No. 21A-

IN THE

Supreme Court of the United States

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

Applicants,

v.

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, IN HIS OFFICIAL CAPACITY OF HEALTH COMMISSIONER OF THE CITY OF NEW YORK, MEISHA PORTER, IN HER OFFICIAL CAPACITY AS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, ERIC ADAMS, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

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

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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QUESTIONS PRESENTED

On November 28, 2021, a merits panel of the Second Circuit Court of Appeals ("First Merits Panel") held that the New York City Department of Education ("DOE") likely violated the First Amendment by implementing a new vaccine mandate through a facially discriminatory religious exemption policy ("Accommodation Policy"). Thousands of employees were suspended pursuant to this policy. Rather than issue an order reinstating them, the First Merits Panel granted Respondents' request for two weeks to provide "fresh consideration" at least to the applications of the named parties, after which they promised to reinstate applicants who met statutory standards for religious accommodation with back pay. Plaintiffs-Applicants ("Applicants") objected, asserting that the proposal was a thinly veiled attempt to whitewash the acknowledged religious discrimination, noting, among other concerns, that it did nothing to cure Respondents' First Amendment violations, and that the "fresh consideration" was to be determined by Respondents' own attorneys, who represent them in this litigation and cannot be neutral. Indeed, all but one of the fourteen applicants were summarily denied again on remand, with no explanation other than "does not meet criteria." Now, despite the fact that the First Merits Panel held they are likely to succeed on the merits, Applicants shall be terminated as of February 14, 2022, unless they waive their right to continue this litigation or violate their sincere religious beliefs. The questions presented are:

1. Whether the "fresh consideration" afforded on remand rebuts Applicants' prima facie case of discrimination and forecloses further injunctive relief.
2. Whether the DOE's vaccine mandate violates the First Amendment.
3. Whether the lower courts erred in holding there is no irreparable harm where the state forces its employees to choose between their faith and their job.

PARTIES TO THE PROCEEDING

The Applicants (Plaintiffs-Appellants below), Matthew Keil, John De Luca, Sasha Delgado, Dennis Strk, Sarah Buzaglo, Michael Kane, William Castro, Margaret Chu, Heather Clark, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Trinidad Smith and Amaryllis Ruiz-Toro, are employees of the New York City Department of Education.

The Respondents (Defendants-Appellees below) are the City of New York, Board of Education of the City School District of New York, David Chokshi, in his official capacity as Health Commissioner of the City of New York, Meisha Porter,[1] in her official capacity as Chancellor of the New York City Department of Education, and Eric Adams, in his official capacity as Mayor of the City.

LIST OF ALL PROCEEDINGS

In the U. S. Court of Appeals for the Second Circuit:

- *Keil et al. v. City of New York, et al.*, No. 21-2711, orders entered November 15 and 28, 2021
- *Keil et al. v. City of New York, et al.*, No. 21-3043, order entered February 3, 2022
- *Kane et al. v. Bill de Blasio, et al.*, No. 21-2678, orders entered November 15 and 28, 2021
- *Kane et al. v. Bill de Blasio, et al.*, No. 21-3047, order entered February 3, 2022

In the U. S. District Court for the Southern District of New York:

- *Keil et al. v. City of New York, et al.*, No. 21-cv-8773 (VEC), orders entered October 28 and December 14, 2021
- *Kane et al. v. Bill de Blasio, et al.*, No. 21-cv-7863 (VEC), orders entered October 5, October 12, and December 14, 2021

[1] Ms. Porter has left her post and been replaced as Chancellor, but her successor has not yet been substituted for her below.

DECISIONS BELOW

The district court's order dated October 12, 2021 which denied the *Kane* plaintiffs' motion for a temporary restraining order or preliminary injunction is published at *Kane v. de Blasio*, 2021 U.S. Dist. LEXIS 210957 (S.D.N.Y. Oct. 12, 2021) and reprinted in Appendix ("App.") C. The district court's unreported order denying the *Kane* plaintiffs' motion for an injunction pending appeal is reprinted in App. Q. The district court's unreported order dated October 28, 2021, denying the *Keil* plaintiffs' motion for a temporary restraining order or preliminary injunction is reprinted in App. I. The district court's unreported order denying the *Keil* plaintiffs' motion for an injunction pending appeal is reprinted in App. R. The Second Circuit's decision, order and judgment granting in part the Applicants' motion for an injunction and remanding the case for additional administrative decision are published at *Kane v. de Blasio*, 2021 U.S. App. LEXIS 35102 (2d Cir. Nov. 28, 2021) and reprinted in Apps. L and M.

The district court's December 14, 2021 order on remand in both the *Kane* and *Keil* cases denying the motions of all applicants for an injunction pending appeal, is reported at *Kane v. de Blasio*, 2021 U.S. Dist. LEXIS 239124, __ F. Supp. 3d ___, 2021 WL 5909134 (S.D.N.Y. Dec. 14, 2021) and reprinted in Apps. Q and R. The district court's unreported order denying the *Kane* and *Keil* plaintiffs' motion for an injunction pending appeal is reprinted in Apps. S and T. The Second Circuit's unpublished decision dated February 3, 2022, denying the Applicants' motion for an injunction pending appeal is reprinted in App. W.

JURISDICTION

Applicants have a pending interlocutory appeal in the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1292. This Court has jurisdiction, pursuant to 28 U.S.C. § 1651.

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To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

By Supreme Court Rules 20, 22, and 23, and 28 U.S.C. 1651, Applicants respectfully request an injunction pending appellate review, temporarily enjoining the continued enforcement of the Mandate against the (less than) three percent of employees who cannot comply due to religious objection.

The wrongfully suspended employees filed their emergency motion for injunction over four months ago and were already found to be likely to succeed by a merits panel on interlocutory appeal because their First Amendment rights were (and continue to be) blatantly violated. Despite this finding, the lower courts continue to delay providing meaningful substantive relief. Applicants and all others should be reinstated to the payroll, and the DOE's unconscionable deadlines for employees to waive their right to sue or lose health insurance benefits over the course of the next week should be stayed.

The issues in this case have been thoroughly briefed, and argued now five times, in the lower courts – by Respondents' counsel and by two teams of lawyers for Applicants, whose cases were most recently consolidated. It is indisputably clear that Respondents grossly violated the Constitution in applying their vaccine mandate. The lower courts acknowledged that the policies under which employees were suspended are "blatantly violative of the First Amendment guarantee" *Kane et al. v. Bill de Blasio, et al.*, No. 21-2678 (2d Cir.) (hereinafter cited as "USCA2 21-2678"), ECF 67, at A-803) because they require discrimination against employees with unorthodox religious beliefs. In implementing the policy, the DOE went even further, resurrecting the unlawful practice of heresy inquisitions and zealously arguing that Orthodox Jews were bound by the pro-vaccination views of rabbis in another country whom they had never even met, and that even non-Catholic employees should be denied religious accommodation because Pope Francis

and other preferred religious leaders do not support their viewpoints.

Various alternative measures can be taken short of forcing employees to submit to vaccination against their sincerely held religious beliefs. (*Kane v. de Blasio,* No. 1:21-cv-7863 (VEC) (S.D.N.Y.) (hereinafter cited as "SDNY 21-cv-7863"), ECF Decl. of Dr. Bhattacharya ECF 18 and Decl. of Dr. Makary, ECF 19). Notably, no other school district among the state's approximately 700 districts require, or has ever required, its teachers to be vaccinated against COVID-19. (*Keil v. City of New York*, No. 21-2711 (2d Cir.) (hereinafter cited as "USCA2 21-2711"), ECF 94, at SA-62–SA-74). Respondents have offered no substantive evidence to establish that their employees cannot be safely accommodated, or that they even attempted to consider alternatives to suspension and termination.

Applicants sought an emergency injunction on October 4, 2021. Ten different judges that reviewed this case at the district and circuit court levels have now acknowledged that the Accommodation Policy under which employees were suspended is unconstitutional. Even Respondents admit that it is at least "constitutionally suspect."

Rather than provide real injunctive relief, the circuit court entertained Respondents' proposal to attempt to fix the problem themselves through a "fresh consideration" process conducted by their defense attorneys and agents. Predictably, rather than provide relief, they merely rubber stamped the previous wrongful suspensions and further delayed justice. Meanwhile, suspended without pay now for over four months, Applicants and the thousands of others that were wrongfully suspended under the discriminatory Accommodation Policy are in crisis. They are losing their homes and struggling just to feed themselves and their families. Yesterday, Applicants were instructed that if they do not waive their right to continue this litigation or get vaccinated in violation of their religious beliefs by Valentine's Day, they will be permanently terminated, losing

their health benefits, seniority, tenure and important pension rights forever. Applicants have exhausted all options for timely relief below. Only this Court can help them avoid further devastating, imminent and irreparable harm and preserve this matter for judicial review.

STATEMENT OF THE CASE

Plaintiffs-Applicants ("Applicants") are public school teachers, supervisors and staff employed by the New York City Department of Education ("DOE"), an agency of the City of New York (the "City"). Most Applicants have worked for the DOE for decades and accumulated significant seniority, pension, and tenure rights. Each holds a sincere, deeply held religious belief that prevents him or her from taking a COVID-19 vaccine.

For a year and a half before the Mandate took effect last October, Applicants were celebrated as "heroes" working on the frontlines to educate children as the pandemic raged. Many caught COVID-19 and have natural immunity. Only after the state of emergency was repealed in New York, in the summer of 2021, Mayor Bill de Blasio decided to mandate COVID-19 vaccines for all DOE employees (the "Mandate"), even if the employee's job was remote and involved no physical presence among other people. Though titled an "emergency" executive regulation, the Mandate was not to take effect until several months later (initially September 27, 2021, later moved to October 4, 2021).

