21-2678-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

BILL DE BLASIO, in his official capacity as Mayor of the City of New York, DAVID CHOKSHI, in his official capacity of Health Commissioner of the City of New York, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX
FOR PLAINTIFFS-APPELLANTS

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PRELIMINARY STATEMENT

This case asks: under what circumstances is it constitutional for the government to participate in heresy inquisitions and discriminate against religious minorities because their views purportedly conflict with the views of Pope Francis?

The answer is hopefully, of course, none. It is hard to imagine a more obvious violation of the First Amendment. *See*, e.g., *Epperson v. State of Ark.*, 393 U.S. 97 U.S. 97, 104 (1968), quoting *Watson v. Jones*, 13 Wall. 679, 728 (1872) ("As early as 1872, this Court said: 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.'")

And yet, though it shocks the conscience, and though Appellants have yet to receive meaningful relief, the fact that New York City (the "City") has been participating in heresy inquisitions and nakedly discriminating against religious minorities for the last month and a half is not in dispute.

Merriam-Webster dictionary defines heresy as "adherence to a religious opinion contrary to church dogma." Historically, heresy was a crime and could result in the loss of life, freedom, and employment among other serious consequences. The First Amendment was promulgated in large part to ensure that the government is restrained from ever again establishing a preferred dogma or holding inquisitions to rout out heretics and punish them or coerce them into abandoning their beliefs in favor of the official dogma.

Unfortunately, in implementing its new COVID-19 vaccine mandate against its dedicated public-school employees, the City officially adopted a religious exemption policy that presents a textbook example of heresy inquisitions. The policy states: "Religious exemptions for an employee to not adhere to the mandatory vaccine 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…or where the objection is personal…" Moreover, only those requests that are in line with the stated beliefs of "recognized and established religious organizations (e.g. Christian Scientist). . .shall be accepted." A-92.

By this plain language, anyone holding a heretical belief (one not supported by church dogma) must be denied reasonable religious accommodation and terminated unless they violate their sincerely held religious beliefs. Indeed, relying on these unlawful policies, the City summarily began suspending thousands of qualified and dedicated teachers, principals, and staff without pay on October 4, 2021. **If this Court does not intervene by November 30, 2021, the DOE has affirmed that they will begin firing all suspended employees who do not agree to waive their right to sue or seek redress**. Under the City's policy, these employees will lose their seniority, including tenure rights, their eligibility for

health insurance benefits, and will even be deprived of the right to receive unemployment compensation.

Appellants respectfully ask this Court to issue an injunction against the continued enforcement of the vaccine mandate pending litigation to avoid irreparable harm, not just material, but also spiritual, as all of these employees are suffering unconscionable coercion each day that the Court fails to stop the discrimination from continuing.

Likelihood of success on the merits is no longer in question. The City attorneys acknowledged the policies are unlawful. They cannot argue otherwise. It is black letter law that personally held religious beliefs are as fiercely protected by the Constitution as those that align with orthodox viewpoints. *See*, e.g., *Welsh v. United States*, 398 U.S. 333, 339 (1970) (personally held moral and ethical beliefs are as protected under the First Amendment as those commanded by established religions); *Ford v. McGinnis*, 352 F.3d 582, 589 (2d Cir. 2003) ("we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization.")

According to the Supreme Court it is irrelevant what the Pope or any other religious leader says: "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 715-16 (1981). Nor does it matter whether

the beliefs are "right" or "wrong" in the opinion of the government. Appellants are not required to make their religious beliefs "acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Id*. at 714.

The lower court erred in denying relief on the unsupported speculation that the waiver doctrine in *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258 (2009) might serve to prevent these hardworking teachers from seeking the court's help to avoid their ongoing harm. A-788-789, A-804. No one had alleged such a defense, and it does not exist here.

As Judge Caproni eventually acknowledged (A-824), the underlying Collective Bargaining Agreements contain no such waiver and the Educators each retain their rights to seek redress in federal court for discrimination and constitutional violations. Neither *Pyett* nor the fair representation cases initially cited by Appellees are apposite to this case as a basis for denying relief. This is not a contract case. Appellees themselves acknowledged that Appellants have standing to sue in federal court during the preliminary injunction hearing.

See, e.g., A-838-39 (October 12, 2021 Transcript):

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

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

THE COURT: Well, what is your position?

MS. MINICUCCI: About liability?

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

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

THE COURT: So why would you argue in your papers about duty of fair representation?

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

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

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

THE COURT: Like an as-applied challenge.

MS. MINICUCCI: Correct.

THE COURT: Like what this lawsuit is.

MS. MINICUCCI: Correct.

It was an error of law for the district court to continue to deny injunctive relief on an unsupported standing theory even after the City conceded that Appellants have standing to sue them in federal court.

Though it is not relevant to the fair representation question, the court below was also mistaken about the nature of these claims. This suit includes as-applied claims, but primarily it is a facial challenge. The two are intertwined.

In evaluating facial challenges, it is proper to consider a city's interpretation and implementation of policy and evidence of widespread patterns and practices. *See Forsyth County 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."); *Ward v. Rock Against Racism*, 491 U.S. 781, 795-96, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) ("Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered'"). *Food Not Bombs*, 450 F.3d at 1035 ("To affect the constitutional analysis, [an interpretation] must 'be made explicit by textual incorporation, binding judicial or administrative construction, or **well-established practice.**'")

However, either way, as acknowledged by counsel, the City cannot shield itself from constitutional claims by hiding behind the fact that an arbitrator's award initially set forth the unlawful policies that the City then adopted and enforced. The state is prohibited under the Fourteenth Amendment from enacting *or enforcing*

unconstitutional policies. As state actors, the City and its DOE were obligated to refuse to adopt the facially violative award.

