No. 26-

IN THE

Supreme Court of the United States

FRANK MORA,

Petitioner,

v.

NEW YORK STATE UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Frank Mora is one of two City Court Judges in Poughkeepsie, New York. When his employer, the New York State Unified Court System, adopted a COVID-19 vaccination mandate, he sought a religious exemption, submitting a sworn statement of his Catholic religious objections to vaccination. The State's Vaccine Exemption Committee denied the exemption on the ground that his "submitted statements do not articulate a consistent reason for why he refused some medical treatments, such as vaccines and immunizations, and not other types" — while, on Petitioner's allegations, granting exemptions to hundreds of other employees, including Catholics whose applications invoked "the same doctrinal basis." The Court of Appeals for the Second Circuit affirmed dismissal of all claims at the pleading stage, holding among other things that Petitioner, as an appointed city judge, is categorically excluded from Title VII's definition of "employee" as "an appointee on the policy making level," 42 U.S.C. § 2000e(f).

The questions presented are:

1. Whether an appointed municipal judge is categorically "an appointee on the policy making level" excluded from the protections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f), or whether that exclusion instead requires a functional inquiry — whether the appointee works closely with and is accountable to the appointing elected official — that this Court's and the courts of appeals' decisions otherwise apply to it.

2. Whether a state employer violates the Free Exercise Clause of the First Amendment when it denies a religious exemption on the ground that the applicant's sworn religious beliefs are insufficiently internally "consistent," based on the State's own evaluation of the applicant's theological distinction between preventive vaccination of a healthy body and medical treatment of a body in crisis.

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner Frank Mora was the plaintiff in the district court and plaintiff-appellant in the Court of Appeals for the Second Circuit.

Respondents, defendants below and defendants-appellees in the court of appeals, are the New York State Unified Court System, Office of Court Administration; and the following individuals: Anne Minihan, Lawrence Marks, Justin Barry, Rosemary Martinez-Burges, Jennifer DiLallo, Shawn Kerby, Keith Miller, Linda Dunlap-Miller, Scott Murphy, Michelle Smith, John Sullivan, Dan Weitz, Nancy Barry, and Tamiko Amaker.

None of the parties listed above is a corporation. Accordingly, no party has a stock ticker symbol to report under Rule 14.1(b)(i).

Since petitioner is an individual, no corporate disclosure statement is required under this Court's Rule 29.6.

Mora v. New York State Unified Court System, et al., No. 22-cv-10322 (VB), U.S. District Court for the Southern District of New York. Judgment entered September 19, 2023.

Mora v. New York State Unified Court System et. al., No. 23-7231, U.S. Court of Appeals for the Second Circuit. Judgment entered March 30, 2026.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit affirming the judgment of the district court, entered March 30, 2026, is unpublished and is reported only at 2026 U.S. App. LEXIS 9087 and 2026 WL 860572. It is reproduced at App. 1a–11a.

The opinion and order of the United States District Court for the Southern District of New York granting Respondents' motions to dismiss, entered September 19, 2023, is unpublished and is reported only at 2023 U.S. Dist. LEXIS 166411 and 2023 WL 6126486. It is reproduced at App. 12a–48a.

JURISDICTION

The Court of Appeals entered its judgment on March 30, 2026. On June 2, 2026, Petitioner applied to Justice Sotomayor for a 60-day extension of the time to file a petition for a writ of certiorari. On June 18, 2026, Justice Sotomayor granted the application, extending the time to file to and including August 27, 2026 (No. 25A1398). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The First Amendment applies to the States through the Fourteenth Amendment, Section 1 of which provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 701(f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f), provides:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding

> sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. § 2000e-16c, governing coverage of previously exempt state employees, provides in relevant part:

> (a) Application. The rights, protections, and remedies provided pursuant to section 302 [42 U.S.C. § 2000e-16b] shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof — (1) to be a member of the elected official's personal staff; (2) to serve the elected official on the policymaking level; or (3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office. . . . (c) Judicial review. Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of title 28, United States Code.

STATEMENT OF THE CASE

Citations to "App. __" are to the separately bound appendix to this petition. Citations to "JA-__" are not reproduced but are citations to the Joint Appendix filed in the court of appeals (2d Cir. No. 23-7231, Dkt. Entry 15.1, Nov. 20, 2023).

A. The vaccine mandate and Petitioner's exemption request

Petitioner Frank Mora is "a duly appointed and sworn City Court Judge" in Poughkeepsie, New York (JA-15), appointed by the city's mayor. In August 2021, the Chief Judge of the New York Court of Appeals directed that all judges and employees of the Unified Court System ("UCS") be vaccinated against COVID-19 unless granted a medical or religious exemption. On September 10, 2021, Chief Administrative Judge Lawrence Marks circulated the policy. Under the religious-exemption procedures, "[t]he decision is final and not subject to appeal," and "[i]f a judge or employee refuses to provide the information necessary for UCS to review and consider their request for religious exemption, they will be required to comply with UCS COVID-19 Vaccination mandate" (JA-116).

UCS created a Vaccine Exemption Committee ("VEC") to evaluate exemption requests. On September 21, 2021, Petitioner submitted a sworn statement in support of a religious exemption. He affirmed: "I claim exemption from immunizations/vaccinations based on my sincere and genuine religious convictions and beliefs" (JA-134). He described his lifelong Catholic faith and service as a parish trustee, lector, and finance-council member (JA-134, "I am a Trustee at Holy Trinity, a member of the Finance Council, and a Lector"), quoted at length from the Catechism of the Catholic Church on the primacy of conscience (JA-135, "He must not be forced to act contrary to his conscience"), and grounded his objection in scripture: "God is our Creator and our Healer. I do not wish to interfere with God's natural way. To inject foreign substances (immunizations into our blood, in order to hopefully protect against a possible disease, is contrary to God's law, and is against my conscience. …to vaccinate is a violation of God's way" (JA-136).

B. The supplemental questionnaire and the denial

On November 4, 2021, the VEC responded that it "requires more information" (JA-138), attaching a supplemental form. Section B of the form asserted that Petitioner's faith "calls for you to abstain from medicines and vaccines due to concerns regarding the sanctity of your body or its purity," and directed him to "[p]lease list all the medicines, medical treatments and procedures, vaccines, and/or foods that you abstain from due to your religious beliefs" (JA-143). It further demanded that he "explain how your religious beliefs permit you to take these vaccines but prohibit the taking of a COVID-19 vaccine" (JA-144).

Petitioner responded under oath on November 12, 2021, answering every question posed. He corrected the form's premise — "I stated no such thing regarding 'medicines'" — and explained the theological distinction at the heart of his belief: "there is a significant difference between a body in crisis needing help and a body that is healthy accepting a procedure. I believe God accepts help in a crisis and rejects vaccinations for 'prevention'" (JA-149). He stated that he had abstained from vaccines "[s]ince 18 years of age," that the religious basis for his objection was "fully explained in my statement dated September 21, 2021," and he answered "No" and "N/A" to the questions asking whether he had taken other adult vaccinations (JA-149).

On December 23, 2021, the VEC denied the exemption and directed Petitioner to submit proof of his first vaccine dose by January 3, 2022. The denial identified no reason. Only on March 2, 2022, did counsel for UCS explain the VEC's reasoning: Petitioner's "submitted statements do not articulate a consistent reason for why he refused some medical treatments, such as vaccines and immunizations, and not other types" (JA-265).

C. Exclusion, comparators, and the disciplinary referral

On January 3 and 4, 2022, Administrative Judge Anne Minihan barred Petitioner from "entering any courthouse in the State of New York" and consigned him "to work virtually and off premises" (JA-22). UCS ordered him "to desist from conducting criminal proceedings, a substantial share of a City Court Judge's workload" (JA-23). He worked from his unfinished basement until UCS repealed the mandate effective February 17, 2023, when he was restored to full duties.

Petitioner's operative Complaint alleged that the VEC simultaneously granted religious exemptions to similarly situated applicants: it granted an exemption to one spouse of a married Catholic couple of judges (W.P.) while denying the other (C.B.) (JA-25, "gave W.P. a religious exemption and denied the same to his wife"); it granted exemptions to two Catholic court employees, Milena Scheib and Deborah Ghent, whose applications were "substantially similar to that submitted by plaintiff, invoking the same doctrinal basis" (JA-25); and it granted "more than five hundred such exemption applications from similarly-situated persons" (JA-31).

On January 6, 2022, Chief Administrative Judge Marks referred Petitioner to the New York State Commission on Judicial Conduct, although "[t]he policy promulgated by defendant UCS does not state that a judge who is denied a religious exemption and refuses, based on his or her faith to vaccinate, will thereby be subject to discipline" (JA-25).

D. The decisions below

The district court (Briccetti, J.) granted Respondents' motions to dismiss on September 19, 2023, and the Clerk of Court entered judgment the same day. As relevant here, the court held that Petitioner "falls within the exemption for an 'appointee on the policy making level' and is not an 'employee' for purposes of Title VII," reasoning that he "certainly 'exercise[s] [ ] discretion concerning issues of public importance'" (JA-273).

The court also dismissed the Free Exercise claims, holding that the mandate as applied was "neutral and generally applicable" (JA-276) and survived rational-basis review; dismissed the equal-protection claim for failure to plead adequate comparators; dismissed the retaliation claim on the ground that '[m]ere referral to a disciplinary body, without any resulting discipline, is not a sufficiently adverse employment action' (JA-283); and dismissed the injunctive claims as moot (JA-270)

The Second Circuit affirmed by summary order on March 30, 2026 (Chin, Carney, and Sullivan, JJ.). On Title VII, the panel held that "Mora – as a city judge appointed by an elected official (in this case, his city's mayor) – falls within the exception for an 'appointee on the policy making level' under Title VII" (App. 7a), reasoning that *Gregory v. Ashcroft*, 501 U.S. 452 (1991) — which construed the identical definition in the ADEA — "also applies in this case" (App. 7a). The panel did not analyze whether Petitioner would normally work closely with, or be accountable to, the Mayor who appointed him.

On the Free Exercise claim, the panel distinguished its own recent decision in New Yorkers for *Religious Liberty, Inc. v. City of New York*, 125 F.4th 319 (2d Cir. 2025), on the ground that Petitioner's "own pleadings reflect that more than 500 other judges and employees – including Catholics with beliefs identical to Mora's – received exemptions" (App. 9a-10a), and attributed the denial instead to "his failure to follow the procedures established for religious exemptions," comparing the policy language (JA-116) with Petitioner's supplemental response (JA-149; App. 10a). But the very page the panel cited contains Petitioner's sworn answers to every question posed (JA-149).

