21-2711-cv

United States Court of Appeals

for the

Second Circuit

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO,

Plaintiffs-Appellants,

– 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,

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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I. INTRODUCTION

By November 30, 2021, Appellants and their similarly situated colleagues will need to choose between their faith and their jobs. In the meantime, the City's pressure on its employees to violate their religious beliefs causes irreparable harm – not only to the Class of New York City Department of Education ("NYC DOE" or "DOE") employees but to the city itself and its entire population as the Defendants/Appellees ("Appellees") impose intolerance for religious dissent as a city-wide condition of public employment.

Appellees initially imposed their will through a no-exceptions vaccine mandate they imposed on DOE workers last August.

On September 15, 2021, Appellees added an ambiguous disclaimer to the original mandate, permitting undefined "reasonable accommodations" as "required by law." Appellees implemented their mandate through arbitration awards which established standards and procedures as the "exclusive" process for religious accommodations to the mandate. Notably, Appellees' counsel has conceded that those standards and procedures were unconstitutional on their face.

However, refusing to bow to their Constitutional duties to respect the religious beliefs of all their employees, Appellees offer a token concession: as a special privilege, they offer to exempt the five named Appellants in this case from the

"exclusive" process that applies to everyone else. Appellees offer to set up a shadowy *ad hoc* panel, including attorneys from the law department that represents Appellees in this very appeal, to take a second look at Appellants' cases, under standards that apply to no one else.

This Court should ignore Appellees' proffer and act to protect the constitutional rights of all of Appellees' employees, whether employed by the DOE or elsewhere, whose religious accommodation requests have been subjected to Appellees' admittedly unconstitutional standards. Appellants ask the Court to enjoin the November 30, 2021 deadline for all who are affected by it, and for other relief, until the Court below establishes a process that protects their rights to free exercise of religion protected by the Constitution.

II. PRELIMINARY STATEMENT

Plaintiffs/Appellants ("Appellants") appeal from a summary decision that dismissed their application for a temporary restraining order and preliminary injunction without opposition or hearing. On October 28, 2021, the same date that this case was assigned to her, District Judge Caproni entered a text order in the case docket, JA-8, stating in its entirety as follows:

> This complaint raises many of the same claims as those raised by plaintiffs in 21-CV-7863, Kane et al v. de Blasio et al. On October 12, 2021, the Court denied plaintiffs' application for a preliminary

> injunction in that case. See 21-CV-7863, Dkts. 60, 65. For the same reasons as discussed in that matter, Plaintiffs' application for a temporary restraining order and a preliminary injunction in this case is DENIED. SO ORDERED.

District Judge Caproni's gave "short shrift" to the 76 pages of Appellants' verified complaint, and to the declarations of fifteen individuals that were submitted in support of Appellants' application below. By design, Appellants' pleadings raised legal issues that were distinct from those raised in *Kane*, focusing on the blatant unconstitutionality of the standards and procedures that Appellees established to implement their vaccine mandate, showing how deeply held and profound religious views were routinely rejected in Appellees' procedures through application of those standards, and describing the widespread harms that Appellees' rejection of Constitutional requirements are causing to religiously devout employees of the DOE. None of the allegations raised in Appellants' complaint were discussed – or apparently, even considered – by the District Court.

As a result, Appellants' claims are being considered for the first time by this Court, with no substantial findings from the District Court to review.

III. JURISDICTIONAL STATEMENT

This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1292(a)(1) and 1294(1) as an appeal from an interlocutory order of a district court in this circuit refusing an injunction.

IV. STATEMENT OF ISSUES

Appellees conceded at oral argument before the Motion Panel on November 10, 2021 that the exemption standards set forth in the September 10, 2021 UFT Award of arbitrator Martin F. Scheinman ("UFT Award") are "constitutionally suspect," as is reflected in their subsequent Proposed Order to the Motion Panel which the Panel adopted. Nevertheless, the following issues are presented to this Court for its determination:

A. Did the District Court err in its determination that Appellants are not likely to succeed on the merits of their facial and as-applied challenges to the constitutionality of the Mandate?

B. Did the District Court apply an improper standard in making its determination?

C. Did the District Court Improperly conclude that Appellants seek to "change the status quo"?

D. Did the District Court improperly conclude that there was unreasonable delay?

E. Did the District Court err in failing to address Appellants' Procedural Due Process claim?

F. Was the Motion Panel's Order proper?

V. STATEMENT OF THE CASE

This case is an appeal from a decision of United States District Judge Valerie E. Caproni of the United States District Court for the Southern District of New York, entered in the docket of that court on October 28, 2021, JA-8, in which Judge Caproni summarily denied Appellants' application for a temporary injunction.

VI. SUMMARY OF ARGUMENT

In essence, the District Court improperly issued a summary denial of Appellants' motion for preliminary relief, incorrectly assuming this case to be the same as the *Kane* matter, and consequently arrived at errant conclusions concerning Appellants' facial and as-applied challenges to the Mandate. Specifically, the District Court improperly analyzed and applied the analysis set forth in *Emp't Div. v. Smith*, 494 U.S. 872 (1990), errantly concluding that the Mandate is neutral and generally applicable. Though Appellees subsequently conceded that the exemption standards set forth in the UFT Award ("Exemption Standards") are "constitutionally suspect," and proposed doing away with them and adopting different standards for examining religious exemption applications, it is for this Court to determine whether the Mandate is facially invalid and, consequently, grant the relief requested to

Appellants and all those similarly situated.

VII. STATEMENT OF FACTS

A comprehensive recitation of the relevant facts is contained within the accompanying Complaint, to which the Court is respectfully referred. *See* JA-86ff. The following summary encapsulates the key facts relevant to this Memorandum.