In late September, the DOE sent notices to its employees giving them a very short time to submit requests for exemption from the Mandate ("Initial Reviews"). Everyone was denied with an auto-generated message that it would be an "undue hardship" to accommodate any employee. The same form was even sent to employees who already worked remotely or who were able to easily work remotely. (*See, e.g.,* SDNY 21-cv-8773, ECF 23). Employees were given one day to appeal their denials ("SAMS Appeals"). Both the Initial Reviews (*see, e.g.*, *Keil v. City of New*

York, No. 1:21-cv-8773 (VEC) (S.D.N.Y.) (hereinafter cited as "SDNY 21-cv-8773"), ECF 28-2) and the SAMS Appeals were governed by procedures and standards that were first announced in an arbitral award dated September 10, 2021, but which were adopted more generally by the DOE and the City as their official Accommodation Policy. (App. H, at 11). The procedures set forth in the Accommodation Policy formed the "exclusive" means of obtaining a religious exemption from the Mandate. (App. H., at 24).

The Accommodation Policy incorporated standards and evidentiary requirements that were patently inconsistent with the DOE employees' First Amendment rights. (SDNY 21-cv-8773, ECF 17-6.) For example, the Accommodation Policy standards specifically defined and limited requests for religious accommodations or exemptions:

> Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy). Requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an on line source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists). *Id*. at 9, Section I.C.

Most of the Applicants, and thousands of other unvaccinated DOE employees submitted applications to the DOE's Initial Review process.[2] The record contains examples of persuasive applications that were submitted to the DOE in both the Initial Review and in the SAMS Appeals, yet were denied. (*See, e.g.*, SDNY 21-cv-8773, ECF 27.) Applicant Matthew Keil's application provides an example: as an ordained Deacon in the Orthodox Church, Keil has spent much time and effort sojourning in monasteries, studying the Christian scriptures, and learning spirituality

[2] One applicant did not submit an application under unconstitutional standards, as the Accommodation Policy specifically stated that unorthodox religious beliefs would not be accommodated. This Applicant elected instead, like many others in the proposed class, to begin raising money for a lawsuit.

from monks and other religious authorities from his faith. His path of study has led him to believe that through the sacrament of communion he shares in the blood of Christ physically in his own body, and that scriptural commands not to profane God's holy temple require him to abstain from injecting vaccines and other substances into his bloodstream. To do otherwise would cause him to be "judged by God." (SDNY 21-cv-8773, ECF 27 at 2-4, paras. 13, 16, 18-21, 25). As a result, he has abstained from all vaccinations in his adult life and has also declined to vaccinate any of his six children. Each of the Applicants has his or her own unique religious story and specific religious beliefs that require them to refuse obey the Mandate.

Unfortunately, the Respondents did not give a fair hearing to requests for religious exemption. The Accommodation Policy made fair adjudications impossible by imposing tests for the preparation and adjudication of religious exemption requests that violated the Free Exercise Clause on their face. Potential applicants were required to submit clergy letters in support of their applications, which disqualified potential applications from persons who did not belong to a religious group that had clergy whose religious beliefs led them to oppose vaccination (or whose clergy were not available to write a letter on one day's notice). Potential applicants were required to support published materials in support of their beliefs, but not from the internet. The Exemption Standards said that applicants who belonged to religions that were well known to oppose vaccination (expressly mentioning Christian Science) could receive exemptions, but not those who belonged to religious groups whose religious leaders have ever spoken in favor of vaccination (e.g., Roman Catholics). (App H, at 20). Additionally, religious exemptions would only be granted for members of recognized and established religious organizations.

Respondents' hostility towards religious opposition to vaccines made accommodation even harder. On October 4, 2021, the DOE began excluding all unvaccinated employees from school

buildings. As denials were generated, the employees were placed on "leave without pay" ("LWOP"), which is involuntary suspension.

Approximately 7,000 employees out of 147,000 employees (3.4% of all employees) were initially placed on LWOP under the Accommodation Policy. (SDNY 21-cv-7863, ECF 52). 165 received accommodations, many of them after the motion for injunctive relief was filed. (SDNY 21-cv-7863, ECF 106-4 at 3.) Applicants submitted evidence to the district court that the arbitrators and City attorneys who participated in the SAMS Appeals regularly referred to the invalid Accommodation Policy standards in discussing the merits of DOE employees' exemption claims. (*See, e.g.*, SDNY 21-cv-8773, ECF 27 at 6, para. 33; ECF 28, at 4, paras. 27, 28, 31; ECF 30 at 4-5, paras. 22, 24, 26-28.) The DOE went a step further, turning the appeals into what can only be properly called heresy inquisitions, and zealously arguing that employees should be denied accommodation because their beliefs run afoul of "established" orthodoxy and are not supported by Pope Francis, and other popular religious leaders. These arguments were levied not only against Roman Catholic applicants, but even Buddhists and non-denominational born-again Christians. (*See, e.g.*, SDNY 21-cv-7863, ECF 20, 21, 22). Orthodox Jews have been told that their requests are suspect because a rabbi living in a different country (and under whose authority they are not bound) disagreed with their standpoint, despite letters of support from their own rabbis. (*See, e.g.*, USCA2 21-2678, ECF 65 at JA-313). Others who possessed the same beliefs were granted exemptions, though the DOE has remained silent on Applicants' speculation that these were largely granted after they filed their motions pointing out the blatant religious discrimination. Matthew Keil, who was ordained as a deacon in the Russian Orthodox Church, was told that his biblically based beliefs seemed merely personal, especially when other Orthodox Christians chose to get vaccinated. (USCA2 21-2678, ECF 65 at JA-376). It was suggested to Appellant Delgado

that other Christian denominations' support of the vaccination made her objection somehow insincere when her own pastor never spoke in favor of it. (USCA2 21-2678, ECF 65 at JA-395, 396). And this is only the tip of the iceberg.

Despite submitting extensive materials in support of their religious exemption applications and appeals, (SDNY 21-cv-8773, ECF 25-1, 27-1, 27-2, 27-3, 28-1, 28-2, 28-3, 29-1, 29-2, 29-3, 30-1, 30-2, 30-3, 30-4), all but one of the Applicants was denied on appeal. The denials provided no detail, and simply had a checked box stating "denied." Denial of an exemption request triggered a cascade of adverse employment effects, according to the Accommodation Policy. In addition to being involuntarily suspended, denied employees faced a deadline to either "opt" for separation from employment with short-term continuation of insurance coverage by October 29, 2021 and the ability to be compensated for accrued paid time off, or "opt" to continue voluntarily on LWOP status by November 30, 2021, losing compensation for accrued paid time off, but retaining insurance coverage for several months. Under this latter option, employees are forbidden from earning any income while on LWOP, even from outside sources or unemployment compensation. Either option requires employees to waive all rights to challenge the DOE's actions in enforcing the Mandate. Those who choose neither option by the deadline are subject to termination for "misconduct"[3] and lose all rights to their accrued paid time off, which for some, amounts to tens of thousands of dollars. To date, employees who did not opt out have a misconduct notation in their file for refusing to be vaccinated, making it virtually impossible to find new employment even if they were allowed. (SDNY 21-cv-7863, ECF 102).

[3]The New York State Government doubled down on the punitive enforcement of the Mandate on September 25, 2021, when Governor Kathy Hochul announced that persons who refused vaccination would be considered to have been terminated for misconduct, disqualifying them from the receipt of unemployment benefits.

Contending that the Mandate facially, and as applied through the Accommodation Policy, restricted their religious freedom, violated the Establishment Clause, deprived them of due process, and violated multiple other laws, ten Applicants (the *Kane* Applicants) filed a motion to enjoin the Mandate on October 4, 2021 (SDNY 21-cv-7863, ECF 12 through ECF 28 and ECF 44 through ECF 47), and asked the Court to issue a TRO or injunction against enforcement of the Mandate. The district court held oral argument on October 5, 2021 and denied the request for the TRO the same day. Supplemental briefing was ordered, and a hearing scheduled for October 12, 2021. Respondents offered no witnesses and little factual material. Applicants offered voluminous factual support and 13 witnesses (two experts in public health, a witness who could testify about conditions in the schools due to the staffing crisis caused by placing Applicants and 7000 others on leave without pay, and the 10 named plaintiffs). The district court limited the evidence and testimony that the *Kane* Applicants were permitted to present in support of their motion (refusing to permit them to present any testimony, including the proffered expert testimony, on whether Applicants presented a direct threat of COVID-19 to schoolchildren), heard oral argument, and denied the motion at the conclusion of arguments on October 12, 2021. (*Id*., ECF 60) (App. C). The *Kane* Applicants appealed the decision and asked the Second Circuit for an immediate injunction staying enforcement of the district court's order. The Second Circuit referred the motion to a motion panel.

Concerned about the *Kane* court's failure to recognize the Respondents' blatant violation of their religious freedom rights, the *Keil* Applicants filed their own action on October 27, 2021, focusing on the clearly unconstitutional provisions of the Mandate as implemented in the Accommodation Policy (SDNY 21-cv-8773, ECF 10), and requesting a TRO and preliminary injunction, *id*., ECF 8. The district court immediately denied the motion without a hearing. *Id*.

(App. I.) The *Keil* Applicants appealed to the Second Circuit and their motion was assigned to the same motions panel ("First Motions Panel") as the *Kane* motion.

At the hearing before the First Motions Panel, the Respondents' attorney made no effort to argue that the Accommodation Policy was constitutionally compliant. To the contrary, she quickly conceded that the policy may be "constitutionally suspect" and pleaded with the panel to remand the case to give the DOE and the City a third opportunity to review Applicants' exemption applications, giving them a "fresh consideration" under the relevant statutory standards instead of the Accommodation Policy criteria (SDNY 21-cv-8773, ECF 83, at 55). The panel asked counsel for both sides to submit proposed orders setting forth interim relief pending the merits hearing. Applicants' counsel requested injunctive relief benefitting all DOE employees suspended under the unlawful Accommodation Policy, while the Respondents proposed a remand for reconsideration of only the Applicants' accommodation requests, to be conducted by a newly invented "Citywide Appeals Panel" which would include, *inter alia*, attorneys employed in the City's Law Department, who represent them and the City in this litigation and had participated in the heresy inquisitions under the Accommodation Policy. (*Id*., ECF 83, at 55).