On retaliation, the panel held Petitioner could not establish causation because the referral came "only after" he "failed to follow the procedures required to obtain a vaccine exemption" and refused vaccination (App. 11a). The panel does not state which procedures Petitioner did not follow. Petitioner submitted the required statement of his religious beliefs, and as explained above and further below, he answered every question posed to him (JA-149).

On mootness, the panel held Petitioner's claims for prospective injunctive relief were moot because the mandate had been repealed and Petitioner reinstated, while affirming dismissal of his damages claims and his as-applied Free Exercise and Title VII claims on the merits. The Court issued its mandate on April 21, 2026.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided over the scope of Title VII's "policy making level" exclusion, and the decision below extends *Gregory v. Ashcroft* beyond its holding.

The courts below held that an appointed city judge is categorically excluded from Title VII because *Gregory v. Ashcroft,* 501 U.S. 452 (1991) deemed appointed state judges "appointees on the policymaking level" under the ADEA's identical definition. However, *Gregory* does not hold what the courts below claim it holds.

Gregory arose under the ADEA and concerned a provision of the Missouri Constitution mandating retirement of state judges; a rule going to "the qualifications of . . . important state officials," adopted by the State itself. The Court did not construe "appointee on the policymaking level" to affirmatively include judges. It applied a federalism clear-statement canon and held only that the phrase was too uncertain to satisfy it: "we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included." 501 U.S. at 467.

The Court's bottom line was ambiguity, not inclusion: "It is at least ambiguous whether a state judge is an 'appointee on the policymaking level.'" *Ibid*. The Court acknowledged that "it is far from plain that the statutory exception requires that judges actually make policy," and that the phrase "is an odd way for Congress to exclude judges; a plain statement that judges are not 'employees' would seem the most efficient phrasing." *Id.* at 466–67. The Court resolved the ambiguity against coverage only because "[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions," *id.* at 470; a canon triggered by a State's sovereign choice about who may serve as its own judges.

The decision below converted that ambiguous holding into a categorical rule of exclusion — applied at the pleading stage, under a different statute, to invalidate a federal discrimination claim by a municipal judge who was appointed by the mayor of one government (the City of Poughkeepsie) but is employed, disciplined, and here was penalized by another (the State's Unified Court System).

No sovereign qualification-setting choice of the kind that drove *Gregory* is implicated when a state agency employer denies a religious accommodation; the State is not defining who may judge, it is administering a workplace vaccination policy.

The courts of appeals — including the Second Circuit itself — are also divided over how the exclusion operates: categorically by job title, or through a functional, position-by-position analysis. Before *Gregory*, the Second Circuit held in *EEOC v. Vermont*, 904 F.2d 794 (2d Cir. 1990), that Vermont's appointed judges were not "appointees on the policymaking level," reasoning from Title VII's text and legislative history that "Congress intended the more limited interpretation" and confining the exclusion to appointees who would work closely with the appointing elected official and invoking the Conference Committee's instruction that the exemption applies to "policymaking positions at the highest levels of the departments or agencies," "such as cabinet officers," and "shall be construed narrowly." *Id.* at 800.

Gregory rejected *Vermont's* result for the ADEA under the clear-statement canon. Yet a decade after *Gregory*, the Second Circuit in *Butler v. New York State Dep't of Law*, 211 F.3d 739 (2d Cir. 2000), reaffirmed that "the policymaker exception should be construed narrowly," *id.* at 749 and resolved the Title VII question functionally by asking whether it "was part of the job" to work closely with the appointing official, and excluded the plaintiff only because, as Deputy Bureau Chief, she "could be required to work closely with the AG." *Id.* at 748–49.

The panel below performed no *Butler* analysis at all. Under *Butler's* framework, the exclusion cannot reach Petitioner: a city court judge does not work closely with, answer to, or serve the mayor who appointed him — judicial independence forbids exactly that, and his relevant employer is not even the appointing official's government.

Under the categorical approach, by contrast, appointment plus judicial discretion ends the case automatically. That is the approach the Eleventh Circuit took in *Wheale v. Polk County,* 2022 U.S. App. LEXIS 27679, at *8–9 (11th Cir. Oct. 4, 2022) (per curiam) (unpublished), holding that "[b]ecause Judge Wheale is an appointee engaged in policymaking, she is not an 'employee' and not protected by Title VII." The two approaches yield opposite answers on these facts.

Other circuits confirm the disagreement runs wider than judges. The Tenth Circuit requires both elements

Butler asks about: appointment by an elected official and whether there is a close, personal and immediate relationship with that official, *Crumpacker v. Kansas Dep't of Human Res.*, 474 F.3d 747, 751 (10th Cir. 2007) (citing *Anderson v. City of Albuquerque*, 690 F.2d 796, 800 (10th Cir. 1982)) — the same functional inquiry *Butler* applies and the summary order ignored.

By contrast, the Seventh Circuit asks only whether the position "authorizes, either directly or indirectly, meaningful input into governmental decision-making on issues where there is room for principled disagreement on goals or their implementation," without regard to any relationship with an elected official. *Opp v. Office of the State's Att'y of Cook Cty.*, 630 F.3d 616, 620 (7th Cir. 2010) (quoting *Americanos v. Carter,* 74 F.3d 138, 141 (7th Cir. 1996)).

Under the Seventh Circuit's framework—and under the categorical approach applied by the panel here—Petitioner is classified as a policymaker, just as that circuit categorically deemed nine hundred assistant state's attorneys to be policymakers. Conversely, under the Tenth Circuit's test, Petitioner falls outside the policymaker exclusion because he shares no relationship with the appointing mayor, much less an intimate or immediate one. Consequently, this case would reach a different outcome in at least three other circuits than it did in the Second Circuit.

Members of this Court have likewise divided on the exclusion's reach since *Gregory* itself. Justice White, concurring in part, dissenting in part, and concurring in the judgment — joined by Justice Stevens — would have held that appointed state judges are policymakers as a matter of law. 501 U.S. at 481–82 (White, J.). Whereas, Justice Blackmun, joined by Justice Marshall, reached the opposite conclusion from the same legislative record, concluding that "it is obvious that judges are neither staff nor immediate advisers of any elected official," and that the evidence "indicates that Congress did not intend appointed state judges to be excluded from the reach of Title VII or the ADEA." *Id*. at 492–94 (Blackmun, J., dissenting).

Three and a half decades later, this Court has yet to decide whether Title VII's narrow, undefined exemption categorically denies federal antidiscrimination protections to all appointed judges across the nation. This case directly presents that issue under circumstances—a municipal judge appointed by one governmental body but employed by another—where the functional analysis required by most circuits, and bypassed entirely by the panel below, is outcome-determinative.

Congress's own handiwork confirms the exclusion's limited office — and Petitioner addresses it directly. In the Government Employee Rights Act of 1991 (GERA), Congress extended federal antidiscrimination "rights, protections, and remedies" to individuals "chosen or appointed, by a person elected to public office" "to serve the elected official on the policymaking level," enforced through an EEOC administrative proceeding, 42 U.S.C. § 2000e-16c(a)(2), (b)(1), with judicial review in the courts of appeals, id. § 2000e-16c(c).

By defining the excluded category as individuals appointed "to serve the elected official," the text of GERA provides statutory confirmation that Congress viewed the § 2000e(f) triad—personal staff, policymaking appointees, and immediate advisers—as consisting of those who serve the official who appointed them.

A judge serves the public and the law, not the mayor who appointed him; and Petitioner's Title VII claim does not even run against the appointing official's government. To be sure, if Petitioner were a GERA-covered appointee, Respondents may contend GERA supplies his remedy instead. *See Butler v. New York State Dep't of Law*, 998 F. Supp. 336, 345 (S.D.N.Y. 1998), aff'd in relevant part, 211 F.3d 739. But that only sharpens the question presented: an appointed municipal judge fits neither box comfortably. Indeed, an appointed municipal judge is too independent of any elected official to "serve" one at the policymaking level under GERA, yet stripped of Title VII's judicial remedy by a categorical reading of the same words. Only this Court can resolve into which regime Congress placed appointed judges.

II. The Second Circuit's approval of a "consistency"-based sincerity inquiry conflicts with this Court's religious-question jurisprudence and with the Second Circuit's own recent precedent.

The VEC denied Petitioner's exemption because his statements "do not articulate a consistent reason for why he refused some medical treatments, such as vaccines and immunizations, and not other types" (JA-265). That is a judgment about the coherence of Petitioner's theology, not about whether he holds it. Petitioner drew a line his faith draws: "there is a significant difference between a body in crisis needing help and a body that is healthy accepting a procedure. I believe God accepts help in a crisis and rejects vaccinations for 'prevention'" (JA-149). The State deemed that distinction insufficiently "consistent" and denied the exemption on that basis alone.

This Court has long held that civil authorities may not sit in judgment on the internal logic of a sincerely held belief. "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981); accord *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021).

Where a believer draws lines that others, even co-religionists, might draw differently, "[i]ntrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process is singularly ill equipped to resolve such differences," and "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas*, 450 U.S. at 715–16.

"[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." *Id.* at 716. These principles trace to *United States v. Ballard*: "Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs," and the fact that such beliefs "may be beyond the ken of mortals does not mean that they can be made suspect before the law." 322 U.S. 78, 86–87 (1944).

Nor may the State demand that a belief track the tenets of an organized denomination: this Court has repeatedly "reject[ed] the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization." *Frazee v. Illinois Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989); *see id*. at 833. And "[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 litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

The Second Circuit's own recent decision in *New Yorkers for Religious Liberty, Inc. v. City of New York* applied exactly this principle to the same kind of vaccine-exemption claim as is at issue here. The court held that a reviewing body "do[es] not 'sit in judgment on the verity of an adherent's religious beliefs,'" and that its "task is 'to determine whether religious beliefs are sincerely held'" — nothing more. 125 F.4th 319, 332 (2d Cir. 2024) (quoting *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984), and *Jackson v. Mann*, 196 F.3d 316, 321 (2d Cir. 1999)). A 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." *Id*. at 332-333

Applying that rule, the court held that a plaintiff who alleged the City's panel had dismissed her stated beliefs as "too idiosyncratic to be religious in nature" by characterizing her reliance on personal spiritual guidance as merely "individualized guidance" rather than doctrine had stated a First Amendment claim, because the panel's reasoning "would be the same constitutional problem" as denying an accommodation on the ground that a belief is "too personal to count as properly religious." *Id.* at 335.

That is precisely what happened to Petitioner, and worse: the VEC did not merely find his distinction too personal, it faulted him for failing to hold the "correct," internally symmetrical theological position on medicine generally.

But under *Thomas* and *New Yorkers for Religious Liberty*, that inquiry was constitutionally forbidden. The panel below distinguished *New Yorkers for Religious Liberty* on the ground that Petitioner's "own pleadings reflect that more than 500 other judges and employees – including Catholics with beliefs identical to Mora's – received exemptions," attributing the denial instead to "his failure to follow the procedures established for religious exemptions." That distinction does not survive examination of the record it purports to rest on.

