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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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SUMMARY OF REPLY ARGUMENT

The City concedes it violated the First Amendment by (a) exempting Christian Scientists and other educators affiliated with "recognized" religions that "publicly" opposed vaccination while (b) refusing accommodation for anyone with "personal" religious beliefs or anyone whose faith leader—like Pope Francis—had publicly endorsed the vaccine. Pet.2, 7; Opp.1–2. The City does not contest what happened next: the Second Circuit's remand for "fresh consideration" meant that over 100 educators belonging to "recognized" faiths—like Christian Scientists and Jehovah's Witnesses—*remained accommodated* while those of other faiths had to show *their* accommodation would not be an undue hardship to the City. Pet.2–3, 7. The City also does not contest that nearly all the non-Christian Scientists and non-Jehovah's Witnesses were then denied an accommodation, Pet.7, including all Petitioners. And the City boasts that the Second Circuit reinstated two non-Petitioners' as-applied claims because the citywide panel found their beliefs "too personal or idiosyncratic," Opp.2, without recognizing these plaintiffs are just like dozens of Petitioners who were denied relief, Pet.7–14.

In sum, the Second Circuit blatantly violated Petitioners' free-exercise rights two ways, forging three circuit splits. Pet.3–4. That decision is "final" for all Petitioners because their claims have been dismissed. See *Clark* v. *Williard*, 292 U.S. 112, 118 (1934). This case is a clean vehicle for this Court to resolve the important question presented. And nothing occurring in state court affects this Court's review.

The petition for certiorari should be granted.

ARGUMENT

I. The City cannot wave away the practical effect of the Second Circuit's decision.

The City's primary objection to the petition is that the Second Circuit "fully honored" the First Amendment's prohibition against denominational discrimination. Opp.16. That blinks reality. As the petition explains and the complaint alleges, it is undisputed that after the court of appeals' ruling below, New York City educators who profess to be Christian Scientist or Jehovah's Witness could receive accommodations automatically while educators of other faiths (a) had to prove their accommodation would not be an undue hardship to the City, and (b) were routinely denied by the citywide panel. Pet.7.

Indeed, no matter how the citywide panel decided individual cases, those who received "fresh review" were treated worse than the Christian Scientists, Jehovah's Witnesses, and others already accommodated under the prior discriminatory standard. That's a "paradigmatic form of denominational discrimination" because it "explicitly differentiat[es] between religions based on theological practices." *Catholic Charities Bureau, Inc.* v. *Wisconsin Lab. & Indus. Rev. Comm'n*, 605 U.S. 238, 249–50 (2025).

The City hides behind the Second Circuit's initial decision, which correctly identified the denominational discrimination, Opp.22; that court's reinstatement of two plaintiffs' claims in round two, Opp.18; and that court's First Amendment precedent in other cases, Opp.18–20. But none of those defenses changes what transpired: all Petitioners have been treated worse than their peers of other faiths. Full stop.

It gets worse. The City praises the Second Circuit for reinstating the claims of plaintiffs Heather Clark and Natasha Solon because the decision-makers who rejected their accommodation requests may have "wrongfully discounted their beliefs as 'too personal to count as properly religious.'" Opp.18. The City fails to recognize that the same is true for Petitioners Michael Kane, Margaret Chu, Stephanie DiCapua, Robert Gladding, Sarah Buzaglo, Eli Weber, Ingrid Romero, Sasha Delgado, and many others. Pet.7–12. These Petitioners, too, were denied an accommodation because their beliefs were based on personal prayer or conscience rather than denominational teaching. *Ibid.* Selective reinstatement of only two plaintiffs deepens rather than cures the unequal treatment of similarly situated Petitioners.

That's equally true for Petitioners who received the scarlet-letter "undue hardship" designation. Pet.12–13. The citywide panel denied an accommodation to these Petitioners—including some who worked remotely and interacted with no one, *ibid.*—while their Christian Scientist co-workers could receive an accommodation automatically, even if they worked in person with students.

In sum, it's not just a "premise" of the petition but an indisputable reality "that the Second Circuit cast aside the bedrock First Amendment principle that personal religious beliefs are entitled to equal protection." Opp.20. And the City cannot hide behind the fact that the court of appeals failed to fully engage in this analysis. The City's actions represent one of the worst examples of denominational discrimination during COVID-19. This Court should say so.