The First Motions Panel adopted the Respondents' draft virtually unaltered and ordered the Respondents to conduct a "fresh consideration" of Respondents' claims, staying Applicants' the waiver and termination deadlines until after such reviews were completed. The Second Circuit ordered the Citywide Appeals Panel to "adhere to the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law." (*Id*., ECF 76) (App. K). *Inter alia*, those laws broadly protect employees from narrow definitions of religion and require employers that deny accommodations to "demonstrate" why the accommodation cannot be granted. *Id.* (App. K). Applicants objected, noting their deep concern

about appointing Respondents' defense attorneys to judge their applications a third time without providing any substantive relief and arguing that the order did not require the "fresh consideration" panel to explain its decisions, nor did it expressly require the panel's decisions to meet the standards of strict scrutiny that the First Amendment requires of all individualized discretionary government decision-making that imposes restrictions on religious exercise.

The Second Circuit merits panel (the "First Merits Panel") issued an opinion, order, and judgment on November 28, 2021, granting Applicants' motion in part and adopting the First Motion Panel's November 15 order (USCA2 21-2711, ECF 118), (App. K). The panel addressed the concern that the order did not offer meaningful standards against which their requests for religious accommodation will be measured as follows: "But Plaintiffs requests will be governed by Title VII and analogous state and city law, and the standards for those claims are well established." (App. L, at 24 n.14). The First Merits Panel found that the Mandate was neutral toward religion on its face, and that the Applicants' evidence did not establish that it was surreptitiously motivated by anti-religious purposes. The panel found that the Mandate was "generally applicable" on its face, reasoning that a law may be generally applicable if it applies to a specific "class" of persons. (*Id*. at 22-2). Accordingly, the First Merits Panel declined to grant relief from the Mandate to any DOE employee except the Applicants. However, the panel found that "the procedures specified in the Arbitration Award and applied to plaintiffs are not neutral." (*Id.* at 26). Citing variations in the extent to which arbitrators applied the Accommodation Standards to individual SAMS appeals, the panel found that the Accommodation Policy was not "generally applicable," vacated the denials that 14 individual plaintiffs had received, applied strict scrutiny to the Accommodation decisions, and ratified the First Motions Panel's order requiring

the Defendants to give a fresh reconsideration to Applicants' accommodation requests, untainted by the Accommodation Policy.

At the merits hearing, Respondents' counsel told the Court that the DOE would invite everyone who had been denied after filing a SAMS Appeal to file a "fresh consideration" appeal with the Citywide Appeals Panel. However, this offer did not cover employees who had not submitted a SAMS Appeal – including employees who had no option to do so because the system crashed or because they were not union members, or because they objected to the unconstitutional criteria. These other employees are still bound by actions taken against them under the unconstitutional Accommodation Policy.

The First Merits Panel also found that the Applicants had made a sufficient showing of irreparable harm by demonstrating "that they were denied religious accommodations — pursuant to what the City has conceded was a 'constitutionally suspect' process — and were consequently threatened with imminent termination if they did not waive their right to sue." (*Id.* at 30). The panel declined to give broader relief, including reinstatement, to the Applicants, finding that the harm suffered from a loss of income is compensable by damages and therefore not irreparable so long as the City was not forcibly injecting Applicants against their faith. (*Id*. at 33.) Finally, the panel declined to extend relief to "similarly situated" DOE employees, noting that the City had offered to permit some DOE employees to submit new appeals to the Citywide Appeals Panel, and finding that extending relief beyond the Applicants was not appropriate under the precedents of this Court. (*Id.* at 38, 39.)

On remand, the Citywide Appeals Panel received administrative records from the Applicants' Initial Review submissions and SAMS Appeals, and any additional materials that the

parties wished to provide for their review.[4] On December 8 and December 10, 2021, the Citywide Appeals Panel informed 13 of the 14 Applicants who appealed that their accommodation requests were denied for failure to "meet criteria." No other explanation was provided as to why the extensive and persuasive materials that the Applicants had provided were insufficient to establish a right to accommodation or exemption, or why the City could provide no accommodation to them. These rubber-stamp notices stated that they constituted the final decision and gave the Applicants three business days in which to get vaccinated or be subject to termination.

On Saturday, December 11, 2021, faced with a three-day deadline and under enormous pressure to betray their religious convictions, the Applicants renewed their motions for preliminary injunction, relying on the declarations and exhibits from counsel, their summary denial letters, and all the evidentiary materials they had previously submitted. In opposition, the Respondents made no effort to "demonstrate" why any of the Applicants did "meet criteria" or why accommodating requests of the remaining 13 Applicants would put an undue hardship on the City, as required under the laws cited in the November 15 and November 28 orders of the Second Circuit. Nor did Respondents attempt to show that the denial decisions could withstand strict scrutiny.[5]

[4] The "explanations" provided by Respondents' counsel shows that the Citywide Appeals Panel considered documentation submitted by "all parties." (USCA2 21-3043 ECF 16-3). While Respondents had ample opportunity to review and respond to Applicants' submissions, the Applicants were never provided with copies of Respondents' submissions or any opportunity to respond to them.

[5] In their responding papers, counsel claimed that they intended to generate and send "reasons" for the denials through email. No prior indication had ever been given to counsel or Applicants that further reasons would be forthcoming, and the effort was clearly a response to Applicants' motion papers complaining of the summary denials. The ex-post-facto "reasons" – which were before the Second Circuit on appeal, (USCA2 21-3043 ECF 31-3) – do not comply with statutory or constitutional standards. Though the "panel" claims to have found that each applicant had sincere religious beliefs, they denied most because they do not consider personally held religious reliefs to be valid. This reasoning is just another reiteration of the unlawful Accommodation Policy standards and squarely violates the statutory and constitutional standards

District Judge Valerie E. Caproni denied the motion on December 14, finding that the Applicants had failed to establish that they would suffer irreparable harm absent an injunction because the DOE was not forcibly vaccinating them in violation of their faith, but only applying economic penalties if they did not comply. The court further held that Applicants were not likely to succeed on the merits and that rational basis review would apply unless Applicants could "prove" that the "fresh consideration" process was irrational or infected with hostility towards religion. (App. Q).

A single Circuit Judge entered a temporary stay upon the filing of the Applicants' appeal and referred Applicants' injunction motion to a three-judge motions panel ("Second Motions Panel"). After briefing for the Second Motion Panel's hearing was complete, but before the date of the hearing, the DOE sent termination notices to its unvaccinated employees who had not appealed their decisions to the Citywide Appeals Panel, setting a termination date of February 11, 2022. (*Keil v. City of New York*, No. 21-3043 (2d Cir.) (hereinafter, "USCA2 21-3043"), ECF 74-2). However, the DOE's website still invited the same employees to submit proof of vaccination and return to the workforce or waive their right to sue to stay on extended leave without pay. The message was clear: unprotected by court orders, these employees – there are potentially still thousands of them – must now, finally, turn their back on their religious beliefs and submit to vaccination or lose their careers in education.

On February 3, 2022, the Second Motions Panel vacated the stay that protected the Applicants from discipline for refusing to comply with the Mandate. The panel noted that the

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protecting personally held religious beliefs. For each denial, the "panel" also added a sentence concluding that in any event, it would be an undue hardship to accommodate anyone. They did not explain why they had been able to accommodate at least 165 other teachers but could not accommodate these thirteen applicants. Nor did these statements comply with the Respondents' obligations to "demonstrate" the reasons accommodation would have posed an undue hardship.

Second Circuit had previously denied facial relief to the Applicants, and denied an injunction to the Applicants individually, finding that they had failed to meet their burden to show that the Citywide Appeals Panel had acted inappropriately in summarily finding that they did not "meet criteria:"

> The injunction issued in [the court's prior] order, which remained in effect during and after the reconsideration of Appellants' requests, directed the parties to "inform the district court . . . of the results of those proceedings" within two weeks of the Citywide Panel's decisions. *Id.* Despite that generous timeline, Appellants filed their motion for a preliminary injunction the day after the Citywide Panel issued its decisions and provided the district court with "almost no information about the process before the Citywide Panel" or the standards the Citywide Panel used to assess Appellants' applications for religious exemptions. *Kane*, Case No. 21-cv-7863, Doc. No. 90 at 8. Given that the filings before the district court fail to even describe the process and rules used to assess Appellants' applications – let alone pinpoint their alleged deficiencies – it is unlikely that the merits panel will hold that Appellants carried their burden below. (App. W at 4.)

Though they were alerted to the February 11, 2022 termination deadline, the Second Motions Panel scheduled an expedited hearing on the merits of the appeal for February 24, 2022. **Several of the Applicants – perhaps all of them – have just received their termination notices from the DOE, telling them that on February 14 – next Monday – they will be terminated unless they get vaccinated or surrender their right to challenge the Accommodation Policy**. (App. X, attached hereto). Until the next merits panel ("Second Merits Panel") meets and issues its decision (and afterward, if the Second Merits Panel endorses the reasoning of the Second Motions Panel), the Respondents are free to enforce the Mandate against the Applicants, terminating their educational careers, nullifying their accrued rights including seniority and tenure, cutting them off from insurance coverage, and rendering them ineligible for unemployment insurance – unless they submit to vaccination and accept the DOE's invitation to return to work or at least terminate this litigation and retain health insurance for their families.