The panel's own prior decision in *Kane v. De Blasio* confirms the point from the opposite direction. There, the Second Circuit held that a vaccine-exemption process was not neutral where reviewers questioned an applicant's sincerity by comparing his belief to the differing practice of other adherents of his own faith — telling one Christian applicant that his beliefs "were merely personal, [because] there are other Orthodox Christians who choose to get vaccinated." 19 F.4th 152, 168 (2d Cir. 2021).

The court explained that "[d]enying an individual a religious accommodation based on someone else's publicly expressed religious views . . . 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 litigants' interpretations of those creeds.'" *Id*. (quoting *Hernandez v. Commissioner*, 490 U.S. 680, 699(1989)).

The VEC did to Petitioner exactly what *Kane* held the City could not do: it treated the fact that other Catholics — who received exemptions on "the same doctrinal basis" (JA-25) — might draw the medicine/vaccination line differently than Petitioner as evidence that his own sincerely held distinction was not really religious.

The panel's alternative rationale, that Petitioner "failed to follow the procedures," is unequivocally contradicted by the record it cited. Indeed, the supplemental form asked five questions; Petitioner answered all five under oath (JA-149, "Question 2 - Since 18 years of age."; "Question 4 - No."; "Question 5 - N/A."). What the panel characterized as an incomplete response was an incorporation by reference: "This is fully explained in my statement dated September 21, 2021" (JA-149).

A pleading-stage dismissal that rests on recharacterizing a sworn, responsive submission as a procedural default inverts the obligation to draw reasonable inferences in the plaintiff's favor. This is not a case, like Matter of Ferrelli v. State of New York, 2024 NY Slip Op 02012 (1st Dep't Apr. 16, 2024), where the applicants "refused to provide complete answers to the supplemental form." Here, the Petitioner answered every question.

The grant of hundreds of exemptions to others does not defeat — it supports — the as-applied claim. On

Petitioner's allegations, the VEC granted exemptions to applicants "invoking the same doctrinal basis" (JA-25) while denying his. A regime of discretionary, standardless, unexplained, and unappealable individualized exemptions (JA-116, "The decision is final and not subject to appeal") is precisely the mechanism this Court subjects to strict scrutiny: "[a] law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions," and "[w]here such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason." *Fulton v. City of Philadelphia*, 593 U.S. 522, 523 (2021).

Sincerity is effectively undisputed on this record in the same sense this Court found it undisputed in *Kennedy v. Bremerton School District*, 597 U.S. 507, 525–26 (2022) and no party contends Petitioner does not actually hold the beliefs he swore to; the VEC's stated objection went only to their internal "consistency."

The state-court decisions available to Respondents confirm, rather than undermine, the need for review. In *Matter of Ventresca-Cohen v. DiFiore*, 225 A.D.3d 9 (3d Dep't 2024), a divided Appellate Division sustained — under New York's deferential arbitrary-and-capricious standard for CPLR article 78 review, not the First Amendment — the same VEC's inconsistency-based denials of other applicants' exemptions. Even so, the majority itself observed that UCS "admittedly required 'the vast majority of applicants for religious exemption . . . to submit the [s]upplemental [f]orm,' raising the question of exactly what standard was being applied" in deeming applications insufficient. 225 A.D.3d 9, 16 n.2.

Presiding Justice Egan, dissenting in relevant part, would have held that UCS's inconsistency rationale flouts *Ballard* and *Thomas*, because a belief "need not be acceptable, logical, consistent, or comprehensible to others" to be sincerely held, and a believer need not exhibit "perfect consistency in [the belief's] observance, practice, and interpretation." 225 A.D. 3d 9, 14 (Egan, J.P., concurring in part and dissenting in part) (quoting *Thomas*, 450 U.S. at 714, and *Adeyeye v. Heartland Sweeteners, LLC*, 721 F.3d 444, 453 (7th Cir. 2013)). That New York's own justices divide over whether this very exemption process respects *Thomas* underscores that the question is substantial and recurring, not a one-off pleading dispute.

III. This case is an ideal vehicle for resolving both questions.

Both questions were pressed and passed upon below; both were dispositive of entire claims; and the case arrives on the pleadings, so the legal questions are unencumbered by factual disputes. Nor does mootness stand in the way. Petitioner's claims for compensatory and punitive damages against the individual defendants for violation of his Free Exercise and Equal Protection rights survive the mandate's 2023 repeal untouched by the mootness ruling below, which reached only Petitioner's claims for prospective injunctive relief.

The Second Circuit has itself recognized that monetary relief keeps a claim alive even after the challenged policy ends: in *New Yorkers for Religious Liberty* it held that a reinstated employee's claim was not moot because she "ha[d] plausibly pleaded that she was potentially subjected to an unconstitutional government action resulting in injury for which she has yet to receive recompense," and backpay "remains an available remedy." 125 F.4th 319, 334 (2d Cir. 2024). The same is true here, a *fortiori*, given Petitioner's pending damages claims.

Respondents may nonetheless press mootness as an alternative ground to avoid review of the merits questions Petitioner presents. That argument would prove too much. The Second Circuit's established practice, consistent with this Court's, is that when a civil case becomes moot while under appellate review, the proper course is to vacate the judgment below rather than resolve it on the merits: "When a civil case becomes moot while an appeal is pending, it is the general practice of an appellate court to vacate the unreviewed judgment granted in the court below and remand the case to that court with directions to dismiss it." *Farrell v. Hochul*, 2023 U.S. App. LEXIS 9409, at *5 (2d Cir. Apr. 20, 2023) (summary order) (quoting *Bragger v. Trinity Cap. Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994)); *see United States v. Munsingwear, Inc.*, 340 U.S. 36, 39–40 (1950) ("[t]he established practice of the Court . . . is to reverse or vacate the judgment below and remand with a direction to dismiss" when a case becomes moot on the way to, or pending decision by, an appellate court).

Here, the panel below did the opposite: it affirmed the district court's merits dismissal of Petitioner's Title VII, Free Exercise, and retaliation claims in full — not on mootness grounds — while separately affirming dismissal of only the request for prospective injunctive relief as moot.

Respondents cannot use mootness as both sword and shield: as a reason the merits rulings should stand unreviewed, while those very rulings dispose of live damages claims that mootness does not touch. This Court's review of the questions presented is unobstructed by any jurisdictional defect.

Finally, this case cleanly isolates the two questions from the surrounding COVID-era litigation. The vaccine mandate itself is not challenged; the mandate has been repealed; and the questions presented — the scope of Title VII's policymaker exclusion, and the limits the Free Exercise Clause places on a State's power to question the coherence of a sincere religious belief — will recur independent of any pandemic-specific mandate, in every context where a State appoints officials through elected officials or administers a religious-accommodation process of any kind. Few vehicles present both questions so starkly or with a record so thoroughly developed at the pleading stage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED MARCH 30, 2026

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-7231

FRANK MORA,

Plaintiff-Appellant,

v.

NEW YORK STATE UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION, ANNE MINIHAN, LAWRENCE MARKS, JUSTIN BARRY, ROSEMARY MARTINEZ-BURGES, JENNIFER DILALLO, SHAWN KERBY, KEITH MILLER, LINDA DUNLAP-MILLER, SCOTT MURPHY, MICHELLE SMITH, JOHN SULLIVAN, DAN WEITZ, NANCY BARRY, TAMIKO AMAKER,

Defendants-Appellees.

Filed March 30, 2026

Appeal from a judgment of the United States District Court for the Southern District of New York (Vincent L. Briccetti, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the September 19, 2023 judgment of the district court is **AFFIRMED**.

PRESENT:

DENNY CHIN,
SUSAN L. CARNEY,
RICHARD J. SULLIVAN,
Circuit Judges.

Frank Mora, a city judge in Poughkeepsie, New York, appeals the dismissal of his second amended complaint against New York State's Unified Court System ("UCS"), its Office of Court Administration ("OCA"), and various individuals employed there on the grounds of mootness and failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). In a nutshell, Mora alleges that Defendants denied his request for a religious exemption from UCS's COVID-19 vaccination mandate, which resulted in his exclusion from entering the city courthouse where he typically presided. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision.

We review *de novo* a district court's dismissal of a claim under Federal Rule of Civil Procedure 12(b)(6), "accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff." *Palmer v. Amazon.com, Inc.*, 51 F.4th 491, 503 (2d Cir.

2022). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and which would "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

I. Mora's Section 1983 Claim against UCS and OCA.

The district court properly dismissed Mora's claims against UCS and OCA for allegedly violating his First Amendment rights, brought pursuant to 42 U.S.C. § 1983, because both entities are immune from suit under the doctrine of sovereign immunity. The Eleventh Amendment to the United States Constitution bars suits in federal court by private parties against a state, absent the state's consent to suit or an express statutory waiver of immunity enacted by Congress. *See* U.S. Const. amend. XI; *see also Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Eleventh-Amendment immunity extends to "state agents and state instrumentalities that are, effectively, arms of a state." *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 236 (2d Cir. 2006) (internal quotation marks omitted).

We have previously concluded that the "New York State Unified Court System is unquestionably an 'arm of the State'" and is therefore "entitled to Eleventh Amendment sovereign immunity." *Gollomp v. Spitzer*, 568 F.3d 355, 368 (2d Cir. 2009). The same is true of OCA, which is simply a subdivision of UCS. *See Posr v. Ct. Officer*

Shield No. 207, 180 F.3d 409, 414 (2d Cir. 1999) ("The State Office of Court Administration is an arm of the state and therefore immune."). In fact, Mora's complaint identifies UCS and OCA as a single defendant, which he describes as a state agency. *See* J. App'x at 16.

We have also recognized that New York has not consented to suits against UCS and OCA in this context. *See Gollomp*, 568 F.3d at 357 n.2 (noting that New York has waived sovereign immunity "only [for suits brought in New York's] Court of Claims." (quoting *Morell v. Balasubramanian*, 70 N.Y.2d 297, 300 (1987))); *see also Posr*, 180 F.3d at 414. Indeed, we have observed that "every court to consider the question of whether the New York State Unified Court System is an arm of the State has concluded that it is, and is therefore protected by Eleventh Amendment sovereign immunity." *Gollomp*, 568 F.3d at 366.

We have likewise concluded that Congress has declined to enact an express statutory waiver of immunity against state court systems for actions brought under section 1983. *Id.* at 367. Put simply, "the Eleventh Amendment renders the Unified Court System Office of Court Administration and the State immune from suit . . . because no express override of State statutory authority has been enacted by Congress in association with [section] 1983." *Id.* (alteration adopted and internal quotation marks omitted).

