 17a-23a). The court found that the complaint failed to include any well-pleaded factual

[3] Petitioners misrepresent the record in stating that defendants "claimed the appeal was moot" (Pet. 15). To the contrary, defendants explicitly stated that the lifting of the vaccination requirement "will not eliminate all live issues" in the appeal (2d Cir. 22-1801 ECF No. 174).

allegations to support petitioners' contentions that the Citywide Panel did not abide by the standards established by Title VII, or gave preference to certain religions over others (Pet. App. 23a).

In evaluating the sufficiency of petitioners' as-applied claims, the Second Circuit recognized that the First Amendment does not permit the court to "sit in judgment on the verity of an adherent's religious beliefs" or "reject beliefs because [it] consider[s] them incomprehensible" (Pet. App. 23a (cleaned up)). And it recognized that "the Citywide Panel could deny accommodations if it concluded a claimant was not personally devout in the belief underlying the objection, but it could not deny accommodations because it cast judgment on the nature of the religious objection raised" (Pet. App. 23a-24a). Applying these standards, the court concluded that petitioners failed to state plausible as-applied claims (Pet. App. 24a-27a). The complaint either did not challenge the denial of their religious accommodation requests, failed to offer any non-conclusory allegations that the denials were related to petitioners' sincerely held religious beliefs, or failed to offer any non-conclusory allegations that the denial of an accommodation on undue hardship grounds was erroneous or pretextual (*id.*).

But the Second Circuit vacated the dismissal of two plaintiffs' as-applied claims, finding that these plaintiffs, Natasha Solon and Heather Clark, had plausibly alleged that the denial of their accommodation requests violated the First Amendment (Pet. App. 27a-30a). Solon had alleged that she "relies on her personal relationship with God as a guide" (Pet. App. 27a (cleaned up)), and her request was rejected by an arbitrator who was supposed to follow standards that the court had previously concluded were "very likely unconstitutional" (Pet. App. 28a).[4] And Clark had alleged that "the Citywide Panel rejected her appeal because it characterized her receiving guidance from the Holy Spirit as allowing her to follow individualized guidance and thus concluded that her beliefs were not religious in nature" (Pet. App. 29a (cleaned up)).

E. Petitioners' simultaneous pursuit of a parallel state action that has resulted in a final judgment and six appeals

While their appeal was still pending in the Second Circuit, 16 of the petitioners here filed suit in state court, asserting a number of state-law claims, including claims arising under the New York State

[4] Solon then elected to get vaccinated and return to work instead of seeking review by the Citywide Panel (*see* Pet. App. 27a).

Constitution and New York's procedural vehicle for challenging final administrative determinations. *See DiCapua v. City of N.Y.*, No. 85035/2023 (N.Y. Sup. Ct.). That action has since resulted in a final judgment. *See* Am. Order & Judgment, *DiCapua v. City of N.Y.*, No. 85035/2023 (N.Y. Sup. Ct. June 13, 2024), NYSCEF No. 198.

The state trial court annulled the Department of Education's termination of employment for 10 petitioners. *DiCapua v. City of N.Y.*, No. 85035/2023, 2023 N.Y. Misc. LEXIS 36533, at *31-*36 (N.Y. Sup. Ct. Sept. 6, 2023). For those petitioners, the court ordered reinstatement with backpay. *Id.* at *40. The resulting award exceeded $4.1 million. Am. Order & Judgment, *DiCapua v. City of N.Y.*, No. 85035/2023 (N.Y. Sup. Ct. June 13, 2024), NYSCEF No. 198.

But the state trial court ruled against all 16 of the petitioners who were part of that action on their state constitutional and statutory claims. *DiCapua*, 2023 N.Y. Misc. LEXIS 36533 at *25-*28. In resolving those claims, the court found that the Citywide Panel did not apply the independent labor arbitrator's standards; did not question the validity of any petitioner's religious beliefs; did not deny any request for failing to submit writings from a religious official; did not deny any request due to public statements from a religious figure in favor of vaccination;

and did not deny any request because a petitioner's beliefs were not tied to a recognized or established religion. *Id*. at *26-*27. The court also found there was no evidence of religious animus on the part of the Citywide Panel. *Id*. at *27.

Both sides have appealed from the state trial court's rulings and final judgment. There are now six appeals pending before an intermediate state appellate court. *See DiCapua v. City of N.Y.*, Nos. 2023-09930, 2024-04494, 2024-08121, 2025-07316 (N.Y. App. Div.) (some dockets capture two appeals). Some of those appeals are now fully briefed and awaiting argument; others are mid-briefing.