On February 7, 2022 – after Applicants had already sent their Appendix for the instant application to the printer for filing on February 8 – Applicant Stephanie DiCapua received an email from the DOE informing her that she would be terminated on February 14, 2022 unless she either opted to take voluntary LWOP (surrendering all legal rights to challenge DOE action, and accepting the condition that she engage in no gainful employment while on LWOP) or agreed to "separate" voluntarily from her employment with DOE. This is the direct result of the Second Motions Panel's decision to dissolve the stay previously protecting the Applicants from termination pendente lite. Since the Second Merits Panel will not hear Applicants' case until February 24, DiCapua's only recourse is to apply to this Court for relief. **As we write this application, more Applicants are sending us similar termination notices.**

When a government forces an individual to choose between his or her obedience to God and his or her obedience to the State, this imposes irreparable harm. The Applicants have been suffering this kind of pressure since last September, and with the loss of judicial protection, that pressure has now reached its greatest extent. Unless this Court acts now, the Applicants must choose either to abandon their educational careers or – in their own eyes – to disobey their God. The daily trauma of being coerced into this choice is causing them irreparable harm.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. 1651(a), authorizes an individual Justice or the Court to issue an injunction pending appellate review "based on all the circumstances of the case [without] expression of the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver v. Sebelius*, 134 S. Ct. 1022, 1022 (2014).

Typically, such injunctions are issued in "exigent circumstances" when the "legal rights at issue are indisputably clear" and injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Com.*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (cleaned up). The Court also considers (1) the likelihood of success on the merits, (2) irreparable harm to the applicants absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009). The first two factors are "the most critical." *Id.* at 434. Recent decisions clarify that under the public interest factor even "a strong interest in combating the spread of the COVID-19 Delta variant . . . does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 141 S. Ct. 2485, 2490 (2021)*; see also Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 562 (D.C. Cir. 2015) (Kavanaugh, J., dissenting in part). Applicants easily satisfy all criteria.

I. Applicants are likely to succeed on the merits because it is indisputably clear that their First Amendment rights were violated.

Applicants are likely to succeed on the merits of their claims. *First*, it is indisputably clear that the religious exemption policies violate their constitutional rights and the summary denials provided after "fresh consideration" on remand cannot rebut or cure these harms. *Second*, the Mandate is neither neutral nor generally applicable, and cannot survive strict scrutiny review. *Third*, there is a reasonable probability that the Court will grant review.

A. It is indisputable that the DOE's religious exemption policies violate the constitution and that the summary denials provided after "fresh consideration" on remand cannot rebut or cure these harms.

At this point, even Respondents agree that the Accommodation Policy they adopted to implement the Mandates is unconstitutional. Because it is not neutral or generally applicable, the First Merits Panel held that strict scrutiny applies, and Respondents have not met their burden of

establishing that the discrimination or denial of accommodations were necessary to serve a compelling interest. Contrary to the lower courts' holdings, the "fresh considerations" do not moot Applicants' likelihood of success or negate the need for strict scrutiny. On the contrary, they only add another basis for strict scrutiny to apply.

1. When a state actor engages in religious accommodation decisions pursuant to Title VII or any other discretionary standard, strict scrutiny must apply.

As a threshold matter, any religious exemption policy decided by a state actor, including the "fresh consideration" purportedly given on remand, must survive strict scrutiny review, because these decisions are inherently not neutral or generally applicable and they burden the free exercise of religion. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879 (2021); *see also Bear Creek Bible Church v. EEOC*, 2021 US Dist. LEXIS 210139, at *71 (N.D. Tex. 2021) ("Because Title VII is not a generally applicable statute due to the existence of individualized exemptions, the Court finds that strict scrutiny applies"). Similarly, as religious accommodation decisions directly assess religion, they cannot be classified as "neutral" toward religion and on this basis too are entitled to strict scrutiny review.

Thus, when state actors make religious accommodation determinations pursuant to Title VII or any other policy, the government bears the burden of establishing compliance with the statutory criteria but also bears the burden under constitutional analysis of showing that their religious accommodation decisions are justified because they further a compelling governmental interest in the least burdensome manner. *See, e.g., CBOCS W., Inc. v. Humphries,* 553 U.S. 442,

455 (2008) ("Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination").

No statute can supplant or diminish constitutional protections when state actors are involved. "In most of the cases alleging religious discrimination under Title VII, the employer is a private entity rather than a government, and the first amendment to the Constitution is therefore not applicable to the employment relationship." *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995). But when the employer is a government actor, and a litigant has mounted a constitutional challenge, a court is "constrained to apply" a constitutional standard "and not Title VII standards." *United Black Firefighters Ass'n v. Akron*, 976 F.2d 999, 1012 (6th Cir. 1992).

Since Applicants have only asserted a constitutional challenge, Title VII standards applied on remand are particularly misplaced. But even if the Educators *had* asserted a Title VII claim, it would not obviate Respondents' obligation to comply with First Amendment standards—which is what Respondents should be employing in considering and reviewing religious exemption applications. *See, e.g., Putaro v. Carlynton Sch. Dist.,* No. 2:07-cv-817, 2007 U.S. Dist. LEXIS 107326 (W.D. Pa. Dec. 12, 2007):

> Unlike the Equal Protection Clause, which limits the actions of only state actors, Title VII limits the actions of private entities falling within its coverage. When a state actor falls within the definition of the term "employer" contained in Title VII, it is limited by both the Equal Protection Clause and Title VII. It is not unusual for a federal constitutional provision and a federal anti-discrimination statute to provide overlapping protection. That does not mean that the two sources of federal law are mutually dependent upon one another. Although both the Equal Protection Clause and Title VII may prohibit the same forms of gender discrimination in certain instances, a cause of action under § 1983 for violations of the Equal Protection Clause is in no way affected by Title VII.

Here, too, Applicants' cause of action under § 1983 for violations of the Establishment, Free Exercise, and Equal Protection Clauses of the United States Constitution is in no way diminished by Title VII. Both the Accommodation Policy and the "fresh consideration" must be

able to withstand strict scrutiny review.

2. The fresh consideration process cannot survive strict scrutiny or justify withholding further injunctive relief - the burden to develop the record is on Respondents, not Applicants.

The "fresh consideration" process cannot withstand strict scrutiny. The summary denials issued by the Citywide Panel do not even meet the basic statutory standards, leave aside the more vigorous showing required under constitutional analysis. The lower court erred by penalizing Applicants for the Respondents' failure to provide a decent record in the new denial process. The burden under strict scrutiny, governing statutes and the framework for adjudicating discrimination claims belongs to Respondents.

a. Under this Court's standards governing discrimination claims, the burden has shifted to the employer to rebut the prima facie case of discrimination.

There is no dispute that the DOE suspended thousands of employees (including Applicants) pursuant to a blatantly unconstitutional discriminatory Accommodation Policy. Because Applicants already established at minimum a prima facie case for discrimination in the overall suit, this Court's precedent requires that the burden now shifts to the defendants to establish a legitimate, nondiscriminatory reason for their actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

Here, rather than grant injunctive relief after finding likelihood of success, the First Merits Panel essentially gave Respondents another bite at the apple to rebut or at least remedy the discrimination for the fourteen remanded Applicants mid-litigation. As a threshold matter, this was not proper. Respondents had already admitted, in the proceedings below, that they did not challenge the sincerity of the Applicants' religious beliefs, and that they could not articulate a legitimate non-discriminatory reason for any of the denials. Applicants were clearly entitled to

injunctive relief, but instead the lower courts gave Respondents yet another opportunity to try to produce a defense by allowing Respondents' own attorneys to spearhead a third review of the religious accommodation applications.

Despite this opportunity, Respondents still failed to rebut the discrimination claims. Instead, once again, they issued blanket summary denials with no explanation other than "does not meet standard." Bare legal conclusions are not enough to rebut a prima facie case of discrimination. "To prevent summary judgment in favor of the plaintiff at this stage, that explanation must, if taken as true, *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 123 (2d Cir. 2004) (citations omitted). Once defendants fail to rebut, no further evidence is required of plaintiffs, even in the more exacting summary judgment context. Rather, at this stage, "the plaintiff may, depending on how strong it is, rely upon the same evidence that comprised her prima facie case, without more." *Id.* at 124.

b. Governing statutes also place the burden on employers to demonstrate that they cannot reasonably accommodate religion.

The City's autogenerated summary denials issued after "fresh consideration" not only fail to rebut the discrimination claims, but also cannot on their own satisfy even the statutory requirements imposed by the remand order, leave aside strict scrutiny review.

Title VII places the burden on the employer to demonstrate that it cannot reasonably accommodate the employee's religious practice. *See, e.g.,* A*nsonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 68 (1986) ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.' 42 U. S. C. § 2000(e)(j)"); *see also Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring) ("Title VII prohibits

employment discrimination against an individual 'because of such individual's . . . religion,' §§ 2000e–2(a)(1) and (2), and the statute defines 'religion' as 'includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.' § 2000e (j).").

The First Merits Panel also ordered that the "fresh consideration" adhere to the standards set forth in the state and local human rights laws. Like Title VII, these laws place the burden on the employer to demonstrate that it cannot reasonably accommodate the religious beliefs of its employees. This standard is more rigorous than the standard adopted by courts to assess undue hardship defenses under Title VII. *See, e.g.*, N.Y.C. Admin Code §8-107(3)(b) ("'Undue hardship' as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or violation of a bona fide seniority system.")

The term "demonstrates" is defined by statute to mean "meets the burden of production and persuasion." 42 U.S.C.A. § 2000(e)(m) (West). As the Second Motions Panel recognized, the cursory email each Applicant received stating only "does not meet criteria" without any explanation of why, or what standards or criteria were employed is grossly insufficient to understand whether a denial was properly issued and certainly cannot persuade a court that reasonable accommodation is not possible or warranted. But the lower courts made a clear error of law by failing to recognize that the burden was on the employer, not the employee, to create a sufficient record to demonstrate a valid basis for denial.

c. Counsel's post-hoc emailed "reasons" generated for litigation purposes do not cure the Respondent's failure to demonstrate a sufficient reason for denying accommodation.