In any event, Mora's claim for prospective injunctive relief here is clearly moot, since UCS vacated its vaccine mandate in February 2023 and since Mora has been reinstated to full in-person duties. J. App'x at 270-71. We "cannot enjoin what no longer exists." *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 393 (2d Cir. 2022).

Nor has Mora shown that his request for prospective relief falls within the exception for conduct that is "capable of repetition, yet evading review," which applies "only in exceptional situations," where: "(1) the plaintiff [has] a reasonable expectation that it will be subject to the same challenged action again, and (2) the challenged conduct [is] of too short a duration to be fully litigated before its cessation." *Id.* at 395 (alteration adopted and internal quotation marks omitted). In other words, "mere speculation that the parties will be involved in a dispute over the same issue" at some time in the future is not enough. *Id.* at 396 (internal quotation marks omitted). Because Mora has not alleged an ongoing violation of federal law that requires prospective relief, the Eleventh Amendment bars his claims against UCS and OCA. *See Ward v. Thomas*, 207 F.3d 114, 119 (2d Cir. 2000) ("[T]he Supreme Court has declined to extend the reasoning of *Ex Parte Young* to claims for retrospective relief.").[1]

1. Mora also requested injunctive relief compelling Defendants to (1) reverse the denial of his exemption request, and (2) "provide him an exemption from any and all [COVID-19] vaccination mandates retroactive to the date he was denied." J. App'x at 31-32. But the district court properly dismissed the request for injunctive relief as moot, since the end of the COVID-19 pandemic "makes it impossible for the court to grant any effectual relief whatever to [a Plaintiff]" even if he were to prevail on the merits. *County of Suffolk v. Sebelius*, 605 F.3d 135, 140 (2d Cir. 2010) (internal quotation marks omitted).

II. Mora's Title VII Claim.

By contrast, Congress *has* abrogated state sovereign immunity for claims under Title VII of the Civil Rights Act of 1964. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-53, 457 (1976). Nevertheless, because Mora—as a city judge—falls within Title VII's exception for "an appointee on the policy making level," his Title VII claim against UCS and OCA also fails. 42 U.S.C. § 2000e(f).

"[T]he existence of an employer-employee relationship is a primary element of Title VII claims." *Felder v. U.S. Tennis Ass'n*, 27 F.4th 834, 838 (2d Cir 2022) (internal quotation marks omitted). But while Title VII defines "employee" broadly to mean "an individual employed by an employer," it specifically excludes:

> [a]ny person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

42 U.S.C. § 2000e(f).

The Supreme Court has held that a state judge appointed by an elected official (there, the Governor) was an appointee on the policymaking level and therefore not an employee protected under the Age Discrimination in Employment Act ("ADEA") from the Missouri

Constitution's mandatory retirement provision for judges. *See Gregory v. Ashcroft*, 501 U.S. 452, 464-67 (1991). Because the ADEA and Title VII use identical statutory definitions of the term "employee," *compare* 29 U.S.C. § 630(f), *with* 42 U.S.C. § 2000e(f), *Gregory*'s holding also applies in this case. *See Butler v. N.Y. State Dep't of L.*, 211 F.3d 739, 747 (2d Cir. 2000) ("rely[ing] on" ADEA caselaw for "the analysis of the definition of employee" under Title VII because Congress, when amending the ADEA, "adopt[ed] verbatim the definition of employee found in Title VII").

Like the judge in *Gregory*, Mora—as a city judge appointed by an elected official (in this case, his city's mayor)—falls within the exception for an "appointee on the policy making level" under Title VII. We therefore affirm the district court's dismissal of Mora's Title VII claim against UCS and OCA because it too fails to state a viable claim.

III. Mora's Fourteenth Amendment Claim.

Mora also brought a Fourteenth Amendment Equal Protection claim, under section 1983, against the individual members of UCS's "Vaccine Exemption Committee," alleging that they denied his request for a religious exemption from the vaccine mandate on discriminatory grounds. App'x at 16, 31. In order to state a selective-enforcement claim under the Equal Protection Clause, a plaintiff must plausibly allege: "(1) the person, compared with others similarly situated, was selectively treated; and (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996) (alteration adopted and internal quotation marks omitted). The district court concluded that Mora had failed to plausibly allege either element. We agree.

A comparator is similarly situated to the plaintiff when "the plaintiff's and comparator's circumstances . . . bear a reasonably close resemblance." *Hu v. City of New York*, 927 F.3d 81, 96 (2d Cir. 2019) (internal quotation marks omitted). Mora identifies several other Catholic UCS employees who received exemptions under the vaccine mandate, but he includes no specific facts about their exemption applications. *See* J. App'x at 21-22, 24-25; *see also Burgis v. N.Y. City Dep't of Sanitation*, 798 F.3d 63, 68 (2d Cir. 2015) (dismissing equal protection claim as "conclusory" where complaint failed to allege "meaningful specifics of the alleged difference in qualifications" between employees who had received promotions and the plaintiffs). Mora also generally alludes to 500 UCS employees who received religious exemptions on the basis of their sincerely held religious beliefs against vaccinations, *see* J. App'x at 26, 31, but he again provides no factual allegations indicating whether or why those individuals are similarly situated to him.

Nor does Mora allege that he was treated differently from his comparators *on account of* his religious affiliation. Mora concedes that the VEC Defendants routinely granted religious exemptions to other Catholics and people of different faiths who opposed the COVID vaccines on religious grounds. *Id.* at 25-26, 31. Since those who shared Mora's religious convictions received the very exemptions that he sought, it is not plausible to infer that the VEC Defendants denied Mora's request for an exemption on the basis of something *other than* his Catholic faith. *See Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (dismissing Equal Protection claim based on the denial of a religious exemption purportedly due to plaintiffs' Catholic faith where complaint acknowledged that other Catholics were granted an exemption). Because Mora alleges no additional facts suggesting a discriminatory motive for the denial of his exemption, he has not plausibly alleged a claim under the Fourteenth Amendment's Equal Protection Clause.

IV. Mora's Free Exercise Claim.

Mora's as-applied First Amendment Free Exercise claim fares no better. In *New Yorkers for Religious Liberty, Inc. v. City of New York*, we reversed the dismissal of plaintiffs' as-applied claims, concluding that plaintiffs plausibly alleged that the City's vaccine-exemption panel impermissibly denied their respective exemptions because they were "too personal" or "idiosyncratic to be religious in nature." 125 F.4th 319, 335 (2d Cir. 2025); *see id.* at 332 (permitting consideration of whether a vaccine-exemption applicant's "religious beliefs are sincerely held," but forbidding examination of "the verity of an adherent's religious beliefs" (internal quotation marks omitted)). Unlike the complaint in that case, however, Mora's own pleadings reflect that more than 500 other judges and employees—including Catholics with beliefs *identical* to Mora's—received exemptions from the vaccine mandate. *See* J. App'x at 26; *see also id.* at 25, 31. Those allegations belie Mora's assertion that the Individual Defendants' denial of his exemption request was based on hostility to his religious beliefs, as opposed to his failure to follow the procedures established for religious exemptions. *Compare id.* at 116 (UCS's "Request for Religious Exemption from COVID-19 Vaccination" policy, which provides: "If a judge or employee refuses to provide the information necessary for UCS to review and consider their request for religious exemption, they will be required to comply with [the vaccine mandate]."), *with id.* at 149 (Mora's incomplete response to OCA's request for additional information regarding his religious beliefs). We therefore see no error in the district court's dismissal of Mora's as-applied Free Exercise claim against the Individual Defendants.

V. Mora's First Amendment Retaliation Claim.

Finally, Mora contends that the chief administrative judge, Lawrence Marks, retaliated against him on the basis of his "religiously based refusal to vaccinate," Mora Br. at 29, when he referred Mora to a disciplinary body. To state a claim for First Amendment retaliation, a public-employee plaintiff must plausibly allege that "(1) he engaged in speech or activity that was protected by the First Amendment; (2) he suffered an adverse employment action; and (3) a causal connection existed between the adverse action and the protected activity." *Specht v. City of New York*, 15 F.4th 594, 600 (2d Cir. 2021) (citing *Smith v. County of Suffolk*, 776 F.3d 114, 118 (2d Cir. 2015)).

Although Mora insists that he was disciplined for seeking a religious exemption, the pleadings again undercut that assertion, revealing that the disciplinary referral was made only *after* (1) Mora failed to follow the procedures required to obtain a vaccine exemption, *compare* J. App'x at 116, *with id.* at 149, and *after* (2) he refused to comply with the then-operative vaccine mandate following the denial of his request for a religious exemption, *see id.* at 64-65. Importantly, Mora does not allege that everyone—or anyone—who merely requested a religious exemption was referred for discipline; nor does he allege that individuals who refused to get vaccinated after the denial of a religious exemption were treated differently (and worse) than those who refused to get vaccinated after the denial of a non-religious exemption. Without such allegations, Mora cannot establish a causal link between his request for a religious exemption (which would on its face qualify as protected First Amendment activity) and his adverse employment action, *i.e.*, his referral to the disciplinary body. We therefore affirm the district court's dismissal of this claim as well.

* * *

We have considered Mora's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

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

/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 19, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

22 CV 10322 (VB)

FRANK MORA,

Plaintiff,

v.

NEW YORK STATE UNIFIED COURT SYSTEM, OFFICE OF COURT ADMINISTRATION; TAMIKO AMAKER, ANNE MINIHAN; LAWRENCE MARKS; JUSTIN BARRY; NANCY BARRY; ROSEMARY MARTINEZ-BURGES; JENNIFER DILALLO; SHAWN KERBY; KEITH MILLER; LINDA DUNLAP-MILLER; SCOTT MURPHY; MICHELLE SMITH; JOHN SULLIVAN; AND DAN WEITZ,

Defendants.

Filed September 19, 2023

OPINION AND ORDER

Briccetti, J.:

Plaintiff Frank Mora, a City Court Judge for the City of Poughkeepsie, New York, brings this action against his employer, the New York State Unified Court System, Office of Court Administration ("OCA"), and individual defendants Tamiko Amaker, Anne Minihan, Lawrence Marks, Justin Barry, Nancy Barry, Rosemary Martinez-Burges, Jennifer DiLallo, Shawn Kerby, Keith Miller, Linda Dunlap-Miller, Scott Murphy, Michelle Smith, John Sullivan, and Dan Weitz (together, the "Individual Defendants"). He alleges defendants violated Title VII of the Civil Rights Act of 1964 and plaintiff's First and Fourteenth Amendment rights by denying him a religious exemption to OCA's COVID-19 vaccine policy.

Now pending are OCA's and the Individual Defendants' motions to dismiss the second amended complaint, each pursuant to Rules 12(b)(1) and 12(b)(6). (Docs. ##73, 81).