REASONS FOR DENYING THE PETITION

A. The petition cannot contrive a cert-worthy issue by misrepresenting the Second Circuit's rulings.

The petition starts by observing that "[t]he First Amendment prohibits the government from choosing which religious beliefs are protected" (Pet. 2 (citing *Larson v. Valente*, 456 U.S. 228, 244 (1982))). That principle is fully honored in the Second Circuit. The central conceit of the petition—that the Second Circuit has broken from this Court by failing to recognize that personal religious beliefs are on equal

footing with orthodox beliefs[5]—is demonstrably false for three reasons.

First, the Second Circuit applied this "bedrock First Amendment principle" at the preliminary-relief stage, when it granted petitioners fresh consideration of their accommodation requests by the Citywide Panel under the neutral standards of Title VII (*see* Pet. App. 137a-140a). The court was unequivocal: "'the government … cannot act in a manner that passes judgment on or presupposes the illegitimacy of religious beliefs and practices'" (Pet. App. 118a-119a (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018))). That is precisely why the court found that the prior accommodation standards established by an independent labor arbitrator "likely violated the First Amendment" (Pet. App. 117a): those standards impermissibly invited the individual arbitrators

[5] *See, e.g.*, Pet. i (claiming the court endorsed discrimination against "personal religious beliefs"); Pet. 4 (claiming the court approved action "disfavor[ing] personal religion"); Pet. 7 (claiming the court itself discriminated against "individuals with 'personal' faith"); Pet. 16 (claiming the court "accepts accommodation rules that disfavor personal religion"); Pet. 17 (claiming the court "accepts that government may discriminate against beliefs not recognized or 'shared by all' members of similar faith"); Pet. 23 (claiming the court permits government to "reject personally held religious beliefs"); Pet. 35 (claiming the court "blessed … discrimination against personal religion").

evaluating specific accommodation requests to disregard unorthodox beliefs as "merely personal" (Pet. App. 119a).

Second, the Second Circuit applied this bedrock principle again in its merits-stage ruling. Far from "bless[ing] … discrimination against personal religion" (Pet. 35), the Second Circuit reinstated the claims of two plaintiffs (Heather Clark and Natasha Solon) because the court found that they had plausibly alleged that the decision-makers—the Citywide Panel, in Clark's case, and an arbitrator, in Solon's case—may have wrongfully discounted their beliefs as "too personal to count as properly religious" (Pet. App. 27a-30a). In reinstating these claims—a development the petition does not so much as mention—the court also highlighted that the plaintiffs' opposition to vaccination was the result of a "personal relationship with God as a guide" or "guidance from the Holy Spirit" (Pet. App. 27a, 29a)—thereby embracing the concept of individual "conscience" that one of petitioners' supporting amici incorrectly claims the court instead rejected (Brief of *Amicus Curiae* Lorica Institute for Freedom of Expression and Religion 6).

Third, the Second Circuit's broader precedent has confirmed this bedrock principle time and again. Consider a recent example: in *Gardner-Alfred v.*

Federal Reserve Bank of New York, 143 F.4th 51 (2d Cir. 2025), the court found that a plaintiff was entitled to a trial on her claim that she was improperly denied a religious exemption to the Federal Reserve's requirement that employees be vaccinated against Covid-19. There, the court said it is "axiomatic" that "'the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect.'" *Id.* at 65 (quoting *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981)). The court was emphatic: it did not matter that the plaintiff's beliefs departed from the position of church officials and were rooted in her individual conscience and personal interpretation of church teachings, *id.* at 58, 64-65; "[w]hat matters to the law is whether *she* sincerely believed that the use of Covid-19 vaccines was contrary to her religious convictions," *id.* at 65 (emphasis in original).

Gardner-Alfred is no outlier. Over and over—before, in, and after the rulings in this case—the Second Circuit has reaffirmed the same principle that the petition maintains has been thrown out the window. As this Court's precedent demands, the only thing that matters in the Second Circuit is that "a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Tanvir v.*

Tanzin, 120 F.4th 1049, 1058 (2d Cir. 2024).[6] No fair appraisal of the Second Circuit's rulings in this case, or outside this case, supports the petition's claim that this Court must intervene to ensure that those who work in the Second Circuit "fear no more than others that they will lose their jobs because they follow the 'wrong' religion" (Pet. 36).