In response to Applicants' motion challenging the Citywide Appeals Panel's failure to demonstrate a valid basis for denial of accommodation, counsel for Respondents generated and sent an email several days after the fact (and after the district court's denial of relief) purporting to give fuller "reasons" for each decision. As an initial matter, these reasons cannot cure the deficient denials. The summary denials Respondents issued to each of the Applicants explicitly stated that they constituted the final decisions and there was no indication further process or information would be provided. Nor was there any "agreement among counsel" that the reasons would be send later, as Respondents' counsel alleged, but did not support. But even if the purported "reasons" are considered as part of the record, they only further emphasize that the Citywide Appeals Panel failed to meet the basic statutory standards. Rather, they show that the Citywide Appeals Panel once more employed unconstitutional and discriminatory standards.

The email confirmed that religious sincerity was not being challenged. The primary "reasons" given for most of the Applicants' denials was instead that the religious beliefs are personally held. This was precisely what the First Merits Panel found unconstitutional about the Accommodation Policy. While some nonreligious people might see guidance from prayer or following one's moral conscience as a "personal choice," that does not mean it can be deemed "nonreligious" under Title VII, or First Amendment standards, which both fiercely protect personally held religious views just as much as religious views that comport with popular religious orthodoxy.

It is black letter law that personally held religious beliefs are protected. Title VII provides that the "term 'religion' includes all 42 U.S.C. § 2000e(j) observance and practice." *Id.* . EEOC

guidelines further define religious practices to "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . .. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee." 29 C.F.R. § 1605.1. The EEOC adopted its expansive definition in *United States v. Seeger*, 380 U.S. 163, 85 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970), which defined religion broadly for purposes of addressing conscientious-objector provisions to the selective service law, and certainly found it to include personally held beliefs.

Furthermore, the DOE not only misstated Applicants' beliefs (and formed conclusions based on these misstatements), but they challenged the factual accuracy of them, which is a realm the government is forbidden to enter. *Smith v. Bd. of Educ.*, 844 F.2d 90, 93 (2d Cir. 1988) ("Generally it is not proper for courts to evaluate the truth or correctness of an individual's sincerely held religious beliefs").

EEOC guidance warns that an "employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief" and is only justified in seeking additional supporting information if it has "an objective basis for questioning" it. Section 12: Religious Discrimination, Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (last visited Feb. 6, 2022). It is not likely that Respondents could rebut the discrimination claims on the summary conclusions drawn by its own counsel about the validity of Applicants' religious beliefs, which the government has no right to assess.

The fact the Citywide Appeals Panel engaged in this analysis raises additional questions about the constitutionality of the new process and may be the basis of a new claim. Policies

allowing the state to make determinations about whether a belief is "religious" versus secular, or sincerely held must especially receive a light touch to survive strict scrutiny review. Allowing overbroad discretion to a government official to pass judgment on the religious beliefs of applicants can facially invalidate a law. For example, in *Cantwell v. Connecticut*, this Court held that a solicitation statute limiting solicitation from non-religious causes was facially invalid under the First and Fourteenth Amendment where it allowed local officials broad discretion to determine which causes were "religious" in nature and which were not. *Cantwell v. Conn.*, 310 U.S. 296, 310 (1940). This Court flatly rejected the states' argument that judicial review of any wrongly decided case was a sufficient remedy, noting the real risk of harm that existed from vesting such broad discretion in a government official. *Id.* at 904.

Here, as Applicants pointed out to the court before the First Merit's Panel order was issued, the "fresh consideration" process is likely unconstitutional because, like in *Cantwell*, it allows the panel unfettered discretion to decide what is religious in nature with no defining criteria other than it should "adhere" to governing statutory protections. Because no written decision was even required to elucidate the reasons for a determination, wrongly decided denials may not even receive judicial review, as evidenced by these proceedings. Even if it were available, as *Cantwell* makes clear, the ability to seek judicial review is not a sufficient remedy.

Respondents' additional tacked on generic statements that it would be an "undue hardship" to accommodate any employees who typically work in classrooms cannot justify the denials either. The government bears the burden of demonstrating through individualized inquiry and non-speculative facts that it would be an undue hardship to accommodate employees' religious needs. Under the governing statutes, this determination must be made in good faith through an interactive process that explores all available accommodations. None of that occurred. Moreover, the DOE

admits they granted at least 165 teachers an exemption under the unconstitutional religious exemption policy. They offer no reason Applicants cannot be similarly accommodated.

d. Respondents bear the burden of establishing that they are likely to survive strict scrutiny.

Ultimately, though, this matter is not a Title VII case, or a statutory case. It is a constitutional case, and the First Merits Panel already held that Applicants are entitled to strict scrutiny of their claims, which the panel determined they were likely to prevail under.

Targeting religious minority groups, including those who hold personal religious objections rather than orthodox ones, in response to real or perceived threats, no matter how well-intentioned the reason, is forbidden under our laws and cannot withstand strict scrutiny review as a matter of law. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling Korematsu v. United States, 323 U.S. 214 (1944)). By their own admission, Respondents have granted at least 165 religious accommodations and bear the burden of showing why they cannot grant the same accommodation to these employees, at the very least.

Aside from discrimination, Respondents' decision to suspend and exclude most of their employees with religious objections to vaccines is unlikely to survive strict scrutiny. It is not enough to assert a compelling interest in stopping the spread of COVID-19. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures imposing lesser burdens on religious liberty would fail to achieve the government's interests." *Agudath Isr. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020).

Respondents have not met this burden. They have not addressed why Applicants cannot work remotely (for example, counsel for the DOE admitted during oral argument that the City is now offering a remote option). They have not addressed why 165 teachers can be accommodated, but they cannot. Nor have they supported their contention that the 3% of employees who remain

unvaccinated pose a "direct threat" to others so grave that they cannot enter any school building (although, apparently, unvaccinated bus drivers can drive children to and from school each day in fully enclosed school buses without issue).

Because the available vaccines cannot meaningfully limit infection and transmission, particularly against the newer variants, Mandating vaccines makes little sense from a constitutional perspective. (*See, e.g.,* SDNY 21-cv-7863, ECF 85-4). Public health officials have reached consensus that virtually everyone will eventually get infected with COVID-19, regardless of mitigation efforts, and regardless of vaccine status. (SDNY 21-cv-7863, ECF 56, at 7 citing NPR article). While there are excellent reasons that a person might want to be vaccinated for personal protection, these decisions are between a patient and their doctor. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 760 (2014) GINSBURG, J., DISSENTING ("No individual decision by an employee and her physician—be it to use contraception, treat an infection, or have a hip replaced—is in any meaningful sense [her employer's] decision or action.")

Respondents' own publicly available data support these points. The DOE publishes regular updates on the number of infected students and in-person staff working in New York City schools. That data shows that excluding unvaccinated staff has not decreased the percentage of staff infected with COVID-19 at all. (SDNY 21-cv-7863, ECF 56, at 7, citing DOE daily case map). The infection rates have followed the same curve as rates in the greater community, whether unvaccinated individuals are excluded or not.

Perhaps most shocking, because such a large percentage of the fully vaccinated staff is currently infected with COVID-19, the DOE adopted the policy that actively infected teachers with mild symptoms should return while still infectious to mitigate the staffing crisis. (21-cv-7863, ECF 56, at 8, citing Business Insider article "Short-staffed NYC schools are asking teachers with mild

COVID symptoms to return to the classroom.") If it is an acceptable risk to allow infected teachers who can spread and transmit COVID-19 to the students to teach in classrooms, certainly unvaccinated teachers who test negative for COVID-19 infection should be allowed to teach in classrooms.

No other school district in the state has vaccine mandates for their staff. The Court can safely enjoin further enforcement of the Mandate pending further judicial review to avoid further irreparable harm. In the meantime, measures such as testing and symptom checks should suffice, alongside all the other tools that these schools have used for the last year and a half to keep everyone safe while still respecting minority religious views.

3. The lower courts' errors set a dangerous precedent

The Second Motions Panel's denial of Applicants' request for injunctive relief, which did not reach the substance of Applicants' claims, can be boiled down to its assertion that Applicants did not adequately develop the record. Specifically, the panel held that they had "'almost no information about the process before the Citywide Appeals Panel' or the standards the Citywide Appeals Panel used to assess Appellants' applications for religious exemptions," (App. W, at 4), and that the Applicants did not provide details about the "process and rules used to assess Appellants' applications –let alone pinpoint their alleged deficiencies[,]" *Id*.

This holding is shockingly unjust for several reasons. First, Applicants specifically objected to the First Merits Panel that the remand order was vague and did not set forth the process or rules or criteria that would be used to determine their applications. (*See, e.g.*, USCA2 21-2711, ECF 73.) The First Merits Panel summarily dismissed these concerns, stating: "Plaintiffs' requests will be governed by Title VII and analogous state and city law, and the standards for those claims are well established." (*See* First Merits Panel Order, App. L at 24 n.14 (citing cases)).

In their motion for injunctive relief, Applicants informed the court that they were not given any further information about the criteria, process or rules used to determine their applications. (SDNY-cv-7863, ECF 85-1). Nor were they provided any clarity about the reasons for denial. They simply received autogenerated denial letters that stated, "does not meet criteria" and that the determination constituted the final determination of the Citywide Appeals Panel. (*Id*.) Using the lack of standards as a sword by shifting the burden to Applicants is a clear error of law, particularly after the same court dismissed objections by stating that the vague standards referenced in the court's remand order are so "well-established" they did not need to be defined. The lower courts' holding sets a precedent that all an employer need do to prevent judicial review is to provide no information as to the criteria it will use or the basis or reason for denial of religious accommodation claims.