On July 21, 2021, New York City Mayor Bill DeBlasio announced what has come to be known as the "Vax-or-Test" policy, stating: "What we're doing is mandate for the folks who work in our public hospitals and clinics, they need to be safe, the people they serve need to be safe. So, we're saying, get vaccinated, or get tested once every week. It's a fair choice." *See* transcript, MSNBC Morning Joe (July 21, 2021) https://www1.nyc.gov/office-of-the-mayor/news/508-21/transcript-mayor-de-blasio-appears-live-msnbc-smorning-joe.

On July 21, 2021, Department of Health and Mental Hygiene Commissioner Dr. Dave A. Chokshi signed an order applicable to staff in public healthcare settings, requiring Vax-or-Test. JA-162, 166-69.

On August 10, 2021, Commissioner Chokshi signed an order applicable to staff in residential congregate settings, requiring Vax-or-Test. JA-162, 163, 170-174.

A mere two weeks later, on August 24, 2021, Commissioner Chokshi signed an order ("Original Mandate") mandating vaccination, but disallowing the "test"

option, for DOE employees. JA-163, 175-79. The Original Mandate was made applicable to: **(1)** "all DOE staff"; **(2)** "all City employees who work in-person in a DOE school setting or DOE building"; **(3)** "all staff of contractors of DOE and the City who work in-person in a DOE school setting or DOE building"; **(4)** "all employees of any school serving students up to grade 12 and any UPK-3 or UPK-4 program that is located in a DOE building who work in-person, and all contractors hired by such schools or programs to work in-person in a DOE building." *Id.*

Notably, the Original Mandate, as well as subsequent orders, was *not* made applicable to certain other classes of individuals, including:

- bus drivers;
- 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"; or
- "Individuals entering for the purposes of voting or, pursuant to law, assisting or accompanying a voter or observing the election." *See id.*, JA-164, JA-227, 228-238.

On September 1, 2021, the United Federation of Teachers ("UFT") commenced an expedited arbitration ("UFT Arbitration") intended to challenge the implementation of the Original Mandate. JA-94.

On September 9, 2021, the UFT and other labor unions representing employees of NYC DOE filed a lawsuit ("New York State Litigation") in the New York State Supreme Court, County of New York, mounting a facial challenge to the constitutionality of the Original Mandate.[1] JA-95.

On September 10, 2021, arbitrator Martin F. Scheinman issued a ruling in the UFT Arbitration ("UFT Award") – apparently composed entirely of language and procedures proposed by the City and the UFT – that required NYC DOE to permit religious exemptions to its vaccine requirements but imposed unconstitutional restrictions on the manner in which requests for such exemptions were to be adjudicated and draconian consequences for unvaccinated NYC DOE employees who failed to obtain such an exemption and refused to be vaccinated. JA-95.

Inter alia, the UFT Award contained the following requirements:

- As an alternative to any statutory reasonable accommodation process, the ***Defendants and the UFT[2] "shall be subject to the following Expedited Review Process to be implemented immediately"*** for full-time staff, H Bank and nonpedagogical employees who work a regular schedule of twenty (20) hours per week or more inclusive of lunch, including but not limited to Occupational Therapists and Physical Therapists, and Adult Education teachers who work a regular schedule of twenty (20) or more

[1] *New York City Municipal Labor Committee, et al. v. The City of New York*, et al., No. 158368/2021 (Sup. Ct. Manhattan Cnty.)

[2] Identical provisions were negotiated or imposed for unions to which each Plaintiff and similarly situated employee belonged. JA-101, 102.

hours per week. This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy ....

- Requests for exemption must be submitted via SOLAS, a NYS DOE internet portal, by no later than 5 PM on Monday, September 20, 2021.
- ***Applications must be supported by a letter from a religious official (clergy).***
- ***Exemption requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine and where documentation of such public statement is readily available (e.g., from an online source).***
- ***Exemption requests that are personal, political, or philosophical in nature shall be denied;***
- ***Exemption requests shall be considered only for recognized and established religious organizations ("e.g., Christian Scientists").***
- The initial determination of eligibility for an exemption or accommodation shall be made by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee Relations.
- If the employee wishes to appeal a denial, such appeal shall be made via SOLAS within *one* school day of the DOE's issuance of the denial.
- The assigned arbitrator, at his or her discretion, shall either issue a decision on the appeal based on the documents submitted or hold an expedited (virtual) factual hearing.
- Appeal decisions shall be expedited without full opinion, and final and binding.
- An employee who is granted a religious exemption shall be permitted to remain on payroll, but ***in no event required/permitted to enter a school building while unvaccinated, for so long as the vaccine mandate is in effect. Such employee may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE. An employee so assigned shall be required to submit to COVID testing twice per week for the duration of the assignment.***
- The process set forth in the UFT Award ***"shall constitute the exclusive and complete administrative review process for the review and determination of requests for religious … exemptions to the mandatory***

exemption policy where the requested accommodation is the employee not appear at school."

- Any unvaccinated employee who has not requested an exemption, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021.
- During such leave without pay, employees shall continue to be eligible for health insurance.
- As of October 29, 2021, any employee who is on leave without pay due to vaccination status may choose either:

    - On or before October 29, 2021, to separate from the NYC DOE, in which case the employee (1) is eligible for health insurance through September 5, 2022 (unless the employee is eligible for health insurance from another source, *e.g.*, a spouse's coverage or another job), but (2) waives the right to challenge the involuntary resignation; or
    - ***on or before November 30, 2021***, to opt to extend the leave through September 5, 2022, in which case the employee (1) is eligible for health insurance through September 5, 2022, and (2) shall have a right to return to the same school; but (3) waives the right to challenge the legality of the exemption application processes or standards; or
    - to exercise neither of the above options, in which case ***the NYC DOE shall terminate such employee as of December 1, 2021***.