B. The alleged circuit splits identified in the petition are illusory.

The petition's premise that the Second Circuit cast aside the bedrock First Amendment principle that personal religious beliefs are entitled to equal protection is plainly incorrect. It is thus no surprise that the petition's attempts to conjure a circuit split anchored in this principle also fall flat.[7]

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[6] *See, e.g.*, *Kravitz v. Purcell*, 87 F.4th 111, 128 (2d Cir. 2023); *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003); *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 574 (2d Cir. 2002); *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999); *Patrick v. Le Fevre*, 745 F.2d 153, 157-58 (2d Cir. 1984).

[7] Even one of petitioners' supporting amici maintains it is the Third Circuit—not the Second—that is the "one outlier" court that fails to give personal religious beliefs their due (Brief of *Amicus Curiae* Pacific Justice Institute 7 (citing *McDowell v. Bayhealth Med. Ctr. Inc.*, Nos. 24-1157 et al., 2024 U.S. App. LEXIS 29065 (3d Cir. Nov. 15, 2024), *cert. denied sub nom. Harvey v. Bayhealth Med. Ctr.*, 145 S. Ct. 2848 (2025))).

Relying on *Does 1-11 v. Board of Regents of the University of Colorado*, 100 F.4th 1251 (10th Cir. 2024), the petition first claims that "the Second Circuit's decision forged a circuit split over whether strict scrutiny applies to a religious-accommodation rule that disfavors personal religion" (Pet. 17).[8] The claim is perplexing, since the very reason that the court granted petitioners fresh consideration of their accommodation requests was because it agreed that strict scrutiny applies in such a situation (Pet. App. 121a-122a). The court could not have been clearer that the initial accommodation standards established by an independent labor arbitrator were subject to "strict scrutiny" in part because those standards favored "recognized and established religious organizations" and invited the arbitrators charged with evaluating specific accommodation requests to set aside unorthodox beliefs as "merely personal" (Pet. App. 119a (cleaned up)).

That determination is thus of a piece with the Tenth Circuit's decision in *Does 1-11*. The Second and Tenth Circuits agree that strict scrutiny applies to accommodation standards that disfavor personal religious beliefs. Petitioners really take issue with

[8] The Tenth Circuit itself disagreed over how the governing legal principles applied to the case. *See Does 1-11*, 100 F.4th at 1281-95 (Ebel, J., concurring in part and dissenting in part).

something else. After finding that the independent labor arbitrator's standards were likely unconstitutional, the Second Circuit responded by ordering a different body—the Citywide Panel—to afford petitioners fresh consideration of their requests under different standards—the accommodation standards supplied by Title VII itself (Pet. App. 137a-140a). Those standards are undeniably neutral: Title VII prohibits employers from favoring orthodox religious beliefs and disfavoring personal religious beliefs, or vice versa. *See* EEOC Compliance Manual § 12-I(A) (2021), available at https://perma.cc/4XVT-NX9C.

So what petitioners characterize as a circuit split over broader legal principles is instead a case-specific disagreement with the Second Circuit's finding that their complaint "fail[ed] to include any well-pleaded factual allegations to support [their] argument" that the Citywide Panel process systematically departed from Title VII's neutral standards (Pet. App. 21a). If petitioners had supplied sufficient non-conclusory allegations in that regard, there is every reason to believe the court would have applied strict scrutiny, as the court did when it confronted the preferential standards established by the independent labor arbitrator. But whether this case-specific finding was right or wrong, it certainly does not reflect a split between the Second and Tenth Circuits over the governing legal principles.

This case and *Does 1-11* also diverge in significant ways. They may share the superficial similarity of a defendant moving from one Covid-19 accommodation process to another, but the circumstances of the transitions were radically different. First, in *Does 1-11*, the defendant-university unilaterally crafted both accommodation processes, and did so within a few weeks. 100 F.4th at 1276. Here, by contrast, an independent labor arbitrator established the initial accommodation process and, months later, the Second Circuit itself directed a new process (Pet. App. 137a-140a, 406a-407a).

Second, in *Does 1-11*, the decision-makers on specific accommodation requests were evidently always employees of the relatively small defendant-university. Here, by contrast, the initial decision-makers were arbitrators unaffiliated with the City (Pet. App. 432a), and later they were City employees who were members of the Citywide Panel (Pet. App. 139a). These stark factual differences help inform why the Second Circuit found that petitioners had not plausibly alleged that the Citywide Panel "conduct[ed] the same sort of inquiry [arbitrators] had under the old rule." *Does 1-11*, 100 F.4th at 1276.