For the reasons set forth below, the motions are GRANTED.

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

BACKGROUND

For the purpose of ruling on the motion to dismiss, the Court accepts as true all well-pleaded factual allegations in the second amended complaint and draws all reasonable inferences in plaintiff's favor, as summarized below.

I. COVID-19 Vaccine Religious Exemption Request

Plaintiff is a "duly appointed and sworn" City Court Judge sitting in Poughkeepsie, New York. (Doc. #94 ("SAC") ¶ 1). He describes himself as a "devout, knowledgeable, and committed Catholic." (Id.).

Plaintiff contends that, in August 2021, the Chief Judge of the New York Court of Appeals promulgated a requirement that all OCA employees, including judges, be vaccinated against COVID-19 unless an employee applied for, and was granted, a religious or medical exemption (the "Vaccine Mandate").

On September 10, 2021, defendant Lawrence Marks, the former Chief Administrative Judge for OCA, circulated a memorandum requiring all judges to "obtain and submit proof of COVID-19 vaccination by September 27, 2021 or submit and obtain an approval for a medical or sincerely-held religious exemption." (Doc. #74-3 (the "Marks Memorandum" at ECF 1);[1] *see also* SAC ¶ 13).[2] To seek a religious exemption, a judge had to submit "a

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1. "ECF __" refers to page numbers automatically assigned by the Court's Electronic Case Filing system.

2. OCA submits a copy of the Marks Memorandum with its motion to dismiss. The Court may consider the Marks Memorandum because plaintiff heavily relies on its terms in framing his allegations, including by quoting from it in the SAC. *See San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 808-09 (2d Cir. 1995) (documents partially quoted in the complaint were integral to the complaint and could be considered on a Rule 12(b)(6) motion).

signed and notarized statement detailing the religious basis for his/her objection to COVID-19 vaccination and the religious principle(s) that guide the objections to COVID-19 vaccination." (Marks Memorandum at ECF 2).

Judges who received a religious exemption were provided an expiration date for the exemption and required to submit weekly proof of testing. Judges who were denied a religious exemption had to submit proof of their first vaccination within ten business days after being notified of the denial.[3]

OCA created a Vaccine Exemption Committee ("VEC") to evaluate employee requests for religious exemptions. According to the SAC, the following Individual Defendants are members of the VEC: Justin Barry, Nancy Barry, Rosemary Martinez-Burges, Jennifer DiLallo, Shawn Kerby, Keith Miller, Linda Dunlap-Miller, Scott Murphy, Michelle Smith, John Sullivan, and Dan Weitz (together, the "VEC Defendants").

Plaintiff alleges the VEC was comprised of two working groups, and that a minimum of three voting members was required for a working group to decide on an employee's vaccine exemption request. The VEC's determination to grant or deny an exemption request was allegedly final: there was "no administrative/internal mechanism for appealing" the VEC's determination. (SAC ¶ 26).

3. Two doses of the COVID-19 vaccine were required to be considered "fully vaccinated," but the Vaccine Mandate allowed additional time for a judge to obtain the second dose after being denied a religious exemption. (Marks Memorandum at ECF 1).

Plaintiff submitted an application for a religious exemption on September 21, 2021—his affidavit submitted therewith is attached to the SAC. (SAC at ECF 32).[4]

In the affidavit, plaintiff states he has been Roman Catholic since his baptism in 1970, and has held several positions with a church and studied scripture. He states he has claimed exemption from all vaccinations since the birth of his three children, the oldest of whom was seventeen years old at the time of his exemption request. He says he is "opposed to *all* immunizations," including the New York vaccine mandate for public schools enacted by "the NYS Legislature and the former disgraced Governor" that "unethically kicked [his children] out of school in 2019." (SAC at ECF 35). He discusses the founding of the United States on religious freedom, an "unalienable right," and laments how "[w]hen we as a society demand that parents, and now adults, prove they have 'sincere religious beliefs,' we truly are going down a slippery slope." (*Id.*)

He identifies the "Catechism of the Catholic Church" as "the supreme teaching authority of the Catholic Church" and purports to quote from scripture throughout the affidavit. (SAC at ECF 35). For example, he includes the following quote, attributed to Matthew 12: "People who are in good health do not need a doctor; sick people do." (SAC at ECF 37).

4. Because the SAC and its exhibits were filed as one document, the Court refers to the applicable "ECF" page number when referring to exhibits to the SAC.

He concludes by saying vaccinating himself against COVID-19 "would be an act of violence against my conscience, and thus, an evil," and that "[i]t is my sincere religious conviction and belief that God has created us whole, with everything we need to grow according to His natural ways, and to vaccinate is a violation of God's way." (SAC at ECF 38).

On November 4, 2021, the VEC sent plaintiff an email stating the VEC had considered his application, but "requires more information before it can make a final determination," attaching a supplemental form. (Doc. #74-5 at ECF 1).[5] Section B of the supplemental form states:

> You have provided information in a previous statement indicating that your religious faith calls for you to abstain from medicines and vaccines due to concerns regarding the sanctity of your body or its purity. Please answer the questions below to allow us to gain a better understanding of your beliefs.

5. Because plaintiff's allegations concern the contents of the VEC's November 4 email and plaintiff's response via submitting a supplemental form, the November 4 email, its attachments, and plaintiff's supplemental response, all of which were submitted by OCA with its motion, can be considered in deciding the instant motions. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (a documents is integral to a complaint "where the complaint relies heavily upon its terms and effect, which renders the document 'integral' to the complaint").

Unless otherwise indicated, case quotations omit all internal citations, quotations, footnotes, and alterations.

1. Please list all the medicines, medical treatments and procedures, vaccines, and/or foods that you abstain from due to your religious beliefs:

2. Please list the date you began to abstain from the above listed medicines and vaccines and/or other medical treatments:

3. Please provide a detailed explanation as to why your relpigious faith requires you to abstain from the listed substances in question 1.

4. Have you received an influenza (flu), pneumonia, tetanus, shingles, HPV or any other type of vaccine since turning 18 years of age? If yes, please specify the type of vaccine(s) and when it/they was/were administered.

5. If you listed any vaccines in question 4, please explain how your religious beliefs permit you to take these vaccines but prohibit the taking of a COVID-19 vaccine.

(*Id.* at ECF 6).

Plaintiff submitted a response to the supplemental form on November 12, 2021. (Doc. #74-6 ("Supplemental Response")). In response to question one, plaintiff stated he "fully stated my personal deeply held and sincere religious beliefs regarding vaccines" in his original affidavit. (*Id.* at ECF 4). He also stated his family "does not take any medicines" and that he would "not speculate" if they would in the future because "it is impossible to comment on something of which I have no knowledge." (*Id.*). He also stated there "is no comparison to taking a vaccine to possibly prevent a future disease (please read my [original affidavit] for an in-depth explanation of this issue), and taking a medicine or having a medical treatment or procedure to help a body suffering from a crisis." (*Id.*). In fact, plaintiff stated "[i]f my body was in crisis, I would consider all of the options available to me, and discuss what to do with my doctor," as well as "consult the Bible, the Catechism of the Catholic Church, and pray to God for guidance." (*Id.*).

Plaintiff answered question two by saying he began to abstain from vaccines when he was eighteen years old, question three by referring back to his original affidavit, and questions four and five with "No" and "N/A," respectively. (Supplemental Response at ECF 4).

On December 23, 2021, plaintiff received an email from "NYCourts" denying his exemption request. (SAC at ECF 40). The email attached a letter from the VEC, dated December 23, 2021, directing plaintiff to "submit proof of the first dose of [his] COVID-19 vaccination" by January 3, 2022. (*Id.* at ECF 41).

Plaintiff alleges he does not know which VEC Defendants ruled on his exemption request, and that the VEC did not meet with him to discuss his request.

On January 3 and 4, 2022, plaintiff alleges defendant Anne Minihan, the Administrative Judge for the Ninth Judicial District, sent him several communications prohibiting him from entering any courthouse in the State of New York, including the courthouse where he worked. Instead, he was allegedly directed to work "virtually and off premises." (SAC ¶ 41). According to plaintiff, she sent these communications after plaintiff reiterated that getting vaccinated would violate his sincerely held religious beliefs. Plaintiff claims he was only permitted to enter the courthouse to retrieve his personal belongings and drop off papers while court was open. He alleges these restrictions remained in force until February 17, 2023.

Plaintiff contends he immediately took issue with these limitations because, according to him, unvaccinated attorneys, litigants, jurors, and members of the public were allowed to enter the facilities without proof of vaccination.

For approximately one month, plaintiff alleges OCA ordered him "to desist from conducting criminal proceedings," which, in plaintiff's view, comprised a substantial share of his duties as a judge. (SAC ¶ 47). He claims his criminal case responsibilities were reassigned to the other Poughkeepsie City Court judge. He also contends he was prohibited from sitting as a presiding judge in county and family courts.

On January 31, 2022, plaintiff alleges defendant Minihan issued an Administrative Order allowing him to "preside over (1) civil matters where the litigants have mutually consented to the Judge appearing virtually and (2) the issuance of Decisions and Orders on motions submitted on criminal matters where no appearances are required." (SAC ¶ 49).

Plaintiff alleges these limitations humiliated and embarrassed him.

On March 2, 2022, plaintiff alleges counsel for OCA "false[ly]" informed plaintiff his exemption request had been denied because he failed to provide information necessary for the VEC to determine if his request was based on a sincerely held religious belief. (SAC ¶ 52). Plaintiff alleges counsel for OCA further explained:

> [Plaintiff's] answer in response to question 1 conflicts with his alleged beliefs, and his failure to provide sufficient details of his religious beliefs in response to question 2 prevented the VEC from being able to determine what, if any, belief or religious tenet prevents him from taking the COVID-19 vaccine, apart from his "conscience." His submitted statements do not articulate a consistent reason for why he refused some medical treatments, such as vaccines and immunizations, and not other types.

(SAC ¶ 53). According to plaintiff, this response from OCA's counsel "represents a blatant intrusion and entangling of church and state prohibited by the First Amendment." (SAC ¶ 54).

In April 2022, plaintiff alleges he sought leave from Administrative Judge Minihan to attend a judicial seminar in June or July 2022 at a private venue, but she denied him permission to attend "based on what she described as 'the unfit letter.'" (SAC ¶ 75).

On September 21, 2022, plaintiff alleges he again applied for a religious exemption and for leave to resume performing his duties at the Poughkeepsie courthouse. Plaintiff contends that, at this time, there had been a "significant diminution of the threat caused by COVID" and OCA "never required anyone visiting the courts to show proof of vaccination." (SAC ¶ 81). Nevertheless, on September 27, 2022, plaintiff was purportedly informed the VEC's prior decision was final and it would not review his new application, even though he had "initially been advised that even a successful application for such exemption had only a one-year life." (SAC ¶ 82).