II. The Second Circuit's decision creates multiple circuits splits and conflicts with this Court's First Amendment precedents.

Once the City's differential treatment is established, the circuit splits create themselves. Contra Opp.20–28. The Second and Tenth Circuits do *not* agree "that strict scrutiny applies to accommodation standards that disfavor personal religious beliefs." Opp.21. The Second Circuit allowed the City to treat Catholics worse than Christian Scientists. But the Tenth Circuit *condemned* a public university that accommodated "Christian Scientists" while denying Buddhists, Catholics, and others with personal "religious practices." *Does 1-11* v. *Regents of Univ. of Colo.*, 100 F.4th 1251, 1269–70 (10th Cir. 2024).

That policy was indistinguishable from the City's; it, too, denied accommodations based on beliefs inconsistent with "the official doctrine of an organized religion … as announced by the leaders of that religion." *Id.* at 1257. The Tenth Circuit recognized this "categorically violates the Establishment Clause." *Id.* at 1270–74. And it granted a preliminary injunction, applying strict scrutiny to the initial, facially discriminatory policy *and* the mid-litigation review which, as here, yielded the same results justified by undue hardship. Here, the Second Circuit denied Petitioners an injunction and affirmed dismissal following a remand that guaranteed Petitioners were treated less favorably than co-workers whose denominational leader never endorsed the vaccine. The decisions are irreconcilable. Pet.17–20. And it makes no difference that the Second Circuit blessed the harm by ordering the citywide panels, or that the City endorsed, rather than issued, the original policy. Contra Opp.23.

The Second Circuit's decision also splits with the Third, Sixth, and Tenth Circuits over whether strict scrutiny applies to religious-accommodation procedures that give officials discretion to make individualized exceptions. Pet.20–23. Petitioners' theory does *not* rely on the theory that the citywide panel "systematically departed from Title VII's standards" (though true). Opp.24. The relevant allegations are that the citywide panel—by its own architect's admission—made "individualized" decisions based on *no* objective criteria, defeating general applicability. Pet.21 (citing Pet.App.189a; ROA-A432, A435–36, A452, A455, A466, and A474). And those allegations are illustrated by the results. Whereas the citywide panel rejected Petitioner Delgado an accommodation because she researched vaccines more carefully than other substances she consumes, the panel accepted Petitioner Keil's nearly identical belief even though he did the same thing. Pet.21 (comparing Pet.App.263a and 266a–67a with Pet.App.244a–53a).

The Second Circuit applied rational-basis review to this discretionary decision-making. Pet.App.17a–27a. That decision cannot be reconciled with circuits that have applied strict scrutiny to vaccine mandates that allow discretionary "individualized exemptions." *Does 1-11*, 100 F.4th at 1273; *Spivack* v. *City of Phila.*, 109 F.4th 158, 167 (3d Cir. 2024); *Dahl* v. *Board of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733 (6th Cir. 2021) (per curiam). The City again defends its process because the Second Circuit ordered the citywide panels to apply Title VII accommodation standards. Opp.25. But even if applied (they were not), Title VII standards do not save a discriminatory scheme that violates the Free Exercise Clause.

Finally, the Second Circuit's decision conflicts in principle with the Sixth, Seventh, and Eighth Circuits over whether Title VII prohibits religious-accommodation schemes that discriminate against personal religion. Pet.23–30 (discussing *Lucky* v. *Landmark Med. of Mich., P.C.*, 103 F.4th 1241, 1242–44 (6th Cir. 2024); *Passarella* v. *Aspirus, Inc.*, 108 F.4th 1005, 1009–10 (7th Cir. 2024); and *Ringhofer* v. *Mayo Clinic, Ambulance*, 102 F.4th 894, 901–02 (8th Cir. 2024)). The City says Petitioners did not raise a Title VII claim. Opp.26. That's why this is a conflict "in principle." Pet.23. The conflict is one of substance, not label; a process that rejects "personal" religious beliefs and imposes a higher (undue burden) standard on certain religious beliefs violates statutory and constitutional standards.