But instead of refusing to enforce the discriminatory religious exemption policy, the City aggressively advocated for more discrimination than the policy even requires. While implementing the mandate, City representatives adopted well-established policies to openly preference certain religions, religious dogmas and religious leaders over minority viewpoints. The DOE was so zealous in their efforts that they adopted another widespread policy of advocating for the denial of reasonable religious accommodation to anyone whose views conflicted with Pope Francis' - even arguing that Buddhists and other non-Catholic employees should be denied accommodation because the Pope believes vaccination is an act of love. *See, e.g.*, declarations at A-243, A-251, A-258.

The Mayor admitted that the City had adopted this policy in his statements to the press, in which he asserted "only Christian Scientists and Jehovah's Witnesses have any prayer for a religious exemption" from the City mandate. A-121, A-140, A-145. During the same press briefing, he referenced the Pope as the authority on the validity (or as he argued lack thereof) of religious opposition to vaccines.

Appellants and their similarly situated colleagues are suffering ongoing irreparable harm each day that they are forced to continue to choose between their

job and their faith and each day that the discrimination is upheld and validated by court inaction.

The public interest is not served by withholding meaningful injunctive relief. These educators have all been safely teaching on the frontlines for the last year and a half without issue. No emergency requires their sudden removal now and there are multiple less burdensome measures that can be taken to mitigate any risk posed by their vaccine status.

No matter how well-intentioned, even public health does not justify discrimination against religious minorities and the public interest is seriously harmed by allowing these abhorrent policies to remain in effect undeterred.

The City's decision to remove several thousand qualified educators from the already critically understaffed public school system last month has had dire consequences not only for the Appellants and their similarly situated colleagues, but for the children as well. As described in the declarations and articles in the record below, the staffing crisis left thousands of children without legally required and desperately needed services. Without security guards or supervision, brutal stabbings are increasing. Children are left alone and unattended. They are suffering. A-708 to A-711, A-766-7. Appellants ask only that they and the rest of the desperately needed educators who were placed on leave be allowed to return to the status quo as it was on October 4, 2021 when they filed their emergency motion

until litigation can yield a better long-term solution. The Court can require weekly testing as a condition of reinstatement pending a review of the evidence and options. Every other school district in the state allows for this option in lieu of vaccination.

STATEMENT OF THE ISSUES

Whether the district court erred in denying the Plaintiffs' application for a preliminary injunction staying enforcement of the "Order of the Commissioner of Health and Mental Hygiene to Require COVID-19 Vaccination for Department of Education Employees, Contractors, Visitors and Others" (the "Vaccine Mandate").

JURISDICTION

This is an appeal from the denial of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1) in a civil action pending in the United States District Court for the Southern District of New York. The District Court had federal question jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

PROCEDURAL HISTORY

The Appellants filed this action in the U.S. District Court for the Southern District of New York on September 21, 2021. A-13. On October 4, 2021, they filed an emergency motion for a temporary restraining order ("TRO") and for a preliminary injunction. A-118. The District Court held a hearing and denied the TRO on October 5, 2021. Transcript, A-771. A preliminary injunction was denied

after oral arguments on October 12, 2021. A-807. The Appellants timely filed their notice of appeal on October 25, 2021. A-833. The same day, Appellants moved the District Court for an injunction staying enforcement of the Vaccine Mandate pending appeal of its denial of their requests for a temporary restraining order and a preliminary injunction. A-884. The District Court denied the motion, and the next day, the Appellants filed a motion for an emergency injunction pending appeal from this Court (CMECF 16). After oral arguments, this Court granted limited relief on November 15, 2021 (CMECF 58) and arranged for an expedited merits review.

STATEMENT OF THE CASE

Appellants ("Educators") are ten public school teachers and administrators employed by the DOE who cannot be vaccinated due to their sincere religious beliefs. They allege that the City's vaccine mandate for DOE employees violates their constitutional rights, facially and as applied, and they seek relief for themselves and all others similarly situated.

On August 24, 2021, Mayor de Blasio announced the new vaccine mandate for DOE employees. A-78. The highly controversial mandate removed the testing option that was supposed to be available to all schoolteachers and municipal employees in New York and intentionally offered no religious or medical accommodation.

Over fifteen unions and thousands of teachers attempted to reason with the City. The City refused to consider reasonable religious accommodations. (*See, e.g.*, A-151) ("DOE has advised that it will not allow those with medical or religious exemptions – should those be accepted – to continue working in person under a strict testing regimen, or remotely with those students receiving remote instructions.")

Multiple courts began issuing TROs against the City's mandate and against a parallel state mandate for healthcare workers and it became apparent that the possibility of religious accommodation is likely required. The City's response was to argue for and obtain a facially discriminatory arbitration award that is designed to deny rather than support reasonable accommodation. A-83, A-102.

As discussed above, the arbitration award is facially discriminatory against religious minorities and people with unorthodox or personally held beliefs. A-92.