The next circuit split alleged in the petition—about "whether strict scrutiny applies to religious-accommodation procedures that give officials broad

discretion to make individualized decisions" (Pet. 20)—suffers from the same problems. Here too, if the complaint had plausibly alleged that the Citywide Panel systematically departed from Title VII's standards when resolving thousands of accommodation requests, then there is every reason to believe that the Second Circuit would have reached a different conclusion. The court had previously found that strict scrutiny applied to the labor arbitrator's accommodation process in part because petitioners had "offered evidence that the arbitrators … had substantial discretion," sometimes "strictly adher[ing]" to objective criteria and other times "apparently ignor[ing] them" (Pet. App. 121a). That holding aligns with the approach taken by the circuits that petitioners claim are on the other side of the imagined split. *See Spivack v. City of Philadelphia*, 109 F.4th 158, 172 n.8 (3d Cir. 2024) (holding that policy authorizing individualized assessments "with no apparent guidelines or guardrails" would trigger strict scrutiny); *Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 733-34 (6th Cir. 2021) (finding policy in which university retained discretion to grant exemption in whole or in part triggered strict scrutiny); *Does 1-11*, 100 F.4th at 1273 (finding policy in which administration granted or denied exemptions based on why applicants held their religious beliefs triggered strict scrutiny).

In other words, Title VII's accommodation standards are unquestionably neutral, and petitioners disagree with the Second Circuit's fact-based conclusion that they failed to plausibly allege that those standards were not generally applied. Petitioners are thus left to argue that the Citywide Panel's determinations were "individualized" (Pet. 21). But of course they were; that is an inherent feature of resolving individual accommodation requests, as Title VII asks whether a specific employee has a sincerely held religious belief that requires a specific workplace accommodation. *See* EEOC Compliance Manual §§ 12-I(A), 12-IV(A).

In some ways, petitioners' fixation on the level of scrutiny is confounding. The Citywide Panel was compelled by court order to apply Title VII's accommodation standards (Pet. App. 139a). The Second Circuit thus appropriately focused on whether petitioners had plausibly alleged that employee-specific determinations departed from those standards, as would be the case if an accommodation request was denied solely because it rested on personal religious beliefs. If that occurred, no means-ends testing could save such a determination; it would simply be unlawful. The Second Circuit recognized this, reinstating the claims of two plaintiffs (Clark and Solon) and remanding to address whether these plaintiffs had sincerely held religious beliefs that were wrongfully

rejected as too personal, without regard to the level of scrutiny (Pet. App. 27a-30a). All of this is fact-specific; none of it is cert-worthy.

The third and final circuit split alleged in the petition—a so-called "conflict in principle over whether Title VII allows an employer to disfavor personal religion" (Pet. 23)—is on even weaker footing. On this front, petitioners point to the Sixth Circuit's decision in *Lucky v. Landmark Medical of Michigan, P.C.*, 103 F.4th 1241 (6th Cir. 2024), the Seventh Circuit's decision in *Passarella v. Aspirus, Inc.*, 108 F.4th 1005 (7th Cir. 2024), and the Eighth Circuit's decision in *Ringhofer v. Mayo Clinic, Ambulance*, 102 F.4th 894 (8th Cir. 2024). But unlike these decisions, the Second Circuit had no occasion to address a Title VII claim here because petitioners made an apparently strategic decision not to pursue one (Pet. App. 322a-371a)—another thing the petition fails to mention. It would be odd for this Court to review a question that hinges on how courts have resolved Title VII claims in a case that has no such claim.

That aside, this alleged split suffers from similar problems as the others. For instance, when the Second Circuit reinstated one plaintiff's constitutional claim (Clark's), it called out the district court's observation that the Citywide Panel's denial of her accommodation request was "entirely proper under

Title VII" (Pet. App. 30a (cleaned up)). The Second Circuit found this observation about adherence to Title VII's standards in connection with that plaintiff's request was hard to square with the plaintiff's allegations, underscoring that she had plausibly alleged that "the Citywide Panel rejected her appeal because it characterized her receiving guidance from the Holy Spirit as allowing her to follow individualized guidance and thus concluded that her beliefs were not religious in nature" (Pet. App. 29a (cleaned up)). So if this plaintiff had asserted a Title VII claim, the court likely would have reinstated that claim too—consistent with *Lucky*, *Passarella*, and *Ringhofer*. The Second Circuit has also cited *Passarella* approvingly elsewhere, further confirming that the courts' views on Title VII are in accord—not in conflict. *See Gardner-Alfred*, 143 F.4th at 64 n.6 (citing *Passarella*, 108 F.4th at 1009-11).