JA-95-101, 188, 194 – 206.

The original mandate was amended on September 12, 2021.

September 13, 2021, marked the commencement of the 2021-2022 school year for NYC DOE students. JA-102.

On September 14, 2021, Hon. Lawrence L. Love, Justice of the Supreme Court of the State of New York, County of New York, issued a temporary restraining

order ("September 14 TRO") "[v]acating as arbitrary, capricious, and contrary to law the August 24, 2021, Order" and "Enjoining Respondents from implementing the Order." JA-164, 223-226. The September 14 TRO was issued primarily because of its lack of a religious exemption, a key issue raised by the plaintiffs in that case in their memorandum of law.[3]

On September 15, 2021, the Commissioner of Health and Mental Hygiene signed a new order ("Mandate"), which "rescinded and restated" the standing September 12 order.[4] In substance, the Mandate added the following language: **"Nothing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law."** JA-163, 180-84.

It should be noted that the UFT Award has been the primary device utilized by the NYC DOE in enforcing the Mandate, as evidenced by Appellants' denial letters. For example, Plaintiff Delgado's denial letter states: "This application was reviewed in accordance with applicable law as well as the UFT Award in the matter of your union and the Board of Education regarding the vaccine mandate." JA-164, 244-250. Indeed, the UFT Award itself notes that "[t]he UFT promptly sought to

[3] Indeed, the same court vacated the September 14 TRO on September 29, 2021, noting that this amended language had obviated the purpose for which it had granted the September 14 TRO. JA-164, 227-238.

[4] The Mandate was subsequently amended on September 28, but in no manner relevant to this lawsuit. JA-163, 185-86.

bargain the impact and implementation of the Vaccine Only mandate," confirming that the purpose for the arbitration was to provide implementation standards.

Thus, while the Mandate can and should be scrutinized facially, its enforcement is best analyzed through the prism of the UFT Award. And while the Mandate is facially unconstitutional, its enforcement is fraught with religious liberty pitfalls.

Under the UFT Award, DOE employees who requested exemption from the Mandate were required to submit applications by September 20, 2021. Thousands of applications were submitted, but only a very small percentage of such requests were granted. The most commonly cited reason for denial of such requests was "undue hardship." JA-103.

The UFT Awards permitted applicants who received first-stage denials to file an appeal with a firm that handles commercial arbitration, and to request a fifteen-minute Zoom hearing. On information and belief, at least one thousand five hundred appeals were filed, but to date, only approximately one hundred and sixty-five exemption applications have been approved at any stage of the UFT Award process.[5]

Appellants all filed initial exemption applications under the UFT Award

[5] Based on representations made by Appellees' counsel in oral argument before a prior panel of this Court on November 10, 2021.

procedures, which were denied, and filed appeals, which were also denied. As shown in the declarations that were submitted to the District Court by Appellants and ten other denied exemption applicants, Appellants and many other applicants provided strong, sincere and credible reasons in support of their applications why vaccination would violate their religious beliefs. Appeal hearings were individually scheduled, with denials issuing shortly after the hearings' conclusion. JA-247ff., 262ff., 287ff., 308ff., 320ff., 333ff., 352ff., 364ff., 370ff., 392ff., 407ff., 435ff., 455ff. Plaintiff John De Luca received a denial of his appeal on October 26, 2021. JA-103, 129.

Pursuant to the vaccine Mandate and the Exemption Standards, on information and belief, thousands of NYC DOE employees, including Appellants, have been placed on involuntary leave without pay since September 28, 2021 pursuant to Section II.A of the Exemption Standards, which orders that such persons are eligible to receive health insurance but "prohibited from engaging in gainful employment" under Section II.C thereof.

Under the UFT Award, the final deadline for unvaccinated NYC DOE employees is about to pass: unvaccinated employees who wish to maintain any employment connection with NYC DOE will be terminated from employment unless they file a form with NYC DOE waiving any claims against Appellees, in return for which they may remain in unpaid leave status through September 5, 2022, keep their

health insurance, but renounce any right to gainful employment. JA-205, 206.

Appellees are therefore forcing Appellants and thousands of other similarly situated NYC DOE employees to choose between vaccination, or termination from their public-school careers, or to spend the next ten months without income or unemployment compensation.

For Appellants, and for many others like them, undergoing vaccination would violate a strongly held religious belief. Because Appellees' "reasonable accommodation" standards and procedures have denied these employees an exemption from the vaccination requirement, they must choose between violating their religious beliefs or losing their jobs.

VIII. ARGUMENT

A. Standard of review

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion. "A district court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *A.H. v. French*, 985 F.3d 165, 175 (2d Cir. 2021).

With respect to Appellants' constitutional challenges, however, "the constitutionality of a statute is a legal question subject to de novo review." *Field Day, L.L.C. v. Cnty. of Suffolk*, 463 F.3d 167 (2d Cir. 2006).