These policies reflect the mayor's repeated assertions that "only Christian Scientists and Jehovah's Witnesses have any prayer for a religious exemption" under the City's approach. A-104, A-145; *see, also,* September 23, 2021 press conference transcript:

> **Mayor:** [responding to question about the City's criteria for granting or denying exemption requests]: 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.**[1]

Even though they claimed to have adopted a religious accommodation policy, at least for Christian Scientists, the DOE initially denied *every* request through a boilerplate auto-generated form email stating that it would be an undue hardship to grant *any* religious accommodation since the Vaccine Mandate still did not allow employees with religious exemptions to enter any school building.

This blanket prohibition on entry is not supported by science or good faith need. Even if herd immunity were possible with these vaccines, Appellees offered no factual support below for why the small percent of employees (between 1- 4%) who need religious accommodation from vaccines are so dangerous that no reasonable accommodation could allow them into the building, while one million unvaccinated children in the school system can apparently come to school without

[1] The mayor's frequent dismissive statements about the validity of religious exemptions to vaccination were not contested by defendants in their briefing below. At oral argument on October 12, 2021, however, the district court declined to credit news articles reporting the statements in case they might be taken out of context and refused to allow Appellants to supplement the record by providing the transcripts of press briefings containing the fully quoted statements. Transcripts of the press briefings, such as this one, are readily available at the City's official website. The Court can take judicial notice of the full transcript available online at https://www1.nyc.gov/office-of-the-mayor/news/644-21/transcript-mayor-de-blasio-holds-media-availability

posing a danger to one another, and unvaccinated school bus drivers can safely drive children long distances in enclosed spaces, and unvaccinated delivery people and visitors can come in and out of buildings, and teachers whose immunity waned long ago can still teach in the schools, and everybody can leave the school building each day and interact with a sea of unvaccinated people. Under this scheme of exceptions, the vast majority of the people inside the school buildings are unvaccinated. Even sterilizing vaccines could not create herd immunity under such conditions.

But the COVID-19 vaccines are not sterilizing and cannot create herd immunity in any event. They are useful for personal protection, but they cannot stop transmission, and it is well-established that vaccinated people can spread disease as when infected easily as unvaccinated, and that initial estimates about the efficacy of the vaccines in mitigating infection are unreliable in light of the delta variant and rapidly waning immunity. The impact on community spread of allowing a small percentage of teachers a religious accommodation is *de minimis* at best.

Appellants submitted sworn declarations from two highly regarded public health experts, who were prepared to testify at the preliminary injunction hearing on October 12, 2021 about the level of risk, what the science says, and what the alternative mitigation strategies are to be able to accommodate exemptions. A-212, A-238. The district court erred by refusing to allow the expert testimony, and instead substituting personal opinions and unexamined assumptions about COVID-19

vaccines that are not only inaccurate, but also improper for a Judge to introduce and rely on without giving an opportunity for cross examination and proper rebuttal and foundation. A-364. Appellants are entitled to an objective fact finding before contested facts are assumed, especially facts as important as whether they can safely ever come to work without violating their deeply held religious beliefs.

Though they had over a week to submit additional evidence, and presumably should have had some real evidence quickly available before instituting the mandate in the first place, Appellees offered no witnesses for testimony, and no substantial support for their position that it was suddenly necessary to exclude teachers with religious exemptions from school buildings even though they have been teaching in the classrooms for the last year and a half without issue.

In late September, after the blanked denials were issued to every applicant, Educators had one day to appeal. Arbitrators had discretion to grant or deny an appeal hearing, with no explanation or criteria as to why some were allowed and some denied. The decisions were arbitrary and random.

About a third of the named Appellants were "denied" any further hearing with no explanation and no further process. Others were given zoom hearings with an arbitrator and a DOE attorney. Most of these zoom hearings took place on October 1, 2021. Some took place the following week.

In each hearing, the DOE attorneys argued aggressively for denial of accommodation. They did not question the sincerity of the applicants (*see, e.g.*, A-243); rather, they asserted that the beliefs were wrong. In every appeal, the DOE took the position that the Pope's stance on vaccines invalidates even Buddhist or non-denominational born-again Christian beliefs. *See, e.g.*, A-243, A-251. In some cases, the DOE not only argued for the invalidation of personally held beliefs that conflicted with their interpretation of established orthodoxy but sought to invalidate entire churches that stand against vaccine mandates on the ground that these non-Catholic churches espoused beliefs that were different from the Pope's and thus are wrong. A-251.

Another common argument advanced by the DOE is that anyone with religious objections to the use of aborted fetal cell material in the testing or production of vaccines is wrong and should be denied. In multiple hearings, the DOE produced a letter from Appellee Chokshi, who believes that fetal cell lines were not used in COVID-19 vaccine development. Dr. Chokshi's belief is not accurate, (*see, e.g.*, A-212 at ¶58), or relevant. The religious debate is not about whether abortion is implicated but whether other factors justify indirect participation in what is otherwise considered a mortal sin to many religious people. This is an individualized determination, even within the Catholic church (which counsels members to make the decision in accordance with their moral conscience).

Effective October 4, 2021, all unvaccinated NYC DOE employees, even those whose appeals were accepted or still pending, were henceforth barred from entering any school building. *See, e.g.*, A-738 ("this means you must not report to your work or school site beginning Monday, October 4"). Those whose religious exemptions were denied were placed on "Leave without Pay" starting October 4, 2021 and though they are temporarily allowed to keep their health insurance, they are not allowed to earn income while on leave without pay from *any source* - including outside employment, or to use their accrued paid time off, or to receive unemployment insurance.