The injustice of this holding is compounded by the fact that the employers have already been caught red-handed engaging in widespread religious discrimination by adopting a written policy requiring discrimination against religious minorities. It is bad enough that the lower courts failed to issue injunctive relief immediately, and instead made the Applicants submit to a third round of religious inquisition, spearheaded not by a neutral party, but by Respondents' own defense attorneys. This Court must intervene to stop the lower courts from now compounding this error by failing to follow this Court's framework for discrimination claims. The government cannot be allowed to avoid any liability for their blatant discrimination by simply having their own defense attorneys rubber stamp the discriminatory suspensions with a vague notation that each applicant in any event "does meet criteria." Such a holding violates everything that our Constitution was adopted to protect against. The burden is on the employer to rebut the claim, and they have not met this burden.

Applicants have amply met their burden in developing a record. They have already submitted over a hundred pages of briefing to the Second Circuit and hundreds of pages of factual submissions to the district court, and have now had three sets of oral arguments before the circuit court and two in the district court. Applicants reasonably understood that there were no more facts necessary to renew their motion for injunction after remand, given the Second Circuit's prior decision that no standards or criteria would be provided, and the DOE's representations that the grossly inadequate summary denials on remand were the "final determination." Instead of denying relief, the lower courts could easily have held a hearing if they felt any further factual development would be useful.

Furthermore, the district court and Second Motions Panel had in their possession nearly all of the materials the Citywide Appeals Panel had before it when issuing their rubber stamp denials, including the following:

- Each of the *Keil* Applicants' initial religious exemption requests and appeals, which included lengthy personal statements, letters from clergy, and other relevant materials. (SDNY 21-cv-8773, ECF 25-1, 27-1, 27-2, 27-3, 28-1, 28-2, 28-3, 29-1, 29-2, 29-3, 30-1, 30-2, 30-3, 30-4).

- Each of the *Keil* Applicants' responses to the City's request for supplemental information. (SDNY 21-cv-8773, ECF 50-3).

- Declarations from 21 DOE employees, including some Applicants, swearing under oath that they held sincerely held religious beliefs. (SDNY 21-cv-7863, ECF 20 through 28; SDNY 21-cv-8773, ECF 19 through 21 and 23 through 31).

The City later admitted that these original materials formed the basis for their denials and referenced them repeatedly. (*E.g.*, USCA2 21-3043), ECF 16-3 (describing Applicants' personal statements, supplemental submissions, and a clergy letter)).

Furthermore, Applicants' 14 denial letters stated that they had only three business days to submit proof of vaccination. The Second Motions Panel ignored this coercive and urgent deadline,

bafflingly suggesting that the two weeks Applicants had to report their denials to the district court was somehow a "generous timeline" or that it allowed them some opportunity to gather information that was never provided to them, and which was not their burden to present (App. L). Ultimately, no discovery was needed, or even possible to get at that juncture. The DOE's rubber stamping of Applicants' previous admittedly discriminatory denials together with the rampant constitutional violations that have plagued this entire litigation warrant giving Applicants the relief they seek here.

B. The Mandate violates the First Amendment

The First Amendment to the United States Constitution prohibits government from prohibiting the free exercise of religion. This Court has established that while laws which violate the Free Exercise Clause have been subjected to strict scrutiny as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), rational basis scrutiny is applicable when the government's actions are neutral and generally applicable. *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

1. Strict Scrutiny applies to the Mandate

a) The Mandate is not neutral because the mayor admitted that the City intentionally targeted for disfavor employees whose religious objection to vaccines were not supported by the official doctrine of "well established religions" and the DOE implemented the Mandate through a written policy that requires discrimination against employees with unorthodox religious beliefs

The lower courts erred by holding that the Mandate is "neutral" because, on its face, it does not appear to target religious minorities. Under constitutional analysis, however, laws such as this, which appear neutral on their face, but which are regularly implemented in an unconstitutional manner, are not neutral and thus must be strictly scrutinized when they function to burden religious rights. *Forsyth Cnty v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("in evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the

ordinance, including its own implementation and interpretation of it." *See also MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000) ("When evaluating a First Amendment challenge of this sort, we may examine not only the text of the ordinance, but also . . . we are permitted — indeed, required — to consider the well-established practice of the authority enforcing the ordinance"); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir. 2006) ("Administrative interpretation and implementation of a regulation are . . . highly relevant to [facial constitutional] analysis").

This is especially true if the textually neutral regulation functions with other well-established policies and practices to suppress unpopular religious beliefs. *See, e.g.,* C*hurch of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 540 (1993) ("We need not decide whether the [the city's fourth facially neutral ordinance] could survive constitutional scrutiny separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship"). As discussed in the previous section, the Mandate was implemented in an unconstitutional manner through policies requiring religious discrimination against unpopular religious beliefs about vaccination.

An otherwise facially neutral regulation can be insulated from facial challenge arising out of unconstitutional application, so long as decisionmakers provide sufficient guidance to reasonably protect the ordinance against facial attack. *Ward v. Rock Against Racism*, 491 U.S. 781, 793-95 (1989). Here, instead of providing guidance to avoid discriminatory application of the Mandate, the mayor, who promulgated the Mandate and exercises control over the DOE, regularly admitted that the City's intention was to target religious minorities for disfavor through discriminatory implementation of the Mandate. *See, e.g.*, Transcript of Press Conference held September 2021, ECF 85-9:

> Mayor: [responding to question about what criteria the City would apply in granting or denying exemption requests from DOE employees]: Yeah, it's a great question. Thank you. Yes. **And very powerfully Pope Francis has been abundantly clear that there's nothing in scripture that suggests people shouldn't get vaccinated**. Obviously, so many people of all faiths have been getting vaccinated for years and decades. **There are, I believe it's two well-established religions, Christian Science and Jehovah's Witnesses that have a history on this, of a religious opposition**. But overwhelmingly the faiths all around the world have been supportive of vaccination. **So, we are saying very clearly, it's not something someone can make up individually. It has to be, you're a standing member of a faith that has a very, very specific long-standing objection**.

As discussed above, these statements admit an intention to commit bold violations of constitutional protections for people whose religious beliefs are personally held, or not shared by well-established religious orthodoxy. In *Dr. A. v. Hochul*, three members of this Court noted that similar statements made by the Governor of New York during the implementation of a parallel state mandate for healthcare workers constituted admissions that the state "'intentionally' targeted for disfavor those whose religious beliefs fail to accord with the teachings of 'any organized religion' and 'everybody from the Pope on down.'" 595 U.S. ___ (2021) (Gorsuch, J., dissenting). Here, where the statements are accompanied by a written policy that requires the same unconstitutional discrimination, there can be no other conclusion drawn but that the government is targeting religious minorities for disfavor.

The DOE implemented the Mandate precisely as directed, not only adopting facially unconstitutional written Accommodation Standards that mirrored the mayor's position on religious minorities, but also resurrecting the unlawful practice of heresy inquisitions,[6] in which DOE representatives (primarily Corporation Counsel) zealously argued for even more blatant discrimination against employees whose religious beliefs are personal in nature or out of step with

[6] Merriam-Webster Dictionary defines heresy as "adherence to a religious opinion contrary to church dogma."

popular religious leaders and official church orthodoxy. The DOE conceded that they do not challenge the sincerity of the applicants' religious beliefs, but rather based their denials in the position that the beliefs are invalid. For example, adopting the mayor's position that the Pope's stance on scriptures proves most religious objections to vaccines are invalid, DOE representatives repeatedly asserted that religious minorities, even from non-Catholic faith traditions, should be denied accommodation because the Pope does not support their beliefs. They argued that the pro-vaccination views of rabbis in different countries and whom various Orthodox Jewish employees had never even met somehow delegitimized their religious objections. Similarly, the DOE claimed over and over again that employees who cannot take a COVID-19 vaccine because of the known connection with abortion are "wrong" to think that such a remote connection is a sin, providing a letter from Commissioner Chokshi to "prove" their viewpoint.

These comments are not only hostile, but unconstitutional: "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others." *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). "A religious belief can appear to every other member of the human race preposterous, yet merit the protections of the Bill of Rights." *Stevens v. Berger*, 428 F. Supp. 896, 899 (E.D.N.Y. 1977). *See also United States v. Ballard*, 322 U.S. 78, 87 (1944) ("The religious views espoused by [the criminal defendants] might seem incredible, if not preposterous, to most people. But . . . those doctrines are [not] subject to trial . . . .").

The ample indicia of religious animus should trigger strict scrutiny for the entire Mandate. *Lukumi*, 508 U.S. at 540. As this Court repeatedly affirms, any indicia, "even [a] slight suspicion" of religious animus or lack of neutrality towards religious viewpoints is per se unconstitutional,

regardless of whether a regulation otherwise forwards a compelling interest. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).[7]

b) The Mandate is not generally applicable

Individualized exemptions aside, as noted extensively above, "[a] law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. This Court has repeatedly affirmed that government may not grant exemptions to a law for secular conduct but deny similar exemptions for religious conduct, for in doing so government simply prioritizes secular conduct over religious conduct in violation of the First Amendment.

The Second Circuit, seemingly conflating the notion of favoring secular conduct over religious conduct with the concept of individualized exemptions involving a grantor's discretion, held that

> [A]n exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons. Rather, there must be some showing that the exemption procedures allow secularly motivated conduct to be favored over religiously motivated conduct. Plaintiffs have made no such showing. Instead, as in We The Patriots, the Vaccine Mandate provides for objectively defined categories of exemptions — such as those for individuals entering DOE buildings to receive a COVID-19 vaccination or to respond to an emergency — that do not "'invite[]' the government to decide which reasons for not complying with the policy are worthy of solicitude. (App. L, p. 21).