B. The District Court applied an improper standard in making its determination

Where First Amendment rights are at issue (as is the case here), the test for obtaining preliminary injunctive relief essentially reduces to a single prong: "the likelihood of success on the merits is the dominant, if not the dispositive, factor." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). This is so because the deprivation of rights itself "for even minimal periods of time,

unquestionably constitutes irreparable injury," protection of First Amendment rights is *per se* "in the public interest," and the balance of hardships is entirely one-sided because "the Government does not have any interest in enforcing an unconstitutional law." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

C. The District Court improperly determined that as-applied challenges are likely to fail

1. The District Court was not fully briefed on the issue of standing, nor did it hear oral argument on the issue

In the *Kane* matter, the District Court expressed doubts that the *Kane* plaintiffs had standing to challenge the exemption process when the *Kane* plaintiffs were represented by one of two unions and were subject to the procedures in the arbitration awards, as well as the collective bargaining process. JA-66. The District Court ordered supplemental briefing on this issue. JA-67. The *Kane* plaintiffs then filed their lawsuit and motion for a preliminary injunction which comprehensively addressed the concerns the District Court expressed in the *Kane* hearing. Nevertheless, after noting that Appellants' complaint "raise[d] many of the same claims as those raised by plaintiffs in 21-cv-7863, Kane et al. v. de Blasio et al." the District Court summarily denied Appellants' preliminary injunction "[f]or the same reasons as discussed in that matter . . .." JA-8. The District Court never gave Appellants an opportunity to present arguments about why its standing concerns

were unfounded, and provided no explanation regarding whether and/or why it rejected Appellants' arguments. Its summary dismissal was completely unwarranted.

2. Appellants have standing to assert as-applied challenges SC

The District Court stated that because an "individual employee represented by a union generally does not have standing to challenge an arbitration proceeding to which the union and the employer were the only parties," *Katir v. Columbia Univ.*, 15 F.3d 23, 24-25 (2d Cir. 1994) (internal citation omitted), and because the *Kane* plaintiffs did not bring a claim against the union for a breach of its duty of fair representation, that it was unclear that the *Kane* plaintiffs had standing. JA-66, 67.

But Appellants explained to the District Court in their brief that their standing was unaffected by the arbitration proceeding that resulted in the UFT Award. Indeed, Appellants could challenge the UFT Award's constitutionality directly in federal court and need not attack it via a CPLR Article 75 proceeding in state court.

Barrentine v. *Arkansas-Best Freight System, Inc.* speaks directly to this point. The issue there was "whether an employee may bring an action in federal district court, alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, . . . after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of

his union's collective-bargaining agreement." *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 729-30 (1981). Respondents in that case argued that "the collective-bargaining agreement between Arkansas-Best and petitioners' union requires that 'any controversy' between the parties to the agreement be resolved through the binding contractual grievance procedures" and that "the District Court made an unchallenged finding that the union did not breach its duty of fair representation" in processing petitioners' grievances. *Id.* at 736. Nevertheless, the unsuccessful arbitration did not strip the plaintiffs of standing in their federal lawsuit. This is because discrimination claims are substantively distinct from the type of contract dispute claims typically resolved by collective bargaining arbitration and "devolve on [employees] as individual workers, not as members of a collective organization." *Barrentine*, *Id.* at 745; *see Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974) (holding "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."); *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998) (holding agreement to arbitrate did not waive federal claim under the ADA because "[t]he cause of action [plaintiff] asserts

arises not out of contract, but out of the ADA, and is distinct from any right conferred by the collective-bargaining agreement").

Furthermore, Appellants' standing argument is not undermined by *14 Penn Plaza LLC v. Pyett*. There, the Court found that plaintiffs' arbitration of their ADEA claims precluded them from later bringing those claims in a federal forum. That was because the collective-bargaining agreement at issue "clearly and unmistakably require[d] union members" to arbitrate their statutory rights, and the Supreme Court has permitted such claims to be arbitrated as long as "an agreement to arbitrate statutory antidiscrimination claims be explicitly stated in the collective-bargaining agreement[.]"*14 14 Penn Plaza L.L.C. v. Pyett*, 556 U.S. 247, 258, 274 (2009).

The CBA at issue there expressly subjected statutory claims to the grievance and arbitration procedures. Ultimately, "*Pyett* does not plainly apply to cases in which the CBA does not explicitly reference the statutory rights subject to arbitration—that is, CBAs whose arbitration provision is not a clear and unmistakable waiver of statutory rights." *Fernandez v. Windmill Distrib. Co.*, 159 F. Supp. 3d 351, 360 (S.D.N.Y. 2016). Moreover, the Southern District of New York has stated that even an arbitration clause covering "any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of the CBA" is not an explicit waiver and falls short of a specific agreement to submit all

claims to arbitration. *Alderman v. 21 Club Inc.*, 733 F. Supp. 2d 461, 468-70 (S.D.N.Y. 2010).

Appellants' collective bargaining agreement contains no explicit waiver. In fact, Article 22, D(2) of the CBA here states that, "[n]othing contained in this Article or elsewhere in this Agreement shall be construed to permit the Union to present or process a grievance not involving the application of interpretation of the terms of this Agreement in behalf of any employee without his/her consent."

The District Court's failure to even entertain Appellants' arguments regarding standing and to summarily dismiss their motion based on the reasons it cited in *Kane* that Appellants more than adequately addressed must be reversed.

D. The District Court improperly determined that facial challenges are likely to fail

1. Challenges to the general implementation of a law are "facial" challenges

Laws which appear to be neutral on their face, but which are regularly implemented in an unconstitutional manner, are not neutral under Constitutional analysis. Thus, in *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (invalidating law based on First Amendment right to free speech), the United States Supreme Court looked to the way in which a county applied its parade-licensing law to decide that the law was unconstitutional on its face:

> 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 Ward v. Rock Against Racism*, 491 U.S. 781, 795-796, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989); *Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 770, n.11, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988); *Gooding v. Wilson*, 405 U.S. 518, 524-528, 31 L. Ed. 2d 408, 92 S. Ct. 1103 (1972). In the present litigation, the county has made clear how it interprets and implements the ordinance.