By November 30, 2021, any remaining employees must waive their right to sue or they will be terminated unless they violate their religious beliefs and get vaccinated. App. A-751.

Appellants have children to feed, mortgages and rent to pay, and families that depend on them for income and health insurance. They cannot hold out much longer and each day that they have to face the choice between their livelihood and their faith presents a serious and devastating harm.

STANDARD OF REVIEW

When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm absent

injunctive relief, and (3) public interest weighing in favor of granting the injunction." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d. Cir. 2020).

The grant or denial of a preliminary injunction is reviewed for abuse of discretion. "Such an abuse occurs when the district court bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013). A finding of fact is "clearly erroneous" only if the reviewing court is "left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Where, as here, the injunction stays enforcement of a state executive branch "emergency" order, this Court "grant[s] no special deference to the executive when the exercise of emergency powers infringes on constitutional rights" because "courts may not defer to the Governor simply because he is addressing a matter involving science or public health." *Agudath Israel*, 983 F.3d at 635. This is so even though, more generally, governmental policies implemented through legislation or regulations "should not be enjoined lightly." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014).

ARGUMENT

I. POINT I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

The lower court erred as a matter of law by holding that Appellants are unlikely to succeed on the merits and applying only rational basis review. Even Appellees concede, at this point, that the policies they adopted are facially unconstitutional. Multiple alleged causes of action require strict scrutiny review, and the mandate is unlikely to withstand that exacting standard.

a. The Vaccine Mandate Violates the Establishment Clause of the First Amendment Because the City Preferenced Some Religious Beliefs over Others and Openly Discriminated Against Minority Religions in Implementing the Mandate.

The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another. *Larson v. Valente*, 456 U.S. 228, 244 (1982). Appellants are likely to succeed on their claim that the City's policies violate the Establishment Clause, because in implementing the Vaccine Mandate, the City expressed "denominational preferences" which constitutes a square violation of the Establishment Clause under the *Larson* test.

In *Larson*, the Supreme Court considered government-imposed reporting and registration requirements that applied to only a subset of religions (those that solicited more than fifty percent of their funds from nonmembers). In holding the law unconstitutional, the Court adopted a new test, and held that strict scrutiny

should be applied in all cases in which a government policy suggests a "denominational preference" between religions.

This doctrine is well-supported by case law. The Supreme Court repeatedly adheres to the principle that pursuant to the Establishment Clause, no State can adopt policies "which aid one religion" or that "prefer one religion over another" see, e.g., *Everson v. Board of Education*, 330 U.S. 1, 67 (1947). It is black letter law that regardless of personal preferences, "[t]he government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306 (1952). "The First Amendment mandates government neutrality" and "the State may not adopt programs or practices…which 'aid or oppose' any religion…This prohibition is absolute." *Epperson v. Arkansas*, 393 U.S. 97 (1968)(citing *Abington School District v Schempp*, 374 U.S. 203, 225 (1963)). As Justice Ginsberg articulated in *Abington School District*, "[t]he fullest realization of true religious liberty requires that government…effect no favoritism among sects....and that it work deterrence of no religious belief." *Id*. at 305.

In *Larson*, the Supreme Court reviewed the long history of the strict prohibition on denominational preferences and concluded: "In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson*, 456 U.S. at 244.

It is rare today to see a government engage in such blatantly violative preferential treatment as this case presents. The policy adopted by the City facially commands that those with minority religious viewpoints should be discriminated against. The mayor embraced this approach and admitted the City's widespread policy of discrimination was official policy in a press conference, in which he stated that only Christian Scientists and Jehovah's Witnesses and other members of a select few state-preferred religions are sanctioned by the City as having "valid" religious objections to vaccines.

In making this shocking statement, the mayor also announced that the City was adopting Pope Francis' alleged interpretation of scripture to adopt the position that there are no other valid religious objections to vaccination. As instructed, the DOE then denied *every* application for religious exemption and when forced to reconsider in the appeals, repeatedly advocated for discrimination against all people with religious objections to vaccination on the ground that their views do not comport with Pope Francis and occasionally other "sanctioned" religious leaders.

In addition to failing the *Larson* test, the Vaccine Mandate at issue here fails the *Coercion* test. *See, e.g., Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2264 (2020) (THOMAS, J and GORSUCH, J Concurring) (Establishment clause forbids "coercion of religious orthodoxy and of financial support by force of law and threat of penalty.") The Vaccine Mandate is blatantly coercive. The City

increased the coercive effect by establishing a preferred religious orthodoxy (i.e., those who are willing to overlook the indirect participation in abortion in service of other goals) and then threatened loss of livelihood and other intentionally coercive consequences if religious observers do not violate their deeply held religious beliefs to conform with the majoritarian preferred religious orthodoxy.

The animus is bare. The City will not even allow employees to use their accrued vacation or sick time while they are excluded, or to earn any income even outside of the school system, or to collect unemployment insurance. Instead, employees are literally being starved out of house and home in an effort to coerce them to violate their faith.

Such coercion and widespread violations of the prohibition on government preference towards "state approved" denominational beliefs or leaders cannot withstand strict scrutiny. Public health cannot be advanced through discrimination against religious minorities. Rather, the public interest specifically requires the state to avoid deciding which religious viewpoint is more valid. "Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the "understanding, reached ... after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens ...." *McCreary Cty., Ky. v. Am. C.L. Union of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Zelman v. Simmons–Harris*, 536 U.S. 639, 718 (2002) (BREYER, J.,

dissenting)). The City showed blatant intolerance here, and it must be squarely faced to avoid repetition and ongoing harm.

b. The Vaccine Mandate Violates the Free Exercise Clause of the First Amendment Because it is Not Neutral or Generally Applicable.