In November 2022, plaintiff alleges he again sought permission to enter the Poughkeepsie courthouse. By this time, plaintiff alleges OCA no longer checked the vaccination status of persons entering the courthouse or required them to wear masks, and that the United States Centers for Disease Control and Prevention guidelines had changed to suggest that unvaccinated persons not be excluded from their places of employment. However, plaintiff alleges Minihan denied his request because plaintiff was not in compliance with the Vaccine Mandate.

Plaintiff purportedly worked alone from his basement until February 17, 2023, when the Vaccine Mandate was repealed and the restrictions on his access to the courthouses were lifted.[6]

Plaintiff alleges two Orange County Court judges, identified as W.P. and C.B., are married and Catholic and "attended church together for years and shared strongly held religious beliefs." (SAC ¶ 59). Plaintiff contends W.P. and C.B. submitted separate requests for religious exemptions, and the VEC granted W.P. an exemption but denied the same to C.B.

He also alleges a court clerk, Milena Scheib, and another full-time OCA employee, Deborah Ghent, are Catholic and submitted requests for religious exemptions. He alleges their applications were "substantially similar to that submitted by plaintiff, invoking the same doctrinal basis in support of their requests for religious exemption," and that their applications were granted. (SAC ¶¶ 63-64).

According to plaintiff, OCA has granted "hundreds" of religious exemptions to employees who share plaintiff's basic religious belief, which he describes in the SAC as: "that God does not condone introducing medical treatment like vaccination into a healthy body, but does not prohibit a body in crises from accepting medical interventions." (SAC ¶ 72).

6. Although the repeal of the Vaccine Mandate is not specifically alleged in the SAC, there is no dispute that it was repealed effective February 17, 2023. (*See* Doc. #68 at ECF 2-4) (letter from plaintiff's counsel attaching memorandum from defendants Nancy Barry and Justin Barry to all OCA employees dated February 15, 2023, announcing the repeal of the Vaccine Mandate effective February 17, 2023).

Plaintiff alleges defendants' conduct has caused him significant insomnia, cold sweats, elevated levels of stress, and an intrusion into his medical and personal history. Plaintiff also alleges "defendants have repeatedly and unconstitutionally claimed that the position of one or another Popes on vaccinations substantially bears upon the bona fides of plaintiff's religious beliefs." (SAC ¶ 89).

II. New York State Division of Human Rights Complaint

On December 28, 2021, plaintiff filed a charge of unlawful discrimination with the New York State Division of Human Rights ("NYSDHR") regarding his exemption denial. In that charge, an incomplete version of which is attached to the SAC (*see* SAC at ECF 20), plaintiff explained other Catholics and people of different faiths had been provided religious exemptions but that, without explanation, his request was denied, representing religious discrimination. He also complained of religious discrimination in the form of being required to test weekly for COVID-19, notwithstanding that he was previously infected with COVID-19, "thereby gaining natural immunity," but others "who did not have Covid, but have been vaccinated" did not have to test. (*Id.* at ECF 22).

On July 6, 2022, the NYSDHR dismissed plaintiff's charge, having determined "there is NO PROBABLE CAUSE to believe that [OCA] has engaged in or is engaging in the unlawful discriminatory practice complained of" because "the investigation revealed [OCA] denied Complainant's request because he failed to articulate a consistently applied religious belief that conflicts with [OCA's] mandatory COVID-19 vaccination policy," not that plaintiff was unlawfully discriminated against. (Doc. #74-10 at 1-2).[7]

III. Referral to the Commission on Judicial Conduct

On January 6, 2022, plaintiff alleges defendant Chief Administrative Judge Marks referred plaintiff to the New York State Commission on Judicial Conduct ("CJC") regarding plaintiff's failure to submit proof of his COVID-19 vaccination by January 3, 2022. Plaintiff argues this referral was made even though the Vaccine Mandate does not state that a judge who is denied a religious exemption and refuses to get vaccinated will be subject to discipline.

According to plaintiff, Marks's referral did not request any particular action but stated the referral was for the CJC's "consideration and appropriate action." (SAC ¶ 67). Plaintiff alleges the CJC has yet to take action on Marks's referral, but that the CJC has "made intrusive inquiries into plaintiff and his families' medical records, and his children's school records." (*Id.* ¶ 71).

7. The Court may consider NYSDHR's resolution of plaintiff's complaint, submitted by OCA with its motion papers, in connection with these motions because plaintiff makes factual allegations about the substance of his NYSHDHR complaint and attaches part of it to the SAC, yet omits and does not discuss the resolution of that complaint. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 421-22 (2d Cir. 2011) (considering emails submitted by the defendant that were identified in the plaintiff's complaint, but not attached to it, as integral to the complaint, in connection with a Rule 12(c) motion).

Plaintiff also alleges another jurist of the Norwich City Court, identified as M.G., was permitted "to continue working from his courthouse" and that the VEC "did not refer him to the Commission [on Judicial Conduct]," notwithstanding that the VEC denied M.G.'s requests for religious and medical exemptions. (SAC ¶ 87).

DISCUSSION

I. Standard of Review

A. Rule 12(b)(1)

A district court must dismiss an action pursuant to Rule 12(b)(1) "for lack of subject matter jurisdiction if the court lacks the statutory or constitutional power to adjudicate it." *Conn. Parents Union v. Russell-Tucker*, 8 F.4th 167, 172 (2d Cir. 2021).

When deciding a Rule 12(b)(1) motion at the pleading stage, the court "must accept as true all material facts alleged in the complaint and draw all reasonable inferences in the plaintiff's favor," except for "argumentative inferences favorable to the party asserting jurisdiction." *Buday v. N.Y. Yankees P'ship*, 486 F. App'x 894, 895 (2d Cir. 2012) (summary order). To the extent a Rule 12(b)(1) motion places jurisdictional facts in dispute, the district court may resolve the disputed jurisdictional fact issues by referring to evidence outside the pleadings. *Amidax Trading Grp. V. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011).

In addition, when a defendant moves to dismiss for lack of subject matter jurisdiction and on other grounds, the court should consider the Rule 12(b)(1) challenge first. *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674, 678 (2d Cir. 1990).

B. Rule 12(b)(6)

In deciding a Rule 12(b)(6) motion, the Court evaluates the sufficiency of the operative complaint under "the two-pronged approach" articulated by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). First, a plaintiff's legal conclusions and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to the assumption of truth and are thus not sufficient to withstand a motion to dismiss. *Id.* at 678; *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010). Second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. at 679.

To survive a Rule 12(b)(6) motion, the allegations in the complaint must meet a standard of "plausibility." *Ashcroft v. Iqbal*, 556 U.S. at 678; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556).

II. Injunctive Relief

Defendants argue plaintiff's request for injunctive relief is moot because OCA has withdrawn the Vaccine Mandate and fully reinstated plaintiff's in-person duties.

The Court agrees.

Plaintiff seeks injunctive relief compelling defendants to take certain actions in their official capacities—namely, to reverse the denial of his exemption request, and to grant him exemption from any future vaccine mandates.

The Eleventh Amendment precludes suits against states and state agencies unless the state expressly waives its sovereign immunity or Congress abrogates that immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996). However, suits against state officers seeking prospective injunctive relief are authorized by the Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908). To "avoid the Eleventh Amendment bar to suit" and seek injunctive relief from state officers, a plaintiff must "(a) allege[] an ongoing violation of federal law and (b) seek[] relief properly characterized as prospective." *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007).

Here, the Vaccine Mandate has been repealed, and plaintiff has been reinstated to his full in-person duties. Therefore, plaintiff has not alleged an ongoing violation of federal law, or a need for prospective relief.

Plaintiff argues he does seek prospective relief: an order requiring defendants to exempt him from all vaccine mandates on religious grounds. However the SAC does not allege the existence of any other vaccine mandate from which he seeks an exemption. Plaintiff's prediction of a future public health emergency in which his COVID-19 Vaccine Mandate exemption denial will "be held against" him is speculative, and is not an ongoing violation of federal law supporting a request for injunctive relief. (Doc. #86 ("Pl. Opp.") at 8).

Accordingly, plaintiff's request for injunctive relief must be dismissed.

III. Claims Against OCA

Plaintiff asserts two claims against OCA arising from the denial of his exemption request and limitations on plaintiff's ability to enter the Poughkeepsie courthouse and perform certain duties: (i) a Section 1983 claim alleging OCA violated the First Amendment's free exercise clause, and (ii) a Title VII claim alleging OCA improperly discriminated against him on the basis of religion. Both claims must be dismissed.

A. Section 1983 Claim Against OCA

OCA argues plaintiff cannot state a Section 1983 claim against it because it is a government entity, and therefore, protected against such suits by the Eleventh Amendment.

The Court agrees.

"[T]he immunity recognized by the Eleventh Amendment extends beyond the states themselves to state agents and state instrumentalities that are, effectively, arms of a state." *Gollomp v. Spitzer*, 568 F.3d 355, 366 (2d Cir. 2009). "[T]he New York State Unified Court System is an arm of the State . . . and is therefore protected by Eleventh Amendment sovereign immunity." *Gollomp v. Spitzer*, 568 F.3d at 366.

New York has not waived its Eleventh Amendment immunity to suit in federal court, and Congress did not abrogate the states' immunity in enacting Section 1983. *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 40 (2d Cir. 1977); *see also Gollomp v. Spitzer*, 568 F.3d at 366 (dismissing Section 1983 claims against the New York State Unified Court System as barred by Eleventh Amendment sovereign immunity). Thus, Section 1983 does not override the Eleventh Amendment, and plaintiff's Section 1983 claim for money damages against OCA is barred by the Eleventh Amendment.

Accordingly, the Section 1983 claim against OCA must be dismissed.

B. Title VII Claim Against OCA

OCA argues plaintiff's Title VII claim must be dismissed because plaintiff is not an "employee" of OCA for purposes of Title VII.

The Court agrees.

Title VII protects employees from employment discrimination based on certain protected characteristics. *See* 42 U.S.C. § 2000e-2(a). "Employee," for Title VII purposes, means "an individual employed by an employer," but specifically excludes:

> any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, *or an appointee on the policy making level* or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

Id. § 2000e(f) (emphasis added). The Supreme Court has held that the exemption for an " 'appointee on the policymaking level' is sufficiently broad" that it exempts "appointed state judges." *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (interpreting identical language in the definition of "employee" in the Age Discrimination in Employment Act of 1967 (the "ADEA")).