While no Title VII claim was raised here, the Second Circuit's unequivocal rejection of personal religious discrimination when addressing petitioners' constitutional claims reinforces the absence of a circuit split. Consistent with the Sixth Circuit's decision in *Lucky*, 103 F.4th at 1243, the court recognized that the government cannot judge the validity of religious beliefs (Pet. App. 23a); *see also Mid Vt. Christian Sch. v. Saunders*, No. 24-1704, 2025 U.S. App. LEXIS 23189, at *18 (2d Cir. Sept. 9, 2025).

Consistent with the Seventh Circuit's decision in *Passarella*, 108 F.4th at 1012, the court recognized that the government can consider whether a plaintiff's beliefs are sincere, but not whether they conform to orthodox views (Pet. App. 23a); *see also Mid Vt. Christian Sch.*, 2025 U.S. App. LEXIS 23189 at *18; *Jackson*, 196 F.3d at 320. And consistent with the Eighth Circuit's decision in *Ringhofer*, 102 F.4th at 901-02, the court recognized that a plaintiff's religious beliefs need not be shared by all members of their faith (Pet. App. 18a); *see also Gardner-Alfred*, 143 F.4th at 65. There is no circuit split here.

C. The interlocutory posture and multiple vehicle problems strongly counsel against granting certiorari.

Even if petitioners had identified a question warranting this Court's review, this case would be a singularly unsuitable vehicle in at least three ways.

First, this case is in an interlocutory posture. Not once does the petition disclose that the Second Circuit reinstated the claims of two plaintiffs (Clark and Solon). The omission is remarkable. The petition's core contention is that the court blessed discrimination against personal religious beliefs, yet the court reinstated these claims *because* it found that the plaintiffs had plausibly alleged that their beliefs were impermissibly discounted as "too

personal to count as properly religious" (Pet. App. 29a; *see* Pet. App. 27a-30a). This case will never be a good candidate for certiorari, but it makes little sense to grant review at this juncture, when overlapping claims are still being litigated.

Second, the way petitioners litigated their claims below was, at best, haphazard (*see supra* at 6-16). No small part of the petition is dedicated to the alleged experiences of specific petitioners (Pet. 7-14, 21, 30, 32), but in the district court, petitioners offered essentially no argument in this regard and addressed their as-applied claims in a completely perfunctory fashion (2d Cir. 22-1801 ECF No. 126 at SA54-SA56). Petitioners changed tack on appeal, but even then they refused to stand on the allegations in their complaint, and instead emphasized evidentiary material taken from a different case (*see, e.g.*, 2d Cir. 22-1801 ECF No. 114 at 32, 39, 40, 45). As the appeal progressed, petitioners invited the Second Circuit to focus on everything except the allegations in their complaint by filing letter after letter purporting to raise new "evidence" (*see, e.g.*, 2d Cir. 22-1801 ECF Nos. 215, 220, 222). It is reasonable for a party to refine its arguments over time, but it is another thing entirely when a party presents a moving target in the lower courts, and then moves the target yet again in this Court.

As another example of petitioners' slapdash approach to this litigation, consider the petition's claim that the Second Circuit endorsed a "two-track accommodation scheme" by granting petitioners fresh consideration of their accommodation requests by the Citywide Panel (Pet. 32). The petition makes a categorical claim that there was *no* "undue-burden bar" under the process established by the independent labor arbitrator, while there was one under the Citywide Panel process (Pet. 32-33). But petitioners presented no such argument to the district court (SDNY 21-7863 ECF No. 121 at 23), their briefing on appeal conceded that "arbitrators may have exercised discretion" to consider undue hardship (2d Cir. 22-1801 ECF No. 114 at 50-51), their own complaint confirms that arbitrators considered undue hardship (*see* Pet. App. 250a ¶ 503; 257a ¶ 531; 273a ¶ 589), and they submitted evidence to that effect too (SDNY 21-7863 ECF No. 23). All this may explain why petitioners bury this contention deep in the petition. But whatever the reason for its placement, this case is a poor vehicle to address a categorical claim that petitioners themselves have undermined, especially when that claim is at least one step removed from the proposed question presented and its focus on the appropriate level of scrutiny.