The Free Exercise Clause of the First Amendment protects both an individual's private right to hold a religious belief and "the performance of (or abstention from) physical acts that constitute the free exercise of religion." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020). It also "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2254–55 (2020) (collecting cases).

Though the Free Exercise protection "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" *Emp. Div. Dep't of Hum. Res. Of Or. v. Smith*, 494 U.S. 872, 879 (1990) any evidence of a lack of neutrality, emerging facially or as applied, triggers strict scrutiny. *See, e.g*; *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

i. The City's Adoption of Facially Discriminatory Policies and Promulgation of Brazenly Discriminatory Statements During the Implementation of the Mandate Negate any Argument that this Mandate is "Neutral."

The district court erred, as a matter of law, by classifying the mandate as "neutral." A regulation is not "neutral" if it discriminates against a religious practice on its face, or if in its real operation it targets a religious practice. *Cent. Rabbinical Cong. of U.S. & Canada*, 763 F.3d 183, 193, 194-95 (2d Cir. 2014). The City's policies do both.

As affirmed repeatedly by the Supreme Court, 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).

> The government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The free exercise clause bars even subtle departures from neutrality on matters of religion…" *Id.* 1731-32.

In this case, the indicia of animus towards minority viewpoints is hardly subtle. The mayor's statements to the media, preferencing certain religions over others, favoring the Pope's interpretation that the "scriptures" show that religious objections to vaccination are invalid, and announcing that the City would not accept

religious exemptions submitted by those with unorthodox or personally held views requires the law to be strictly scrutinized and likely struck down. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *see also Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540 (1993)).

The district court made another clear error of law by holding that statements made after the Vaccine Mandate was announced on August 24, 2021, but before it took effect, could not be considered in analyzing neutrality. A lack of neutrality revealed at the time of the application is clearly as relevant as lack of neutrality admitted before a policy is announced. *See New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 168 (2d Cir. 2008) (agency official's biased response to plaintiff's concern about a promulgated rule, and a spokeswoman's later statement to a reporter were relevant in evaluating the rule's lack of neutrality); *see also Masterpiece Cakeshop*, 138 S.Ct. 1719 (finding lack of neutrality from statements made during the time of the application of the law rather than statements issued before the law was promulgated).

Moreover, laws and policies are assessed for neutrality in context, not only of statements, but of other related laws and policies which impact their administration. In *Lukumi*, the Supreme Court explained that the history and context of a regulation, both before and after it is first enacted, along with any subsequent related regulations taken together can evidence a lack of neutrality. *Lukumi*, 508 U.S. at 539–540. Thus,

in adopting facially discriminatory policies to implement the mandate, the mandate loses its claim to neutrality and must be strictly scrutinized, just as the supposedly "neutral" policies in *Lukumi* were analyzed in the context of the full history of related non-neutral policies and statements. Examined together with its implementing policies and the statements made by policy makers about the validity (or lack thereof) of religious opposition to vaccines, there can be no dispute that the Vaccine Mandate lacks neutrality.

For as long as there have been vaccines, there have been people from every major and minor religion who opposed the practice based on their personally held religious beliefs. It is black letter law that personally held or unorthodox religious beliefs are just as protected as those beliefs supported by the orthodoxy or leadership of a church.

EEOC guidelines, for example, 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." 29 C.F.R. § 1605.1. Pursuant to statute, "[t]he 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."

The EEOC adopted its expansive definition of religion based on two Supreme Court decisions in the First Amendment context, *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970).

Appellees knew or should have known that their policies violate Appellants' First Amendment rights. This precise issue has already been litigated in New York. *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987). In *Sherr*, the Eastern District of New York held that New York's policy on religious exemption to childhood vaccines, which only granted exemption to "bona fide members of a recognized religious organization" violated both the Establishment and Free Exercise clauses of First Amendment. New York was forced to amend the statute as a result of this landmark case so that any child whose guardian held a sincere religious belief against vaccination was exempt "and no certification shall be required."

The district court acknowledged that *Sherr* is directly on point and that the polices in the arbitration agreement and implemented by the DOE are "blatantly violative of the First Amendment guarantee." A-803. Strict scrutiny should have been applied.

ii. The Vaccine Mandate is Not Generally Applicable and Thus Must Be Strictly Scrutinized

In addition to failing the neutrality test, the City's mandate is not generally applicable, as it allows over one million unvaccinated children to enter school

buildings each day (along with unvaccinated bus drivers, delivery people, visitors and other carve outs) but will not afford religious accommodation to educators who also need to remain unvaccinated due to their religious beliefs. This is an independent reason for striking the regulation. See *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021) (citing *Lukumi*, 508 U.S. at 542–546 for the holding that underinclusiveness triggers strict scrutiny); *Tandon v. Newsom*, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021) (Comparison is concerned with the risks various activities pose, not the reasons why the policies have been adjudged to be more worthy of protection). The virus does not care about the validity of the policy reasons underlying such carve outs. If it is safe to allow the vast majority of people in the school buildings and school busses to come to school each day unvaccinated, an inference arises that it is likely safe to also allow the 1-4% of non-exempt DOE staff to be safely accommodated in the classrooms as well.