Here, plaintiff is a "duly appointed . . . City Court Judge." (SAC ¶ 1).[8] Moreover, plaintiff, who conducts

8. The Court cannot consider the appointment letters OCA submitted with its motion to dismiss (*see* Docs. ##74-1, 74-2), because they are not attached to or incorporated by reference in the SAC, and plaintiff did not rely heavily upon the terms and effect of those letters in drafting the SAC. However, plaintiff does not contest that he was appointed by an elected official. (*See* SAC ¶ 1; *see also* Pl. Opp. at 23-24).

criminal proceedings as a "substantial share of [his] workload" (SAC ¶ 47), certainly "exercise[s] [] discretion concerning issues of public importance." *Gregory v. Ashscroft*, 501 U.S. at 466-67. Therefore, plaintiff falls within the exemption for an "appointee on the policy making level" and is not an "employee" for purposes of Title VII.

Plaintiff argues *Gregory v. Ashcroft* should not apply to plaintiff's Title VII claim because *Gregory v. Ashcroft* interpreted the definition of "employee" in the ADEA. (Pl. Opp. at 23). However, "[t]he definition of an employee in both statutes is identical." *Fischer v. New York State Dep't of Law*, 2014 WL 12674462, at *2 n.1 (S.D.N.Y. June 20, 2014). This is because "[i]n 1974, Congress amended the ADEA, adopting verbatim the definition of employee found in Title VII." *Butler v. New York State Dep't of Law*, 211 F.3d 739, 747 (2d Cir. 2000). Thus, courts generally analyze the "policymaker exemption" to Title VII and the ADEA the same. *See id.*

For example, the Second Circuit has applied *Gregory v. Ashcroft* to a Title VII claim brought by a former deputy bureau chief for the New York State Law Department, who the Circuit determined was an appointee policymaker exempt from the Title VII definition of "employee." *See Butler v. New York State Dep't of Law*, 211 F.3d at 739 (affirming grant of summary judgment); *see also Zagaja v. Vill. of Freeport*, 2015 WL 3507353, at *13 (E.D.N.Y. June 3, 2015) (granting motion to dismiss Title VII claim). Moreover, several federal courts have dismissed Title VII claims brought by judges on this basis. *See Wheale* *v. Polk Cnty.*, 2022 WL 4953350, at *3 (11th Cir. Oct. 4, 2022) (affirming dismissal of Title VII claims brought by a juvenile court judge); *Spann-Wilder v. City of N. Charleston*, 2010 WL 3222235, at *5 (D.S.C. Aug. 13, 2010) (granting summary judgment dismissing Title VII claim brought by a municipal judge). Plaintiff likewise falls within the policymaker exemption, and cannot bring a claim pursuant to Title VII.

Accordingly, plaintiff's Title VII claim against OCA must be dismissed.

IV. Claims Against the Individual Defendants

Plaintiff asserts the following claims against the Individual Defendants, all pursuant to Section 1983:[9] (i) First Amendment free exercise claims against the VEC Defendants for denying plaintiff's request for a religious exemption and "barring him from his place of work" (SAC ¶ 99), and against defendants Marks, Amaker, and Minihan for imposing and enforcing limitations on plaintiff's ability to enter the courthouse in an allegedly overbroad, selective, and irrational basis;[10] (ii) a First

9. In his opposition, plaintiff clarifies that he is suing the Individual Defendants only in their personal capacities, and not in their official capacities. (Pl. Opp. at 9).

10. Although plaintiff's fourth cause of action seems to assert a selective enforcement claim arising under the Equal Protection Clause, it does not refer to the Fourteenth Amendment or the Equal Protection Clause. (*see* SAC ¶ 103 ("By imposing and enforcing prohibitions against him in an overbroad, selective, and irrational basis, defendants UCS, Marks, Amaker, and Minihan

Amendment retaliation claim against Marks for referring plaintiff to the CJC; and (iii) a Fourteenth Amendment equal protection claim against the VEC Defendants for denying his religious exemption while allegedly approving exemptions submitted by similarly situated persons. For the reasons that follow, each claim must be dismissed.

A. Personal Involvement of the VEC Defendants

The VEC Defendants argue plaintiff's Section 1983 claims against them must be dismissed because plaintiff does not allege which VEC Defendants reviewed (and denied) his exemption request.

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have each violated plaintiff's free exercise rights of his religion as guaranteed by the First Amendment.")). Accordingly, the Court treats plaintiff's fourth cause of action as pleaded—a First Amendment free exercise claim.

However, even if plaintiff had intended to assert a Fourteenth Amendment selective enforcement claim against Marks, Amaker, and Minihan, he has failed to plead that claim. Plaintiff claims he was treated differently from M.G., who was allegedly allowed to continue working from his courthouse after being denied religious and medical exemptions. However, plaintiff has not alleged that M.G. refused to get vaccinated once his exemption requests were denied, as plaintiff did, and therefore, that M.G. was "similarly situated" to plaintiff, or any facts that indicate the allegedly different treatment plaintiff received was "was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996). Accordingly, even considered through the lens of the Equal Protection Clause, plaintiff's claim would be dismissed.

The Court disagrees.

Plaintiff contends he is suing all VEC members because none of his written communications with the VEC revealed who reviewed his exemption request and the VEC never met with him personally to discuss his exemption request.

At this early stage, it is reasonable to infer that any or all of the VEC Defendants could have participated in reviewing and denying plaintiff's exemption request, and thus the Court will not dismiss claims against the VEC Defendants based on lack of personal involvement. *See Collins v. City Univ. of N.Y.*, 2023 WL 1818547, at *6 (S.D.N.Y. Feb. 8, 2023).

However, as discussed below, plaintiff's First Amendment free exercise claim and Fourteenth Amendment equal protection claim against the VEC Defendants must be dismissed for failure to state a claim.

B. Free Exercise Claims

The VEC Defendants and defendants Marks, Amaker, and Minihan argue plaintiff fails to state a free exercise claim because the Vaccine Mandate, as plaintiff alleges it was applied to him, is a neutral and generally applicable rule that passes rational basis review.

The Court agrees.

1. Legal Standard

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. It "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." *Kane v. De Blasio*, 19 F.4th 152, 163-64 (2d Cir. 2021).

"This protection, however, 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.'" *Kane v. De Blasio*, 19 F.4th at 164 (quoting *Emp. Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990)). Thus, "a state can determine that a certain harm should be prohibited generally, and a citizen is not, under the auspices of her religion, constitutionally entitled to an exemption." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 281 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021), *cert. denied sub nom.*, *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022).

"[A] law that incidentally burdens religious exercise is constitutional when it (1) is neutral and generally applicable and (2) satisfies rational basis review." *We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 144 (2d Cir. 2023). "If the law is not neutral or not generally applicable, it is subject to strict scrutiny, and the burden shifts to the government to establish that the law is narrowly tailored to advance a compelling government interest." *Id.*

Regarding neutrality, "the minimum requirement of neutrality is that a law not discriminate on its face." *Kane v. De Blasio*, 19 F.4th at 164. In addition, "[t]he State fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th at 281. "To fail the neutrality prong, it is not enough for a law to simply *affect* religious practice; the law or the process of its enactment must demonstrate hostility to religion." *We the Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th at 145.

Regarding general applicability, a law is not generally applicable "if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"; or "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th at 284. But "[a]n exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons." *Kane v. De Blasio*, 19 F.4th at 165. For a law that includes exemptions to not be "generally applicable, 'there must be some showing that the exemption procedures allow secularly motivated conduct to be favored over religiously motivated conduct.'" *Ferelli v. Unified Court Sys.*, 2022 WL 673863, at *6 (N.D.N.Y. Mar. 7, 2022) (quoting *Kane v. De Blasio*, 19 F.4th at 165).

2. Application

Here, plaintiff fails to allege the Vaccine Mandate as applied violated his free exercise rights.[11]

First, the Vaccine Mandate is neutral. "[I]t applies to all judges and employees of the state court system, and in no way singles out those who decline vaccination on religious grounds." *Ferrelli v. Unified Court Sys.*, 2022 WL 673863, at *6 (considering the same Vaccine Mandate on a motion for a preliminary injunction and temporary restraining order brought by OCA employees who sought and were denied religious exemptions). Moreover "[p]laintiff has not pleaded, nor argued, any facts that suggest that the purpose of the rule was to suppress or discriminate against religion, rather than to protect the workers" of OCA "and those interacting with them from a highly contagious and potentially fatal virus." *Algarin v. NYC Health & Hosps. Corp.*, 2023 WL 4157164, at *12 (S.D.N.Y. June 23, 2023).

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11. The Court fairly construes the SAC to complain of how the Vaccine Mandate was applied to plaintiff, not to assert facial challenges to the Vaccine Mandate. (*See* SAC ¶ 99) (claiming the VEC Defendants violated the free exercise clause "[b]y wrongfully failing to recognize his sincerely held religious beliefs, denying him a religious exemption, and barring him from his place of work", ¶ 103) (claiming defendants Marks, Amaker, and Minihan violated plaintiff's free exercise rights "[b]y imposing and enforcing prohibitions against him in an overbroad, selective, and irrational basis"). However, plaintiff also fails to plead a facial challenge to the Vaccine Mandate for the same reasons his "as applied" challenge fails—that is, because the Vaccine Mandate, as alleged, is neutral and generally applicable and withstands rational basis scrutiny.

That plaintiff's exemption request was denied does not obviate the Vaccine Mandate's neutrality. *See Collins v. City Univ. of N.Y.*, 2023 WL 1818547, at *8 (quoting *Phillips v. City of N.Y.*, 775 F.3d 538, 543 (2d Cir. 2015)). In fact, by "permit[ting] exemptions for [employees] who put forth sincerely held religious beliefs," the Vaccine Mandate "goes beyond what the Constitution requires." *Id.*

Thus, plaintiff has alleged the Vaccine Mandate was applied to him neutrally.

Second, the Vaccine Mandate is generally applicable. The exemption application required applicants to describe the sincerely held religious beliefs that prevented them from being vaccinated against COVID-19, and the supplemental form asked applicants to support their professed religious beliefs by describing their prior and anticipated conduct respecting medicines and vaccines. Thus, the religious exemption application and supplemental form did "not presuppose the illegitimacy" of plaintiff's articulated religious beliefs, but "merely [sought] to determine whether such concerns are the applicant's true motivation for seeking an exemption." *Ferrelli v. Unified Court Sys.*, 2022 WL 673863, at *8.