Third, petitioners have followed a highly irregular litigation playbook by simultaneously pursuing

overlapping federal and state actions. In their briefing below, petitioners maintained that they had stated claims for relief under Title VII's state and local counterparts (*see* 2d Cir. 22-1801 ECF No. 114 at 52 n.5). But just a few days after argument, petitioners abandoned their state-law claims (2d Cir. 22-1801 ECF No. 187), and then 16 of them brought and actively litigated a parallel state-court action while the matter remained before the Second Circuit. And that state-court action has yielded a final judgment on the merits and half a dozen pending appeals. *See DiCapua v. City of N.Y.*, No. 85035/2023 (N.Y. Sup. Ct.); *DiCapua v. City of N.Y.*, Nos. 2023-09930, 2024-04494, 2024-08121, 2025-07316 (N.Y. App. Div.) (some dockets capture two appeals).

Petitioners' peculiar litigation strategy unnecessarily complicates this Court's review.[9] Until the state-court appeals are resolved, the trial court's final judgment on the merits has collateral estoppel effect. Federal courts must "give the same preclusive

[9] In all candor, defendants share some responsibility here, as defendants told the Second Circuit during argument that they would not assert a prior-action-pending defense if petitioners commenced a state-court action. *See* 2d Cir. Oral Argument Audio 26:40-27:55, available at https://tinyurl.com/2x8sk3k4; *see* N.Y. C.P.L.R. § 3211(a)(4). If defendants had asserted such a defense, then this federal action may have reached an end before the state-court action began in earnest.

effect to a state-court judgment as another court of that State would give," *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523 (1986), and New York courts apply collateral estoppel to judgments pending appeal, *Matter of New York City Asbestos Litig.*, 187 A.D.3d 468, 469 (N.Y. App. Div. 2020) (citing cases).

And the state trial court resolved multiple issues against the petitioners in that case, including most of the petitioners whose accounts are specifically called out in the petition (Chu, DiCapua, Gladding, Kane, Romero, and Smith).[10] For example, in resolving the state constitutional claims raised by 16 of the petitioners here, the state trial court found that the Citywide Panel did not deny any of the plaintiffs an accommodation because their "beliefs belong[] to an unrecognized or unestablished religion," and that "no denial questioned the validity of any [plaintiff's]

[10] A seventh petitioner highlighted in the petition (Amoura Bryan) brought a separate state-court proceeding and lost on appeal. *See Matter of Bryan v. Bd. of Educ.*, 222 A.D.3d 473, 473 (N.Y. App. Div. 2023) (concluding that the Citywide Panel "had a rational basis for finding that petitioner failed to establish that her objection to receiving any of the COVID-19 vaccines was based on a sincerely held religious belief") (cleaned up).

religious belief." *DiCapua*, 2023 N.Y. Misc. LEXIS 36533 at *26.

While the state court's final judgment may not bind every single petitioner here, it has implications for all of them. The more petitioners who are precluded from claiming that their accommodation requests were denied for impermissible reasons, the more difficult it will be for petitioners as a whole to maintain a claim that the Citywide Panel systematically departed from Title VII's standards. Moreover, at this point, one can only guess whether the state appellate court's resolution of the parties' many appeals will exacerbate or alleviate these preclusion problems. This Court should not be compelled to untangle this evolving collateral estoppel thicket, which is the consequence of petitioners' decision to simultaneously litigate in federal and state courts.[11]

The bedrock principle that the government must give equal protection to personal religious beliefs is

[11] Petitioners' chosen litigation strategy has also created collateral estoppel problems for their state-court action. As defendants have explained there, petitioners are also barred from relitigating in state-court the factual claims that were rejected by the Second Circuit in this action. *See DiCapua v. City of N.Y.*, Br. for Respondents-Appellants-Respondents 5-9, No. 2023-09930 (N.Y. App. Div. Aug. 25, 2025), NYSCEF No. 26.

secure in the Second Circuit. But if a departure from that principle arises in other cases—in any circuit—it is highly unlikely that those future cases would present the same procedural morass that this one does. There should be cleaner vehicles for this Court to revisit this terrain, should it decide to do so.

CONCLUSION

The petition should be denied.

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