Because it is not neutral or generally applicable, the Vaccine Mandate must be assessed under the strictest scrutiny and will likely be found unconstitutional. [2]

[2] The Vaccine Mandate also triggers the "Hybrid Right" exception to the *Smith* neutral and generally applicable test, and therefore is entitled to strict scrutiny on that basis as well, because in addition to the Free Exercise claims, it implicates the fundamental right to refuse medical treatment – particularly medical treatment that is by all standards and accounts, still experimental in nature. The Second Circuit does not appear to recognize the Hybrid Rights doctrine, so briefing will not heavily focus on this point, but it has not been overturned by the Supreme Court and if *Smith* remains good law, it is hard to reconcile the many cases which do not fit within *Smith's* criteria, but nevertheless received strict scrutiny though appearing to

c. The Vaccine Mandate Violates the Equal Protection Clause of the Fourteenth Amendment

The antidiscrimination command of the Fourteenth Amendment *also* prohibits discrimination on the basis of religion and provides a separate basis for exercising strict scrutiny review. It is well-settled law that discrimination on the basis of religion is a forbidden form of class legislation, and it is always unconstitutional. *See generally* Melissa L. Saunders, Equal Protection, Class Legislation, and Colorblindness, 96 Mich. L. Rev. 245, 262 (1997). In adopting facially discriminatory policies, which treat applicants differently depending on the source of their religious belief, the City violated the equal protection rights of thousands of employees. This triggers strict scrutiny and Appellants are likely to prevail.

d. The Vaccine Mandate Violates the Supremacy Clause.

Last, the Vaccine Mandate violates the Supremacy Clause of the U.S. Constitution, because it prohibits reasonable accommodation under Title VII of the Civil Rights Act of 1964 ("Title VII") by failing to allow people with religious exemptions to enter any school building whether or not they are a direct threat to others. Such an inflexible predetermination is likely preempted under the Supremacy Clause. *See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272

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challenge neutral and generally applicable laws without applying the Hybrid Rights doctrine.

(1987)(Title VII preempts state law in cases where the state law stands as obstacle to accomplishment and execution of the full purposes and objectives of Congress.)

Title VII places the burden on employers to prove that they cannot reasonably accommodate religious beliefs in an individualized context. "The broad aim of Title VII is to eliminate discrimination in employment…Title VII's provisions make it an unlawful employment practice to discriminate against any employee 'with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... religion,' *id.*, or to 'limit, segregate or classify' an employee in a way that would 'adversely affect his status as an employee,' because of that employee's 'religion.' 42 U.S.C. § 2000e–2(a)(2), § 703(a)(2)." *Cosme v. Henderson*, 287 F.3d 152, 157 (2d Cir. 2002).

Pursuant to Title VII, employers bear the burden of proof that it would be an undue hardship to reasonably accommodate religious exemptions because the Educator poses a "direct threat" to others so significant that they must be excluded from all school buildings. Such a finding is unlikely in this case. Moreover, direct threat analysis it must be determined on an individualized basis, which the City's mandate does not allow.

The Mayor's blanket interference with such an important employer obligation cannot be taken lightly. In 2017, the Attorney General of the United States published

a memorandum titled Federal Law Protections for Religious Liberty. The memo begins by reciting the primary significance of religious liberty in the United States, which is worth repeating here:[3]

> Religious liberty is a foundational principle of enduring importance in America, enshrined in our Constitution and other sources of federal law. As James Madison explained in his Memorial and Remonstrance Against Religious Assessments, the free exercise of religion "is in its nature an unalienable right" because the duty owed to one's Creator "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." Religious liberty is not merely a right to personal religious beliefs or even to worship in a sacred place. It also encompasses religious observance and practice. Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity, including employment, contracting and programming…In the United States, the free exercise of religion is not a mere policy preference to be traded against other policy preferences. It is a fundamental right.

The Vaccine Mandate's prohibition on the good faith individualized requirement to reasonably accommodate employees' religious beliefs is not something that can be taken lightly or allowed to continue in effect without strict scrutiny to ensure such a burden is necessary and the least restrictive method of achieving a compelling interest of the City. The City bears the burden of proof on this issue and they have not met that high burden.

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[3] Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668-01, 49668 (Oct. 26, 2017).

e. The Vaccine Mandate Will Not Likely Survive Strict Scrutiny

Each cause of action above requires strict scrutiny review. Strict scrutiny's "stringent standard," is not "watered down but really means what it says," *Lukumi*, 508 U.S. at 546 (internal quotation marks and alterations omitted). To satisfy it, government action "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests." *Ibid.* (quoting *McDaniel*, 435 U.S. at 628, 98 S.Ct. 1322). *See, also, Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2260 (2020).

"A government policy can survive strict scrutiny under the First Amendment's Free Exercise Clause only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct at 1888. "So long as the government can achieve its interests in a manner that does not burden religion, it must do so, in order to survive strict scrutiny under the Free Exercise Clause of the First Amendment." *Id.*

The discrimination inflicted on Educators who hold unorthodox religious viewpoints, and the refusal to provide reasonable accommodations, even to those who are accepted, is all the more unconscionable because Defendants did not justify the restrictions as necessary to achieve any compelling state interest.