"While a state is not entitled to evaluate the legitimacy of religious beliefs, courts have made clear that the state is permitted to assess whether a belief is sincerely held and religious in nature." *Brignall v. New York State Unified Court Sys.*, 2022 WL 17543641, at *7 (N.Y. Sup. Ct. Steuben Cnty. Apr. 13, 2022) (considering a motion to preliminarily enjoin the same Vaccine Mandate on free exercise and equal protection grounds). Here, the Vaccine Mandate did "not create[] a system of individualized exemptions and refuse[] to extend it to religious hardships." *Ferrelli v. Unified Court Sys.*, 2022 WL 673863, at *7. Rather, the mandate created a "system of religious exemptions" that permissibly permitted the VEC to assess the sincerity of applicants' professed beliefs, but "refused to extend it to Plaintiff[] based on [plaintiff's] responses, or lack thereof, to a supplemental form." *Id.*

Moreover, plaintiff has not alleged the VEC Defendants "favored certain religious beliefs over others." *Ferrelli v. Unified Court Sys.*, 2022 WL 673863, at *8. In fact, plaintiff alleges two Catholic employees of OCA submitted applications for religious exemptions "substantially similar to that submitted by plaintiff, invoking the same doctrinal basis in support," that were granted. (SAC ¶ 62). Nor has he alleged that exemption applications based on comparable secular conduct were favored.

Therefore, plaintiff has not pleaded that the Vaccine Mandate provided a mechanism for individualized exemptions or prohibited religious conduct while permitting comparable secular conduct.

Accordingly, the Vaccine Mandate, as plaintiff alleges it was applied to him, is neutral and generally applicable, and is subject to rational basis review, a level of scrutiny it easily passes.[12]

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12. Even if the Court had determined that the Vaccine Mandate, as alleged by plaintiff, was subject to strict scrutiny, at least one court has determined it would "satisfy that rigorous test,"

First, "[s]temming the spread of COVID-19 is unquestionably a compelling interest," and therefore is certainly a legitimate one. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020). Second, the Vaccine Mandate is rationally related to furthering that interest because it maximizes the vaccination rates of OCA employees against COVID-19, whom members of the public are required to interact with, including criminal defendants, lawyers for parties in civil and criminal actions, and the parties themselves.

Accordingly, plaintiff's First Amendment free exercise claims must be dismissed.[13]

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and this Court agrees. *See Ferrelli v. Unified Court Sys.*, 2022 WL 673863, at *8; *see also UnifySCC v. Cody*, 2022 WL 2357068, at *8 (N.D. Cal. June 30, 2022) (vaccine mandate with an exemption for sincerely held religious beliefs applicable to all Santa Clara County employees was subject to rational basis review but would more likely than not survive strict scrutiny).

13. A New York state court recently determined OCA acted arbitrarily and capriciously in denying certain religious exemption applications under the same Vaccine Mandate based on applicants' reservations regarding the COVID-19 vaccines being tested on fetal cell lines. *See Ventresca-Cohen v. DiFiore*, 77 Misc. 3d 652 (N.Y. Sup. Ct. Albany Cnty. 2022). However, plaintiff is incorrect that *Ventresca-Cohen* supports his position. The religious beliefs plaintiff professed have nothing to do with fetal cell lines. Moreover, the *Ventresca-Cohen* court determined OCA did *not* act arbitrarily and capriciously when it denied exemption requests based on the applicant's belief in the sanctity and purity of the body, or because the applicant failed to identify a particular religious belief or tenet or comply with OCA's requests for further information. *Id.* at 667, 668. The court also noted how other courts had "repeatedly rejected requests for injunctions

C. First Amendment Retaliation Claim

Defendant Marks argues plaintiff's First Amendment retaliation claim must be dismissed because the CJC has not yet concluded its investigation and, therefore, the claim

and/or dismissed facial challenges to the Unified Court System's COVID-19 vaccination policy." *Id.* at 663 n.3 (collecting cases); *see also Brignall v. New York State Unified Court Sys.*, 2022 WL 17543641, at *2 (denying a motion to preliminarily enjoin the Vaccine Mandate, holding "UCS had a rational basis for implementing the [Vaccine Mandate] as a means for achieving its goal of minimizing the spread of COVID-19 through the UCS facilities and maintaining an accessible forum for justice.").

Plaintiff also submitted, as supplemental authority in support of his opposition, another recent state court case, *Cooper v. Roswell Park Comprehensive Cancer Ctr.*, 2023 WL 5660095 (N.Y. Sup. Ct. Aug. 17, 2023). The *Cooper* court vacated an arbitration award approving the termination of a nurse's employment for failure to comply with the vaccine mandate for New York State healthcare workers as contrary to public policy. *Id.* at *15. Specifically, the plaintiff in *Cooper* was granted a religious exemption to that mandate, only to have it subsequently revoked. *Id.* at *2. Her employment was suspended without pay the following day, and a notice of discipline was imposed three days later. *Id.* However, at the time of the arbitration decision, the vaccine mandate at issue in *Cooper*, which was promulgated by statute by a different government authority, had been held unconstitutional by a state court for violating existing law preventing the Commissioner of Health for the State of New York from ordering mandatory immunization. *See id.* at **2, 4. Thus, the facts surrounding and legal standards governing the plaintiff's claims in *Cooper* are inapplicable to plaintiff's free exercise and equal protection claims in this action, which challenge a different vaccine policy promulgated by the New York courts.

is not ripe for review, and because plaintiff has failed to state a retaliation claim.

The Court agrees the claim must be dismissed for failure to state a claim.

1. Legal Standard

"To survive a motion to dismiss, a plaintiff claiming that he was retaliated against in violation of the First Amendment must plausibly allege that (1) he engaged in speech or activity that was protected by the First Amendment; (2) he suffered an adverse employment action; and (3) a causal connection existed between the adverse action and the protected activity." *Specht v. City of New York*, 15 F.4th 594, 600-01 (2d Cir. 2021). "The speech of a public employee is protected by the First Amendment when the employee speaks as a citizen on a matter of public concern, rather than pursuant to his employment responsibilities." *Id.* at 601.

"[O]nly retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action." *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 225 (2d Cir. 2006). "In this context, adverse employment actions include discharge, refusal to hire, refusal to promote, demotion, reduction in pay, and reprimand" although "lesser actions" such as "negative evaluation letters" or "express accusations of lying" may also be considered adverse employment actions. *Id.* at 226.

Adverse actions "may also include a pattern of harassment, where, using an objective standard, a plaintiff shows that the total circumstances of [his] working environment changed to become unreasonably inferior and adverse when compared to a typical or normal, not ideal or model, workplace." *Montero v. City of Yonkers*, 890 F.3d 386, 400 (2d Cir. 2018). The "test for determining whether an employer has taken adverse action is not wooden: it must be tailored to the different circumstances in which retaliation claims arise." *Specht v. City of New York*, 15 F.4th at 604. However, the alleged act of retaliation must be "more than de minimis." *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d at 226.

To "plausibly allege a causal connection between the adverse employment action and the protected activity," the plaintiff must allege "the protected activity was a substantial motivating factor in the adverse employment action." *Specht v. City of New York*, 15 F.4th at 604-05.

2. Application

Even assuming plaintiff has pleaded he engaged in protected speech—that is, assuming submitting a private application for a vaccine exemption (or his complaints to defendant Minihan about not being granted the requested exemption) comprise protected speech—and causation, he has not alleged that he suffered adverse action.

Although plaintiff alleges Marks referred him to the CJC, a disciplinary committee, "for its consideration and appropriate action" (SAC ¶ 67), the CJC has not concluded its investigation or imposed discipline.

Mere referral to a disciplinary body, without any resulting discipline, is not a sufficiently adverse employment action to deter a similarly situated individual to plaintiff—a judge—from exercising his constitutional rights. *See Murray v. Town of North Hempstead*, 853 F. Supp. 2d 247, 269 (E.D.N.Y. 2012) (threats of termination and the consideration of disciplinary charges were not adverse employment actions).

Accordingly, the First Amendment retaliation claim against Marks must be dismissed.

D. Equal Protection Claim

The VEC Defendants argue the equal protection claim against them must be dismissed because plaintiff has failed to plead he was treated differently from a similarly situated individual or that these defendants acted with discriminatory intent in denying plaintiff's application for a religious exemption.

The Court agrees.

In order to state a selective enforcement equal protection claim, a plaintiff must plausibly allege: "(1) the person, compared with others similarly situated, was selectively treated; and (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Crowley v. Courville*, 76 F.3d 47, 52-53 (2d Cir. 1996).[14]

Plaintiff does not identify any similarly situated individuals that the VEC Defendants treated differently. He identifies one other judge and two non-judicial employees who were granted religious exemptions but does not allege facts that would permit the Court to reasonably infer that those applications relied on the same purported religious tenets as plaintiff. Regarding the other judge, W.P., plaintiff alleges only that W.P. was Catholic. And regarding the two non-judicial employees, he claims only that they submitted "substantially similar" applications to that submitted by plaintiff, which is conclusory and insufficient to plead that those individuals are similarly situated to plaintiff.

And even if plaintiff had adequately alleged he was treated differently from similarly situated individuals, he does not allege he was "treated less favorably [than such similarly situated individuals] *because of his religious affiliation*—which is the protected class at issue in [plaintiff's] class-wide selective enforcement claim." *King v. City of New York*, 581 F. Supp. 3d 559, 576

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14. "[T]he class-of-one theory of equal protection does not apply in the public employment context." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008). Therefore, plaintiff cannot state an equal protection claim by "claim[ing] that [he] has been irrationally singled out as a so-called 'class of one,'" without any allegation of class-based discrimination. *Id.* at 601.

(S.D.N.Y. 2022), *aff'd*, 2023 WL 2398679 (2d Cir. 2023). Indeed, plaintiff contends OCA has granted "hundreds" of religious exemptions to employees who "profess the same basic religious belief as plaintiff holds" (SAC ¶ 72), from which the Court may reasonably infer that it was not the substance of plaintiff's stated religious beliefs that resulted in his request being denied. Nor has plaintiff pleaded any facts that indicate his application was denied based on other impermissible considerations.

Moreover, "[w]hen a free exercise challenge fails, any equal protection claims brought on the same grounds are subject only to rational-basis review." *Kane v. De Blasio*, 19 F.4th at 167 n.14; *see also Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004) ("Because we hold . . . that the [challenged] program is not a violation of the Free Exercise Clause . . . we apply rational-basis scrutiny to [the plaintiff's] equal protection claims" premised on the same program.); *We The Patriots USA, Inc. v. Conn. Off. of Early Childhood Dev.*, 76 F.4th at 158. Because plaintiff failed to state a free exercise claim against the VEC Defendants based on the same conduct, and the Vaccine Mandate, as alleged by plaintiff, survives rational basis review, his equal protection claim premised on the same conduct must fail.

Accordingly, plaintiff's equal protection claim against the VEC Defendants must be dismissed.

CONCLUSION

The motions to dismiss are GRANTED.

The Clerk is instructed to terminate the motions (Docs. ##70, 73, 81) and close this case.

Dated: September 19, 2023
White Plains, NY

SO ORDERED:

/s/ Vincent L. Briccetti
Vincent L. Briccetti
United States District Judge