As for the conflict with this Court's precedent, Pet.31–34, the City's opposition brief contains no discussion of this Court's decision in *Catholic Charities*. That's inexcusable. *Catholic Charities* held unequivocally that when the government disfavors certain religious beliefs, that is "textbook" religious "discrimination," and "strict scrutiny" applies. 605 U.S. at 248. Here, Christian Scientists, Jehovah's Witnesses, and others whose religious leader had not spoken publicly in favor of the vaccine could receive an accommodation, no questions asked. Those with personal religious beliefs—including those whose beliefs differ from their spiritual leader—had to prove no undue hardship and were routinely denied. The citywide panel forced Petitioners to clear an extra hurdle and routinely denied their accommodation requests because the panel rejected Petitioners' religious beliefs. Pet.31–34.

Indeed, the Second Circuit's decision is so at odds with *Catholic Charities* that this is the rare case where summary reversal is appropriate. And the Court should not GVR in light of *Catholic Charities* to give the Second Circuit a second chance. Petitioners have been waiting for relief for five years. Even after the Second Circuit agreed to hold oral argument (the second time) on an expedited basis, it waited nearly *two years* before issuing a cursory opinion that disregarded Petitioners' detailed claims. Pet.15. Petitioners are entitled to relief, and if this Court declines to order full merits briefing and oral argument, it should issue a per curiam opinion that lays bare the denominational discrimination and reinstates Petitioners' claims in full.

III. The petition is an excellent vehicle for addressing this critically important issue.

The City does not contest the importance of the question presented, evinced by the multiple supporting amicus briefs. Instead, the City says this case is not the *cleanest* vehicle because it's "in an interlocutory posture," raises a moving "target," and runs parallel to ongoing state-law actions in state court. Opp.28–31. These arguments lack merit.

First, this case is final as to Petitioners because all their claims have been dismissed. See *Clark*, 292 U.S. at 118 (order "final" as to parties in multi-party litigation for which "nothing more" will "be decided"). Regardless, in appeals from federal courts, this Court may review "the petition of any party … before or after rendition of judgment." 28 U.S.C. 1254(1); see Stephen M. Shapiro et al., *Supreme Court Practice* § 2-10 (11th ed. 2019).

Any delay risks more harm. Many Petitioners have lost jobs, homes, and livelihoods. Forcing them to wait longer while two peers continue to litigate will deny them justice for years. What's more, the district court is pressuring the two plaintiffs who had their claims reinstated to "resolve any remaining issues without further litigation" because of "the extremely limited relief that" they achieved on appeal. Mem. & Order, *Keil* v. *City of New York*, No. 1:21-cv-08773-NRB (S.D.N.Y. Sept. 3, 2025), ECF No. 106. Denying the petition risks substantial harm to Petitioners.

Second, Petitioners litigated this case based on changing realities. The City repeatedly altered its policies and positions. It vigorously defended its original mandate while conceding on appeal the mandate was "constitutionally suspect." Pet.App.43a. When Petitioners challenged an unconstitutional application of the City's new scheme, the City opposed their request for a preliminary injunction, then rescinded its mandate and attempted to moot the issue two days before oral argument on appeal. Pet.App.13a. On appeal, the City said Petitioners should bring their claims in state court. And when asked at oral argument if this would lead to preclusion, the City said it could not.

This shuffling explains how the litigation below unfolded. Multiple cases were consolidated to address the City's growing unconstitutional actions. Petitioners appealed from a judgment dismissing their claims *and* denying a preliminary injunction. The City faults Petitioners for citing material outside the complaint and providing fewer individual details; but Petitioners cited the full record to justify preliminary relief, and they gave fewer details because they were among 33 appellants competing for individual attention.

Despite the City's constant changes, Petitioners kept steady aim. The City accuses Petitioners of asserting a new claim—that the Second Circuit endorsed a two-track religious-accommodation scheme, allowing employees accommodated under the original standard to continue working without having to prove undue hardship while forcing Petitioners to clear that hurdle to satisfy the court-revised standard. That claim isn't new. Petitioners raised this claim at each level below. In the district court, Petitioners said the City had not shown why "165 employees … were … accommodated under the [original standard]" but Petitioners were not. Mem. of Law in Supp. of Pls.' Mot. for Prelim. Inj. 17, *Kane* v. *De Blasio*, No. 1:21-cv-07863-NRB (S.D.N.Y. Apr. 12, 2022), ECF No. 121. On appeal, they argued that the original standard allowed accommodations for "established" or "recognized" religions "without any mechanism for undue hardship." Br. & Special App. 50, *NYFRL* v. *City of New York*, No. 22-1801 (2d. Cir Oct. 17, 2022), ECF No. 114. Petitioners then explained that if officials examined undue hardship in isolated cases under the original standard, officials broke the rule, and those random departures cannot justify treating Petitioners worse under a separate rule. *Ibid*.