A compelling interest "cannot be stated at an unduly "high level of generality," but rather must show a compelling interest "in denying an exception"

to "*particular* religious claimants." *Id.* at 1882. The DOE is unlikely to be able to establish a compelling interest in being able to honor the religious beliefs of Christian Scientists but deny the same protection to those whose same belief is rooted in another spiritual source.

To the extent that the City claims that it needs to enact a Vaccine Mandate for employees to stem the spread of COVID-19, this point needs to be carefully scrutinized. In *Does v. Mills*, 595 U.S. __ (2021), Justices Gorsuch, Thomas and Alito discussed (in their dissent) likely upcoming changes in the way the Court will begin examining COVID-19 policies as we progress out of the beginning stages of the pandemic:

> For purposes of resolving this application, I accept that what we said 11 months ago remains true today—that "[s]temming the spread of COVID–19" qualifies as "a compelling interest." Roman Catholic Diocese of Brooklyn v. Cuomo, 592 U. S. ___, ___ (2020) (per curiam) (slip op., at 4). At the same time, I would acknowledge that this interest cannot qualify as such forever. Back when we decided Roman Catholic Diocese, there were no widely distributed vaccines. Today there are three. At that time, the country had comparably few treatments for those suffering with the disease. Today we have additional treatments and more appear near. If human nature and history teach anything, it is that civil liberties face grave risks when governments proclaim indefinite states of emergency. (GORSUCH, J. dissenting)(footnotes omitted).

New York State declared the state of emergency over in July. The City is not experiencing a resurgence of deaths and hospitalizations. Most people are now vaccinated and have personal protection. COVID-19 is not particularly serious in

children, and as discussed earlier, herd immunity cannot stop transmission in school communities anyway with these vaccines. It is unlikely that the City can establish why it is deemed safe for one million children and thousands of unvaccinated adults who do not have religious exemptions to come to school unvaccinated each day, but so unsafe as a blanket matter for any person with a religious exemption to enter a school building even if their exemption request is granted that several thousand dedicated teachers must be fired.

Strict scrutiny requires the Court to abandon outdated notions of blind deference to public health, and to engage with the science and the various experts to objectively determine the levels of risk posed and the options for inflicting the least restrictive burdens on the fundamental rights at stake. Courts routinely resolve far more complex issues, hearing testimony from competing experts and assessing standards of care, and scientific studies. There is no reason why they should shy away from review of the facts at issue here. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007) (Although we review congressional factfinding under a deferential standard, we do not in the circumstances here place dispositive weight on Congress' findings. The Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake).

No serious argument has been advanced yet for why these Educators, who were able to safely teach in the schools throughout the worst of the pandemic,

suddenly cannot enter school buildings and practice their professions now. October 4, 2021 was an arbitrary deadline. The City admits it was not driven by any real increase in danger. The mandate, announced more than a month before it was to take effect, was not about urgency. It was introduced because the City wanted to see if it could get away with it once the FDA approved its first vaccine. Encouraged by the results, and the lack of lasting court intervention to stop them, the City then quickly announced a plan to impose the same mandate on all other municipal employees, which went into effect at the end of October while this motion pended.

The Court can and should safely enjoin enforcement of the mandate while the district court reviews the evidence to avoid irreparable harm to Appellants and to avoid what appears to be increasing overreach by the City absent guidance from the Court. In the meantime, measures such as testing and symptom checks should suffice, alongside all the other tools we now have, to keep everyone safe while still respecting minority religious views.

II. POINT II – WITHOUT INJUNCTIVE RELIEF APPELLANTS WILL SUFFER IRREPARABLE HARM

Courts presume that a movant has established irreparable harm in the absence of injunctive relief when the movant's claim involves the alleged deprivation of a constitutional right. *Am. Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). In particular, the Supreme Court holds that "[t]he loss of First

Amendment freedoms, for even minimal periods of Case time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Here, where at least five constitutional harms are alleged and likely to be found, irreparable harm must be presumed.

Moreover, Appellants also show additional irreparable and imminent harm because they have been removed from the schools and are barred from working as educators in the New York City public school system unless they receive COVID-19 vaccinations in violation of their religious beliefs. Now, they face the imminent threat of also losing their health insurance unless they waive their right to sue. Forcing a person to choose between their job and their faith constitutes daily imminent harm. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 716–17 (1981)(quoting *Sherbert v. Verner*, 374 U.S., at 404, 83 S.Ct., at 1794 ("The ruling [disqualifying Mrs. Sherbert from benefits because of her refusal to work on Saturday in violation of her faith] 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 [her] for her Saturday worship.")

The court erred by adopting Appellees' argument that the presumption of harm normally afforded in cases alleging a constitutional violation should not be apply here due to accusations of "inexcusable delay" in filing a motion for relief. First, it is inaccurate. Appellants filed their motion a few hours *before* the mandate took effect on October 4th. Second, Appellees simultaneously argued that the Appellants had filed *too soon* since most of them were still pending relief. It can't be that they were both too late and too early. *See, e.g.*, (ECF 51 pp. 9-10): "Because plaintiffs have not yet exhausted their appeals, their challenges to the vaccination mandate are both unripe and unfit for a preliminary injunction here." The motion cannot be both "unripe" and "inexcusably late" and the contradictory arguments establish that neither is a valid reason to presume there is a lack of harm. The "gamesmanship" was not coming from the working-class teachers who have put everything they have into attempting to get urgent relief and are moving as fast as resources allow. To the extent that they do not have teams of lawyers available to work around the clock to file motions that will be kicked back as "unripe", they should not be penalized for that.