See also Ward v. Rock Against Racism, 491 U.S. 781, 793-95 (1989) (reasonable guidelines protect city ordinance against facial attack); *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 any binding judicial or administrative construction of it. And 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").

Because the issue of "permitting" raises the possibility that ostensibly neutral regulatory language might be intended to empower violations of free speech, courts consider "the [government's] authoritative constructions of the [law], including its own implementation and interpretation of it," *See Forsyth Cnty.*, 505 U.S. 123 (invalidating law based on First Amendment right to free speech), in deciding

whether a law is facially invalid. If the government has developed rules or practices that limit the application of an otherwise broad or vague law in ways that preclude unconstitutional application of the law, it survives judicial review.

As in *Forsyth County* and *MacDonald*, *supra*, where the governments claimed that their laws were content-neutral toward speech, the defenders of the Mandate and Exemption Standards in the case at bar claim that they are neutral toward religion. However, the Mandate's language – not exactly permitting, but creating an undefined option for, exemptions to the Vaccine Mandate – is so vague that it vests the adjudicator with unrestricted discretion to grant exemptions. To withstand a facial constitutional challenge to the Mandate, Appellees must show that its discretion is constrained by interpretation, regulation or practice in ways that preclude its application in unconstitutional ways.

In the instant case, the precise opposite result is demonstrated by the materials submitted by Appellants in support of their application for preliminary injunction. The Mandate is expressly and exclusively implemented through application of the Exemption Standards for certain DOE employees during the 2021-2022 school year. *See infra;* JA-187, 188-206. Since the Exemption Standards provide the exclusive way in which administrative religious accommodation is given to covered DOE employees under the Mandate, the Mandate itself must be read *in pari materia* with

the Exemption Standards. Appellees' application of the Exemption Standards to religious exemption requests explicitly and clearly violates the religious freedom rights of each person whose exemption request is adjudicated under them. Since the Exemption Standards fall under constitutional analysis, the Mandate must also fall.

2. The Exemption Standards are facially unconstitutional because they exclusively implement the DOE's religious exemption process

The Exemption Standards acknowledge that they arise out of a need to provide rules and procedures for the "implementation of the Vaccine Only mandate." *See* JA-192. They also contain the following statement:

> L. The process set forth, herein, shall constitute the ***exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy*** and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision.

JA-201.

The plaintiffs in the New York State Litigation also represented to the court in that matter that the UFT arbitration which generated the Exemption Standards arose from an "expedited arbitration between Petitioner UFT and DOE regarding the [Original Mandate]'s *implementation*." *See Matter of The New York City Municipal Labor Committee, et al., v. The City of New York,* Index no. 158368/2021, NYSCEF

Doc. No. 1 at 4, n.2 (Sup. Ct. N.Y. Cnty. Sept. 9, 2021).

While the Exemption Standards refer to themselves as "an alternative to any statutory reasonable accommodation process," the context of this statement shows that going through the Exemption Standards process is not an *optional* alternative but the only one. The full sentence reads: "As an alternative to *any* statutory reasonable accommodation process, the . . . "Parties" . . . *shall* be subject to the following Expedited Review Process to be implemented immediately. . .." JA-194, 195. Consequently, when read in conjunction with *shall*, the "alternative" is the sole vehicle for review.

While Appellees cannot insulate themselves from judicial review under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and other "statutory" provisions requiring "reasonable accommodation," the Exemption Standards make it clear that they "constitute the *exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy*" for "full-time staff" during the 2021-2022 school year. In order to sue Appellees for violation of statutory rights in individual cases, DOE employees *must first submit an administrative request for exemption* under the deeply unconstitutional rules and procedures set forth in the Exemption Standards.

Since the Exemption Standards are binding obligations of the parties to the arbitration, the DOE has bound itself *not to offer any alternative administrative process* for the adjudication or resolution of religious accommodation requests.

3. Appellees have conceded facial unconstitutionality, as confirmed by the Emergency Motion Panel's Order

The District Court's absolute determination that the Mandate is constitutional facially and as applied, Appellees, as noted, conceded at oral argument that the Mandate is "constitutionally suspect." This concession is reflected in Appellees' Proposed Order to the Motion Panel, which the Panel subsequently adopted in large part. This Court should adopt this concession in a formal determination of the Mandate's facial and as-applied invalidity as non-neutral and not generally applicable.

E. The District Court improperly concluded that Appellants seek to "change the status quo"

As applied to this matter, the District Court improperly stated that Appellants were seeking to change the status quo because the Mandate has already gone into effect. Appellants in this case have not sought to enjoin enforcement of the Mandate itself; they were merely seeking to stay the October 29, 2021 deadline that required Appellants to decide whether to violate their sincerely held religious beliefs, separate from the DOE while maintaining their health insurance (and giving up their right to

sue), remain on unpaid leave while maintaining their health insurance until November 30 or September 2022, or to be terminated. And, before this Court, Appellants continue to seek maintenance of the status quo and request a stay of the November 30, 2021 deadline by which DOE employees have to decide whether to violate their sincerely held religious beliefs, remain on unpaid leave while signing away their right to sue, or to be terminated and lose their health insurance.