Third, nothing occurring in state court affects this Court's review. The City's contrary arguments fail procedurally and substantively.

Critically, the City waived any preclusion defense. Such a defense must be raised "at the earliest possible moment." *Evans* v. *Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d Cir. 1983); see *Arizona* v. *California*, 530 U.S. 392, 410 (2000) (preclusion defenses "lost if not timely raised"); *Lennon* v. *56th & Park*

(NY) Owner, LLC, 153 N.Y.S.3d 535, 541 (N.Y. App. Div. 2021). Here it was not. The City knew of the state-court judgment months before the Second Circuit ruled below, see *Dicapua* v. *City of New York*, No. 85035/2023, 2023 WL 11798909 (N.Y. Sup. Ct. Sept. 6, 2023), yet it failed to note its possible application *until over a year later*. That defense is waived.

Any preclusion defense fails anyway. No federal claim was brought in state court. See *City of New York* v. *Welsbach Elec. Corp.*, 878 N.E.2d 966, 968 (N.Y. 2007) (requiring "claim" identity). Many Petitioners are not parties to that litigation. See *Schwartz* v. *Public Adm'r of Bronx Cnty.*, 246 N.E.2d 725, 730 (N.Y. 1969) (requiring "full and fair opportunity" to litigate in "prior action"). It's unclear the issues allegedly resolved were "essential" to the state-court judgment. *Ryan* v. *New York Tel. Co.*, 467 N.E.2d 487, 490 (N.Y. 1984). And preclusion works against the City: the state court awarded most plaintiffs a "religious exemption" after finding "no rational basis" for the citywide panel's "seemingly blanket denial of any religious exemption" under its discriminatory undue-hardship rule. *Dicapua*, 2023 WL 11798909, at *12–13.*

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* This may explain the City's refusal to raise a preclusion defense below. It *again* waived that defense in its answer to plaintiffs whose claims were reinstated. Answer, *Kane* v. *De Blasio*, No. 1:21-cv-07863-NRB (S.D.N.Y. July 18, 2025), ECF No. 235. If preclusion applies, the City could not justify burdening religion under even rational-basis review. *Employment Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 879 (1990) (neutral, generally applicable law must be otherwise "valid" to burden religious exercise).

Additionally, preclusion doctrine does not apply when key "differences" exist "in the quality or extensiveness of the procedures" that different jurisdictions follow. Restatement (Second) of Judgments § 28(3) (1982). In federal court, constitutional facts are reviewed de novo to ensure that state courts "properly" applied "the governing constitutional law." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 492 (1984). Applying preclusion doctrine here would subvert that protection, making a state court "the ultimate fact finder" as to facts that control federal claims while shielding those findings from federal review. *Jeffreys* v. *Griffin*, 749 N.Y.S.2d 505, 509 (N.Y. App. Div. 2002) (rejecting application of issue preclusion that would deny "valuable rights" to otherwise available and more complete review).

Finally, New York preclusion doctrine is flexible, favoring "[f]airness" over "rigid" enforcement. *Read* v. *Sacco*, 375 N.Y.S.2d 371, 375 (N.Y. App. Div. 1975); see *Schwartz*, 246 N.E.2d at 730. That supports Petitioners. Preclusion doctrine aims to limit multiple lawsuits, *Buechel* v. *Bain*, 766 N.E.2d 914, 919 (N.Y. 2001), but to its advantage, the City encouraged this path below, Opp.31 n.9. Petitioners should not be punished for taking that path to save their jobs, homes, and livelihoods. The state-court judgment also came before this Court decided *Catholic Charities*. That "intervening change" in law disfavors preclusion. David D. Siegel, *N.Y. Prac.* § 467 (6th ed. 2018); Restatement (Second) of Judgments, *supra*, at § 28 cmt. c.

The petition is a clean vehicle for resolving an entrenched circuit split over a question that impacts the rights of religious individuals across the country. Every day the Second Circuit's decision remains in place, it denies justice to devoted public servants who have suffered much for their faith. Relief is needed.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted. Alternatively, the Court should summarily reverse and reinstate Petitioners' claims in light of *Catholic Charities*.

Respectfully submitted,

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