[7] Respondents also violated the most basic commands of the Establishment Clause by openly preferencing the viewpoints of the Pope and other popular leaders over those held by religious minorities. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.") Strict scrutiny clearly applies under the Establishment Clause as well as the Free Exercise and Equal Protection Clauses. "In short, when we are presented with a state law granting denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Id.*

Applicants are aware of no exception to this Court's holdings in *Fulton* and *Tandon* concerning "objectively defined categories of exemptions." If those objective categories of individuals, which here happen to include voters, delivery personnel and bus drivers, are granted exemptions and not those who wish to exercise their religion freely, then the law is not generally applicable (and has a high likelihood of lacking neutrality as well). Indeed, even the "objectively defined" category of medical exemptions constitutes just such a constitutional problem. To the contrary, "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

Mayor de Blasio and Commissioner Chokshi simply do not get to decide that voters, delivery personnel and bus drivers are more important than religious DOE employees.

(1) **The Mandate is not *generally* applicable; it is one of fifty-four *specifically* applicable mandates**

In announcing its rule in *Smith*, this Court did not specifically define general applicability. Subsequently, this Court has further expounded the seemingly elusive term's parameters, often with a focus on the contrast between the treatment of religious and secular conduct under the law. *See, e.g.,* F*ulton,* 141 S. Ct. at 1877 ("A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way"); *Lukumi*, 508 U.S. at 557 ("The defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment"). This aspect

of the Court's analysis tends to overlap with the neutrality requirement,[8] as both relate to discriminatory intent or impact, further complicating the effort to explain just what is meant by general applicability.[9]

In its most basic form, and most simply put, *generally applicable* means *generally applicable*—applicable in general, to the general public. "The terms 'neutrality' and 'general applicability' are not to be found within the First Amendment itself, of course, but are used in *Employment Div., Dep't of Human Resources of Ore. v. Smith* and earlier cases . . . ." *Id.* at *557 (Scalia, J., concurring) (citation omitted).[10] The term is also codified in the Code of Federal Regulations, first published in 1938, five decades prior to *Smith*:

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[8] In the same vein, Justice Scalia noted in his concurring opinion in *Lukumi* that "[i]n my view . . . the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target the practices of a particular religion for discriminatory treatment." *Id.*

[9] Even Justice Scalia, *Smith*'s author, opined at oral argument for *Lukumi*, "[t]hat's . . . maybe what a generally applicable law means." *Oral Argument Transcript*, 1992 U.S. Trans. LEXIS 126, at *29 (1992).

[10] Well prior to *Smith*, countless Supreme Court and Federal Circuit cases considered the importance of general applicability. All applied to the general public; none concerned an individual organization, agency, or department. *See, e.g., Davis v. Beason,* 133 U.S. 333, 348 (1890) (involving "a general law applicable to all Territories and other places under the exclusive jurisdiction of the United States"); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 603 (1940) (involving "a general law compelling attendance at public schools," recognizing "the state's authority to control its public streets by generally applicable regulations" and "[the state's] authority to penalize littering of the streets by a general law"); *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 321 (1941) (concerning "a legislature's act, generally applicable to all the people"); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 655 (1943) ("The subjection of dissidents to the general requirement of saluting the flag . . . is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples"); *Marsh v. Alabama*, 326 U.S. 501, 513 (1946) (Alabama statute "generally applicable to all privately owned premises"); *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) (Court noted state's "generally applicable educational requirements" and "general applicability of the State's compulsory school-attendance statutes"); *Meek*, 421 U.S. at 351 ("As part of general legislation applicable to all students," state may provide church-related schools "bus transportation, school lunches, and public health facilities"); *United States v. Top Sky*, 547 F.2d 486, 488 (9th Cir. 1976) ("The Bald Eagle Protection Act is a federal statute of general applicability making actions

> *Document having general applicability and legal effect* means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or *applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuations* (latter emphasis added). 1 C.F.R. § 1.1. *Id.* .

Thus, generally applicable refers to applicability to everyone, without excluding individuals or particular organizations. The application of this statutory definition clearly demonstrates why the Mandate is not generally applicable, as it applies to a single organization– the DOE–and neither to the general public nor to a relevant class of individuals.

Laws that are generally applicable are intended to address broad "socially harmful conduct" and various "aspects of public policy." *Smith*, 494 U.S. at 885. They are designed to govern "relevant concerns of a political society." *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 603 (1940). Because of their application to the general public, they have historically been referred to as "general laws." *See, e.g., Davis,* 133 U.S. at 348; *W. Va. State Bd. of Educ.*, 319 U.S. at 655; *Meek*, 421 U.S. at 351 (1975).

In his concurrence in *Lukumi*, Justice Souter seemed to have adopted this approach, noting that "general applicability is, for the most part, self-explanatory," *id*. at 561 (Souter, J., concurring), and referring to generally applicable laws as "secular law[s], applicable to all." *Id.*

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criminal wherever and by whomever committed"); *Bob Jones Univ. v. United States*, 639 F.2d 147, 153 (4th Cir. 1980) (approving the government interest in eliminating all racial discrimination and holding "the Free Exercise Clause cannot be invoked to justify exemption from a law of general applicability grounded on a compelling state interest"); *Surinach v. Pesquera De Busquets*, 604 F.2d 73, 74 (1st Cir. 1979) (citations omitted) (sanctioning statutorily authorized investigation of private schools operating in Puerto Rico despite the inclusion of parochial schools under the aegis of the Roman Catholic Church and recognizing the "sensitive and delicate task of balancing governmental dictates of social policy against a religious claim for exemption from requirements of general applicability").

Smith limited its holding to general laws, such as criminal or tax statutes, applicable to all and beyond the reach of *Sherbert*'s strict scrutiny standards. In doing so, it leaned upon a number of its prior rulings, each of which involved laws that were generally applicable: they applied to *everyone.*

- *Reynolds v. United States*, 98 U.S. 145 (1878) (involving criminal laws against polygamy)
- *Prince v. Massachusetts*, 321 U.S. 158 (1944) (involving child labor laws)
- *Braunfeld v. Brown*, 366 U.S. 599 (1961) (involving Sunday-closing laws against)
- *Gillette v. United States*, 401 U.S. 437, 461 (1971) (involving military Selective Service System)
- *United States v. Lee,* 455 U.S. 252, 258-61 (1982) (involving payment of Social Security taxes)

The one vaccine case to which the Court cited, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), was markedly distinguishable from this case. There, the statute provided that "[t]he board of health of a city or town if, in its opinion, it is necessary for the public health or safety shall require and enforce the vaccination and revaccination of *all the inhabitants* (emphasis added)." *Id.* at 22. Indeed, the statute's applicability to the entire population is precisely why the court sanctioned "reasonable regulations, as the safety of the general public may demand." *Id.* In contrast with the narrow Mandate, containing myriad carveouts and applicable only to the DOE, the *Jacobson* statute expressly applied to "*all persons*," "*all the inhabitants of Cambridge,*" *and* "*all the inhabitants of the city.*"

Unlike the controlled-substance law in *Smith* and the criminal and tax cases upon which it relied, all of which were applicable to the public at large and excepted no person or group, the Mandate is one of fifty-four covid-related executive orders (SDNY 21-cv-8773, ECF 57-2), each of which *specifically* targets a *unique* and *different* group, none of which is the sole object of that mandate. The various de Blasio and Chokshi mandates all purport to be addressing the *general* Covid-19 pandemic affecting the *general* population of New York City. Yet each governs a

specific subsector of this vast City and is therefore *specifically* applicable and patently *not* generally applicable.

For example: the DOE Mandate, like all others, expressly declares that it is issued because "Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents." The DOE Mandate does not purport to address concerns raised by a children's pandemic, a school pandemic, or any other health emergency that is uniquely connected to NYC public schools in any way. There is nothing in the blackboards, pencils, erasers, books, backpacks, lockers, or anything else specific to schools, school children, teachers or school buildings that purports to be specifically connected to Covid-19 or heighten its effects. The same, of course, applies to the various other de Blasio and Chokshi vaccine mandates. They are all separate slices of vaccine pie, each with a different flavor, color, and expiration date—certainly not one generally applicable pie!

The Mayor and his Health Commissioner could have implemented a vaccine mandate generally applicable to all New Yorkers, requiring everyone in New York City to be vaccinated—as other municipalities worldwide have done. Instead, he decided to "divide and conquer," by picking off various segments of New York City one at a time, apparently based upon nothing more than pure muscle and expedience, and each replete with arbitrariness and capriciousness.

New York City's 54 vaccine mandates, handcrafted and custom-tailored for the various sub-sectors of New York City's work force, are flatly outside of the ubiquitous laws that *Smith*, its predecessors, and its progeny deemed to have such broad political and societal reach that they warranted departure from strict scrutiny.

(2) **The Mandate is both overinclusive and underinclusive**

Laws are not generally applicable when they are overinclusive or underinclusive "in

relation to the state interests they purportedly serve." *Lukumi*, 508 U.S. at 579. A law is not generally applicable when "it is underinclusive in relation to its asserted secular goals." *Cent. Rabbinical Cong. of the U.S. v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 186 (2d Cir. 2014). Ironically, the same Second Circuit Court of Appeals now concludes that "[t]he Vaccine Mandate, in all its iterations, is neutral and generally applicable." (App. L, p. 17).

The Mandate is overinclusive because it was made applicable to all DOE employees and staff—even those working remotely or who otherwise do not come into contact with children.