This argument also misstates the legal standard. In ongoing constitutional violations, "delay" in filing is not relevant to whether there is irreparable harm. *See, e.g., Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (holding "courts will presume the existence of irreparable harm when the plaintiff alleges a violation of a

constitutional right" and granting a preliminary injunction without issue though the plaintiff waited two and a half years to file a motion for relief.)

This is an untenable situation. Appellants and the proposed class of their similarly situated co-workers are in urgent need of this Court's help. They are not willing and should not have to waive their right to sue, but they cannot survive much longer without intervention from this Court either. Many provide the sole income for their families. They have children to feed and care for. Some have children on the way. They depend on their benefits and income to survive. No amount of money can make them whole if they find themselves without insurance when their babies need to be born, or when their children or spouses need healthcare, or when they face eviction and hunger. Nor can money fix the psychological damage of being daily coerced and bullied by the Government into violating their faith.

III. **POINT III - THE PUBLIC INTERESTS WEIGH IN FAVOR OF THE APPELLANTS**

The right to religious freedom is enshrined in the Constitution, Title VII and the laws of each state. The repeated efforts that society has made to articulate the public's supreme interest in protecting religious freedom cannot be clearer. As the Supreme Court indicated in *Roman Catholic Diocese of Brooklyn v. Cuomo*, "even in a pandemic, the Constitution cannot be put away and forgotten." 141 S.Ct. 63, 68 (2020).

Appellants posed no danger to others during the last year and a half while they taught in person in the schools unvaccinated and they pose no significant danger to others now on the basis of their vaccine status. If anything, the record shows that the sudden deprivation of thousands of qualified teachers is *causing* irreparable harm to the children. To justify First Amendment burdens, Appellees must show that "public health would be imperiled" by less restrictive measures. Id. at 68. Here, Appellants have proposed less restrictive measures. Appellees have not appeared to rebut them, and a stay is necessary to ensure that Appellants are not coerced into waiving their rights while the Court examines this matter.

IV. POINT IV: THE SECOND CIRCUIT'S TEMPORARY ORDER IS NOT SUFFICIENT

The relief offered by the emergency motions panel does not adequately address the harms in this case. Nor is it just. The City admits that it subjected thousands of employees to a facially discriminatory and unlawful process. This was extremely traumatic for all of the thousands of DOE employees who bared their soul in good faith, only to be ridiculed, abused, and summarily rejected. It is unimaginable to now ask them to blithely submit to another inquisition without first ensuring that the process has adequate safeguards.

The City has offered no real details about the process they propose, and nothing is in the record. The few details that have emerged are largely unacceptable. For example, opposing counsel suggests that rather than apply to a neutral evaluator,

Appellants must come before Corporation Counsel, the City's attorneys who are not only adverse to them in this case but who also participated in the original heresy inquisitions in such inappropriate fashion just a few weeks ago. The ethical rules do not even allow Corporation Counsel to have communications with our represented clients during this pending litigation since they represent the Appellees. Now they have demanded to sit in judgment of our clients' sacred religious beliefs.

The criteria upon which they will be judged, and the availability of sufficient notice and opportunity to be heard are similarly obscure. It is vital that a procedurally sufficient process be set up. The property rights here are substantial. Most of these Appellants are tenured teachers, with pensions, thousands of dollars in accrued time, and their entire careers at stake. They have a right to be assured that they will not be subjected to another arbitrary witch hunt. The history here makes that necessity particularly acute.

Last, all of the Educators placed on Leave without Pay must be reinstated now and their benefits restored while the process is created and finalized. The equities do not support limiting relief in this instance to the fifteen named Plaintiffs or delaying reinstatement while the teachers suffer ongoing daily harm and the City makes vague promises to "consider" their applications.

The Educators are in this together. Both lawsuits were brought as a community effort to pool resources and try to obtain relief for hundreds of similarly situated teachers.

While technically not originally filed as a "proposed class action" the original *Kane* complaint repeatedly notes that the Appellants are seeking injunctive and declaratory relief for themselves and "all others similarly situated." Yesterday, Appellants filed an Amended Complaint as of right. A-888. The amended complaint clarifies that the suit is a proposed class action, and Appellants respectfully request that this Court afford relief to all DOE employees who assert a sincerely held religious belief against vaccination.

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court reverse the lower court's denial of a preliminary injunction, issue a preliminary injunction enjoining the enforcement of the vaccine mandate pending resolution of litigation that allows for testing in lieu of the vaccine requirement, and direct the DOE to immediately reinstatement to any DOE employees involuntarily placed on Leave without Pay who assert that they have a sincerely held religious objections to COVID-19 vaccine.

Dated: November 17, 2021 Respectfully submitted,

/s/Sujata S. Gibson

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), the word limit of Local Rule 32.1(a)(4) (A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this document contains 9,485 words.

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Dated: November 17, 2021

Respectfully submitted,

/s/Sujata S. Gibson

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SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO, Plaintiffs, -against- BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK; DAVID CHOKSHI, IN HIS OFFICIAL CAPACITY OF HEALTH COMMISSIONER OF THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION, Defendants.	:	21-CV-7863 (VEC) ORDER

VALERIE CAPRONI, United States District Judge:

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

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

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

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

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

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

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

SO ORDERED.

Date: October 12, 2021
New York, New York

VALERIE CAPRONI
United States District Judge