In any event, the "'[s]tatus quo' to be preserved by a preliminary injunction is the last actual, peaceable uncontested status which preceded the pending controversy." *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (quoting *LaRouche v. Kezer*, 20 F.3d 68, 74 n.7) (alteration in original) (quoting Black's law Dictionary 1410) (6th ed. 1990) (internal quotation marks omitted)); *N. Am. Soccer League, L.L.C. v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 38 (2d Cir. 2018) ("The status quo is the parties' pre-controversy position vis-à-vis the other"). The status quo therefore existed before the Mandate was even issued, and the District Court's assertion that Appellants are attempting to change it was incorrect.

F. The District Court improperly concluded that there was unreasonable delay

In accusing counsel for *Kane* of "gamesmanship," Judge Caproni stated that she was "baffled" by the Kane plaintiffs' "delay in seeking a preliminary

injunction." JA-69. Judge Caproni noted that the Mandate "was announced on August 23 and published on August 24. Appellants filed this action almost a month later, on September 21," and then "waited to seek an order to show cause why a TRO and preliminary injunction should not be granted until October 4, three days after the effective date of the order they were challenging." *Id.*

1. Appellants brought this action as soon as they reasonably could

The Mandate went into effect on September 15. On September 18, 2021, the NYC DOE formally informed its employees, including Appellants, of the opportunity to apply for the exemption, with a deadline of two days later, September 20. After exemption application letters were filed, Appellants received their denial letters several days later. Then Appellants needed to file an appeal, receive a hearing date, appear remotely for the hearing, and await the arrival of the results by email. All of this took several weeks, with denials generally arriving between early and late October.

It is thus confounding that Judge Caproni was "baffled" by delay, when the action below was commenced on October 27, only several weeks after four Appellants received their denials and one day after Appellant De Luca's final denial.

Appellants are not wealthy individuals who can walk into a high-priced law

firm and readily retain qualified counsel. Instead, it has taken large groups of individuals to help organize and fund a legal challenge. When considered against that backdrop, Appellants have actually moved rather quickly.

2. The District Court misconstrues and misapplied the law concerning delay

The District Court cited this Court's holding in *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985), for the proposition that "a delay in seeking enforcement [of a plaintiff's rights] ...tends to indicate at least a reduced need for such drastic, speedy action." JA-68, 69. *Citibank* concerned trademark infringement *already in effect*, where this Court pointed out that Citibank's delay of nine months after learning that competition intended to move into its home territory, and ten weeks after the competing branch was opened, undercut the "urgency" of its application that the court mandatorily enjoin City-trust from further using its name. If it was that urgent, reasoned the court, Citibank should have acted sooner. Indeed, the Court wrote: "Significant delay in applying for injunctive relief *in a trademark case* tends to neutralize any presumption that infringement alone will cause irreparable harm pending trial, and such delay alone may justify denial of a preliminary injunction for trademark infringement." *Id.* (citing GTE Corp. v. Williams, 731 F.2d 676, 678 (10th Cir. 1984) (emphasis added)).

Poignantly, this Court in *Citibank* noted that Citibank's vast resources further undercut its position, *Citibank, N.A.*, 756 F.2d at 277, something painfully absent with Appellants in the instant case, who, as noted above, do not have the resources to promptly hire qualified counsel.

In establishing this principle, the court in *Citibank* cited *Gillette Co. v. Ed Pinaud, Inc.*, 178 F. Supp. 618 (S.D.N.Y. 1959). That case, too, involved trademark infringement, leading that court to conclude that "[b]y sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . .." *Id.* at 622.

G. The District Court erred in concluding that Appellants' Free Exercise claims are unlikely to succeed on the merits

In its haste to summarily deny Appellants' motion, the District Court failed to have the core issues in this case fully briefed and argued, resulting in wrong conclusions concerning the Mandate's constitutionality.

1. The Mandate lacks neutrality

a. The Mandate lacks neutrality on its face

The District Court focused exclusively on the events leading up to the establishment of the Mandate to determine whether it was neutral. While that is one way to discern whether a law is neutral, also relevant to the inquiry is whether "the purpose or effect of a law is to . . . discriminate invidiously between religions, . . . "

Braunfeld v. Brown, 366 U.S. 599, 607 (1961); *Congregation Beth Yitzchok, Inc. v. Ramapo*, 593 F. Supp. 655, 658 (S.D.N.Y. 1984) (finding that under the Free Exercise Clause, "if the explicit or implicit purpose of a law is to regulate religious beliefs, to impede the observance of all religions or a particular religion, or to discriminate invidiously between religions, that law cannot pass constitutional muster"). Indeed, "no State can 'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947)); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[the] government must be neutral when it comes to competition between sects"); *Epperson v. Ark.*, 393 U.S. 97, 104, 106 (1968) ("[t]he First Amendment mandates governmental neutrality between religion and religion . . . . The State may not adopt programs or practices . . . which 'aid or oppose' any religion. . . . This prohibition is absolute") (internal quotation marks removed); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) ("[the] fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief"). The Supreme Court has therefore found that "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 246.

The Exemption Standards unquestionably make such distinctions. They purport to authorize some religious claims and to forbid others and are thus subject to strict scrutiny.

Even if the fact that the Exemption Standards are *all about* religious claims were not dispositive on its own, the non-neutral way in which those Standards treat different religions on their face shows that the Exemption Standards, and by implication, the Mandate, are not "neutral" toward religion. Section 1(C) of the Exemption Standards, for example, contains the following statement:

> 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.

The Exemption Standards' most glaring breach of neutrality is set forth in the final sentence quoted above. If an applicant belongs to a "recognized and established religious organization [ ] (e.g., Christian Scientists)," his or her exemption request

"shall be considered" by the adjudicators. However, the Exemption Standards impose no explicit obligation upon adjudicators to consider the requests of persons who do not belong to "recognized and established religious organizations." Aside from the reference to Christian Scientists, adjudicators are given no guidance as to how to distinguish "recognized and established religious organizations" from other groups, but the distinction is clearly intended to cause them to do so.