The Mandate is underinclusive because it is expressly inapplicable to:

- bus drivers; (*see* USCA2 21-2711, ECF 81, pp. JA-240-243)
- workers at "UPK" programs not located in a NYC DOE building
- "Individuals entering a DOE school building for the limited purpose to deliver or pickup items"
- "Parents or guardians of students who are conducting student registration or for other purposes identified by DOE as essential to student education and unable to be completed remotely"
- "Individuals entering for the purposes of voting or, pursuant to law, assisting or accompanying a voter or observing the election." (*Id.,* pp. JA-164, JA-227, 228-238)

"[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat any comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. "Whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue . . . ." Comparability is concerned with the risks various activities pose." *Id.*

The Mandate's preamble recognizes a "public health emergency within the City" and seeks "to address the continuing threat posed by COVID-19 to the health and welfare of City residents." It also states that "the City is committed to safe, in-person learning in all pre-school to grade 12 schools, following public health science." To the extent that the goal is to curtail Covid-19 in New

York City at large, as is evident by the City's imposition of vaccine mandates or other Covid-19 regulations upon its various agencies and some commercial sectors, the Mandate is underinclusive, as it does not apply to the public at large or, indeed, even to the students in the very same classroom as the teachers affected by the Mandate. If, on the other hand, the Mandate is specifically and exclusively concerned with schools, its scope should include all schools, not just DOE schools. *See Ky. ex rel. Danville Christian Acad., Inc. v. Beshear*, 981 F.3d 505, 509 (6th Cir. 2020) (holding that "Executive Order 2020-969 applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it is therefore neutral and of general applicability"(emphasis added)). Pre-school to grade 12 students in private and charter schools, after all, should also be entitled to safe, in-person learning, and the failure to include these students and their schools within the scope of the Mandate renders it patently underinclusive.

In either case, religious objectors pose no greater risk of spreading Covid-19 to others than bus drivers or FedEx personnel. As such, the Mandate is not generally applicable.

C. There is a reasonable probability that the Court will grant review

This Court has now twice declined to grant applications for injunctive relief in Covid-19 cases. *Does 1–3*, 142 S. Ct. 17. In *Does 1–3 v. Mills*, 142 S. Ct. 17 (2021), Justice Barrett (joined by Justice Kavanaugh) recently explained that the likelihood of success on the merits encompasses "not only an assessment of the underlying merits but also a discretionary judgment about whether the Court should grant review in the case." *Id.* at 18 (Barrett, J., concurring). Justice Barrett further expressed concern with this Court giving "merits preview in cases that it would be unlikely to take . . .without benefit of full briefing and oral argument."

This case is different: Applicants are likely to succeed on the merits, according to a merits panel in the circuit court. This case has been fully briefed many times over, and has been argued

orally no less than five times *each* by counsel for the *Keil* Applicants and counsel for the *Kane* Applicants. There is not much more in the way of briefing or oral argument that could further assist the Court in reviewing and deciding the matter.

If Applicants were to petition for certiorari, the Court would likely grant certiorari. Supreme Court Rule 11 allows the issuance of a writ of certiorari in cases of "imperative public importance" that "justif[ies] deviation from normal appellate practice" and "require[s] immediate determination in this Court." Such is the case here.

First, the nation is now two years into a pandemic that is not expected to disappear anytime soon. The emotional climate is high, particularly concerning Covid-related restrictions. New York is the nation's most populous city, and its public school system by far the nation's largest, boasting over one million students. The state and federal courts whose jurisdiction includes New York City are among the most influential, precedent-setting in the country. Almost daily, suits are filed across the country challenging vaccine mandates, many on Free Exercise grounds. Judicial rulings concerning the issues at hand appear to portray much the same ethos that governs the general public. Despite Justice Gorsuch's exhortation that "[g]overnment is not free to disregard the First Amendment in times of crisis," *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring), Free Exercise has been given little deference with vaccine mandates, and this Court's guidance is greatly needed.

Second, New York City's fifty-four vaccine mandates constitute unprecedented exercise of executive authority in that a single municipality has within several months issued fifty-four different, specifically tailored executive orders and made each applicable to a different segment of the population at large, only to claim that each is generally applicable. This stunning abuse of

executive power and reckless disregard for the Constitution can only be corrected by this Court's guidance, for which the nation thirsts.

Third, time is of the essence. Thousands of DOE employees will be terminated this Friday, February 11—13 days before oral argument is scheduled with the Second Merits Panel—pursuant to a policy rife with constitutional violations, as admitted by Respondents themselves. Applicants will be terminated on February 14. These employees have been on unpaid leave since October. They have already lost their paychecks and cannot collect unemployment because their records indicate termination for misconduct. Some of them are losing their homes. On Friday they will lose their health insurance and their livelihoods, their careers placed in jeopardy. Every day since October 2021 they have been forced to decide whether to abandon their job or their faith. It would be a grave injustice if this Court were to decline to step in, as they have nowhere else to turn.

Fourth, such a situation warrants departure from the normal appellate procedure to remind government actors in the City and State of New York that "even in a pandemic, the Constitution cannot be put away and forgotten." *Id.* at 68. New York continues to flout such admonitions. The DOE admitted repeatedly that its Accommodation Policy was unconstitutional. The First Merits Panel found the same. Yet thirteen of fifteen Applicants and thousands of other DOE employees have failed to receive any meaningful relief, due to Respondents' continued First Amendment abuses and the Second Circuit's failure to put an end to them. Indeed, the First Merits Panel found that Respondents violated the First Amendment, but then failed to order them to follow it in the "fresh review," instead ordering compliance with an inapplicable standard. As a result, Respondents continue to hide behind the improper "undue hardship" standard, failing to satisfy even that, or to acknowledge that undue hardship has different standards under state and federal law.

II. Absent a stay, Applicants and all those similarly situated will suffer irreparable injuries

The deprivation of First Amendment rights itself, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Nevertheless, the district court and the First Merits Panel decision that it relied upon erroneously discarded this *per se* rule as applied to the Applicants because, "'[t]he City is not threatening to vaccinate Applicants against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Applicants instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations[.]'" (SDNY 21-cv-8773, ECF No. 54, at 7) (citing USCA2 21-2711, ECF 117-1, at 34-36). By assuming that the only harm to Applicants here is economic, the First Merits Panel completely misstated the standard for what constitutes a Free Exercise violation and misapprehends the constitutional harms at issue here.

A state actor does not just violate the Free Exercise Clause when it physically forces a religious adherent to "perform or abstain from any action that violates [his or her] religious beliefs," *Elrod*, 427 U.S. at 373, as the First Merits Panel and the district court believe. *Id.* A state actor also violates the Free Exercise Clause when it coerces religious adherents to substantially modify their behavior in violation of their religious beliefs.

Here, the DOE's coercion comes in the form of loss of health insurance and income, and the anticipated modification of behavior is Applicants getting vaccinated. The loss of First Amendment freedoms in this context is no less *per se* irreparable harm because the government uses economic harms to do it. *Thomas*, 450 U.S. at 717-18 ("[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on

an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon Free Exercise is nonetheless substantial"); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2277 (2020) (internal quotation marks omitted) ("the government tests the Free Exercise Clause whenever it conditions receipt of an important benefit upon conduct proscribed by a religious faith, or . . . denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Sherbert*, 374 U.S. at 404 ("[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against Appellant for her Saturday worship"); *Smith v. Bd. of Educ.*, 844 F.2d 90, 91 (2d Cir. 1988) (holding that "to demonstrate an infringement on his free exercise rights, an individual must have shown the coercive effect of the enactment as it operated against him in the practice of his religion" and that "[t]his coercion can be either direct or indirect"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (finding irreparable harm due to religious exercise violation when inmate was given choice between submitting to a test that violated his sincerely held beliefs or adhering to his beliefs and enduring medical keeplock).

Therefore, while these economic harms by themselves would not constitute irreparable harm, the Defendants use of them to coerce Applicants to violate their sincerely held religious beliefs indisputably does so.

Indeed, in one of the cases that the First Merits Panel cited and upon which the district court relied; the court found no irreparable harm *only* because the alleged harm was unrelated to the constitutional violation. *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988).

Here, the source of the Applicants' chilled free exercise rights is the coercive termination deadline of February 14 Applicants seek to stay, and the distressing choice Applicants are forced to make between faith and job. Irreparable harm therefore exists, and there is no question that this prong is satisfied.

III. The equities and the public interest favor a stay

Typically, "the movant must show that the harm which he would suffer from the denial of his motion is 'decidedly' greater than the harm his opponent would suffer if the motion was granted." *Buff. Forge Co. v. Ampco-Pitt. Corp.*, 638 F.2d 568, 569 (2d Cir. 1981). But in a First Amendment case, the balance of hardships is entirely one-sided because "the Government does not have any interest in enforcing an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). In any event, given the fact that COVID positive teachers are being invited back into the schools as well as the schizophrenic "scientific" COVID standards, the ever-changing executive orders, the disparate rules for different classes or groups of people, and the chaotic stab-in-the-dark enforcement "procedures," the equities weigh heavily in favor of the tried and true First Amendment and the ability for Applicants and their families to have health insurance, to earn a living, and to live comfortably with their faith.

Further, a preliminary injunction is in the public interest, as "securing First Amendment Rights is in the public interest." *Id.; Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 50 (S.D.N.Y. 2020) ("securing First Amendment rights is in the public interest") (internal quotation marks and alteration omitted). Furthermore, where Respondents failed to "demonstrate that public health would be imperiled if less restrictive measures were imposed," the public interest favors granting injunctive relief. *Roman Catholic Diocese*, 141 S. Ct. at 68; *Agudath Isr.*, 983 F.3d

at 637. "No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Id.* Additionally, while there is no evidence that draconian and discriminatory policies are advancing public health, substantial evidence establishes that the staffing crisis caused by the removal of thousands of qualified teachers from the already struggling New York City school system has caused chaos, trauma, and loss of needed services and programming which is severely harming children. The public interest strongly supports broad injunctive relief. This element is therefore unmistakably satisfied.

CONCLUSION

For the reasons stated in this application, Applicants respectfully request that the Circuit Justice or the Court enjoin the Mandate as applied to employees who assert a religious objection pending judicial review or grant such other relief as the Court deems proper.

Dated this 8th Day of February 2022.

Respectfully submitted.

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