It is also well-settled law that an individual seeking to demonstrate a sincerely held religious belief need not prove that his or her belief is part of the recognized dogma of a religious sect, and the individual need not even be part of a recognized religious sect themselves. It is only necessary that the belief be religious in nature and sincerely held. *See also Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987) (striking down statute conditioning religious exemption to vaccination mandate on membership in recognized religious group).

The Exemption Standards also explicitly require adjudicators to *deny* applications "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." This provision is non-neutral toward individual religious beliefs that vary from the beliefs of any "leader" of the individual's religious organization who supports

vaccination – no matter how strongly and sincerely such beliefs may be held. It is non-neutral toward any religious beliefs that are "personal … in nature." It is also non-neutral toward any religion or religious organization that has posted information about vaccines "on line." It is also unconstitutional, as the Supreme Court and the Courts of New York State have found that there is no requirement that for a belief to be religious and sincerely held, it must be consistent with those held by others in the denomination. In fact, such a requirement contravenes the First Amendment. *Thomas v. Rev. Bd. of Ind. Emp't Sec'y Div.*, 450 U.S. 707, 715 (1981) (disagreement among sect workers as to whether their religion made it sinful to work in an armaments factory irrelevant to whether belief was religious in nature because, "[t]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect"); *Farina v. Bd. of Educ.*, 116 F. Supp. 2d 503 (E.D.N.Y. 2000) (beliefs "need not be consistent with the dogma of any organized religion, whether or not the plaintiffs belong to any recognized religious organization"); *Widmar v. Vincent*, 454 U.S. 263, 270 n.6 (1981) (it is unconstitutional for courts "to inquire into the significance of words and practices . . . in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases"); *Bowles v. N.Y. City Transit Auth., No. 00 Civ.* 4213 (MHD); Section 12: Religious

Discrimination, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_71848579934051610749830452 (last visited Nov. 4, 2021) ("[a]n employee's belief, observance, or practice can be 'religious' . . . Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief, observance, or practice, or if few – or no – other people adhere to it.").

The Exemption Standards' requirement that exemption requests "be documented in writing by a religious official (e.g., clergy)" is also non-neutral toward religions that do not have established religious officials or clergy. It is also non-neutral toward the applications of persons with sincerely held religious beliefs toward vaccination who are unable to obtain such a letter, perhaps (again) because their beliefs vary from the officials' beliefs or because the official was unavailable to provide such a letter on short notice.

Moreover, such a requirement is also blatantly unconstitutional. The law in is clear. For example, in *Farina v. Board of Education*, the Court held that individuals asserting religious objections to a public school vaccination "had no obligation to provide documentation from [their] church regarding their beliefs," and found the requirement imposed by the school secretary that they "obtain a letter from [their

church]" to be "misplaced." *Farina*, 116 F. Supp. 2d at 507-08. This is because, "[p]ersonal religious beliefs, as long as they are in fact religious, are sufficient . . . if sincerely and genuinely held." *Id. See also Sherr*, 672 F. Supp. 81 (holding unconstitutional a statutory scheme that conditioned eligibility for a religious vaccination exemption on documentation from clergy).

Because the Exemption Standards are not neutral between different religious groups in their express terms, and the Mandate implicitly incorporates their standards and procedures, the Mandate and Exemption Standards are subject to strict scrutiny.

b. The Mandate lacks neutrality in its application

Appellants and other DOE employees were continually told that their beliefs were not eligible for protection because they did not align with the beliefs of others in their religious groups, or similar religmandateious groups to theirs.

Appellant De Luca was told by a DOE official during his arbitration hearing that his religious leaders have "clearly and publicly expressed support for the vaccine," and was berated for believing that he would be condemned for taking the vaccine when "the leader of the Catholic Church . . . says you have a moral obligation to be vaccinated." JA-127, 129. Appellant Keil—a deacon in the Russian Orthodox Church—was told by a DOE official during his arbitration hearing that his beliefs

seemed to be personal in nature because other Orthodox Christians choose to get vaccinated. JA-376. Appellant Delgado, a born-again Christian, was told by a DOE official during her arbitration hearing that "there's no theological objection raised by many if not all the denominations in Christianity to the vaccine." JA-134. Appellant Buzaglo—an Orthodox Jew who is bound by the authority of her own rabbi—was told by a DOE official during her arbitration hearing that it was relevant that a Sephardic Chief Rabbi in Israel whom she did not know supported the vaccine. JA-151. DOE employee Amoura Bryan was told by a DOE official during her arbitration hearing that the Seventh Day Adventist Church—which she affiliates with but which does not control her views on vaccination—does not oppose the vaccine. JA-264, 265-66. DOE employee Ageliki Heliotis, a member of the Orthodox Christian Church, was told by a DOE official during her arbitration hearing that it was the DOE's position that since the leader of her religion approved the vaccine, she would be automatically denied. JA-249. DOE employee Eleni Gerasimou was told by a DOE official during her arbitration hearing, that officials in the Greek Orthodox Church—of which she is a member—support the vaccine. JA-364, 365. The DOE official also noted that she did not have a clergy letter supporting her request. JA-365. DOE employee Inna Cohen was told by a DOE official at her arbitration hearing that because her congregation did not specifically

say, "don't get vaccinated," her objection was personal and not religion-based. JA-338. A Christian employee who attends Church at the Rock in Brooklyn and submitted a clergy letter from her pastor was denied while another parishioner at Church at the Rock who submitted a clergy letter from the very same pastor, was granted his exemption. JA-321, 323. And finally, a devout Catholic DOE employee did not submit a clergy letter and was granted an exemption in her appeal, while another devout Catholic with substantially the same beliefs as the first Catholic employee was denied her appeal, despite her submission of a clergy letter. JA-314.

2. The Mandate is not generally applicable

For a law to be generally applicable, it (1) must be applicable to the general public and (2) may not allow discretionary "individualized exemptions." The Mandate fails both these prongs of general applicability.

a. The Smith standard

In 1990, the United States Supreme Court decided *Emp't Div. v. Smith*, 494 U.S. 872 (1990) in connection with its controlled substance statute which provided in part that "it is unlawful for any person to manufacture or deliver a controlled

substance." 1987 ORS § 475.992.[6] Alfred L. Smith, a recovered alcoholic, worked as a substance abuse counsellor for the municipal Douglas County Council on Alcohol and Drug Abuse Prevention and Treatment ("ADAPT"), whose written employment policies contained the following language:

> In keeping with our drug-free philosophy of treatment, and our belief in the disease concept of alcoholism, and the associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:
>
> **1.** Use of an illegal drug or use of prescription drugs in a non-prescribed manner is grounds for immediate termination from employment.

Smith v. Emp't Div., 301 Or. 209, 211-12, 721 P.2d 445, 446 (1986).

Smith was fired for his religiously inspired use of peyote and then denied unemployment benefits. He sued, and his matter first came to the United States Supreme Court in 1986, *Smith*, 301 Or. at 211-12, 721 P.2d at 446, as a challenge to the constitutionality of ADAPT's policy for its lack of a religious exemption. But the court found it necessary to first determine whether the peyote use in question

[6] It is noteworthy that the 1991 version of the statute, in apparent response to *Smith*, included an express exemption for religious use: "In any prosecution under this section for manufacture, possession or delivery of that plant of the genus Lophophora commonly known as peyote, it is an affirmative defense that the peyote is being used or is intended for use: (a) In connection with the good faith practice of a religious belief; (b) As directly associated with a religious practice; and (c) In a manner that is not dangerous to the health of the user or others who are in the proximity of the user." 1991 ORS § 475.992.

also violated Oregon's criminal statute, and remanded. The state's Supreme Court determined that the use *did* violate Oregon's criminal statute, but determined the lack of a religious exemption to be unconstitutional. Then, and only then, did the United States Supreme Court reverse.

Justice Scalia, writing for the majority, explained that "if prohibiting the exercise of religion . . . [is] merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Emp't Div.*, 494 U.S. at 878.

It is important to note *Smith*'s procedural history, which demonstrates that the determination that the ADAPT policy alone might not have been deemed *generally applicable*, but the criminal statute, which prohibited *everyone*, *everywhere*, and *at all times* from the knowing or intentional possession of an unprescribed[7] "controlled substance."

In explaining why the strict scrutiny standard of *Sherbert* and its progeny did not apply, Justice Scalia noted that "the conduct at issue in those cases was not

[7] It cannot properly be argued that the statue's application only to those who did not have a prescription constituted some sort of "medical exemption," because the very purpose of *Smith*'s *controlled* substance statute, like all such statutes, was to regulate the *uncontrolled* use of *controlled* substances. The individual who was properly administered such controlled substances by authorized personnel, or given a prescription to use the same, was not receiving a medical *exemption*; that person was simply outside the scope of the statute, much one who kills a fly is not to be classified as *exempt* from a homicide statute.

prohibited by law," *Emp't Div.*, 494 U.S. at 876, and that

> [e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.

Id. at 884 (emphasis added). It is the fact that there were individualized exemptions, such as criminal prohibitions, that rendered *Sherbert* not generally applicable.

Smith based its ruling on the notion that a religious exemption should not issue where no exemption is available "to those who use the drug for other reasons. *Id.* at 878. In arriving at this conclusion, the Court contrasted *Smith*'s facts with those at issue in its prior rulings involving neutral laws of general applicability. All those cases involved laws that were generally applicable: they applied to *everyone, everywhere, and at all times*.

- *Reynolds v. United States*, 98 U.S. 145 (1878), in which the Court "rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice."

- *Prince v. Massachusetts*, 321 U.S. 158 (1944), in which the Court "held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding." The court "found no constitutional infirmity in 'excluding [these children] from doing there what no other children may do.'" (Emphasis added.)

- *Braunfeld*, 366 U.S. 599, in which the Court "upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose

religions compelled them to refrain from work on other days."

- *Gillette v. United States*, 401 U.S. 437, 461 (1971), in which the Court "sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds."

- *United States v. Lee*, 455 U.S. 252, 258-261 (1982), in which an Amish employer "sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs." The court "rejected the claim that an exemption was constitutionally required."

Of critical importance to this case, is *Smith*'s clear exception to individualized exemptions, based upon language which grants discretion:

> The statutory conditions [in Sherbert and Thomas] provided that a person was not eligible for unemployment compensation benefits if, '**without good cause**,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen v. Roy*, supra, at 708 (opinion of Burger, C. J., joined by Powell and Rehnquist, JJ.). See also *Sherbert*, supra, at 401, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason.

Emp't Div., 494 U.S. at 884. The inclusion of "without good cause" in the statutory scheme rendered the laws examined in *Sherbert* and *Thomas* not generally applicable as subject to individualized exemptions.

Recent Supreme Court decisions have unequivocally endorsed the principle that religious exercise may not be curtailed in the face of myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. And historically, strict scrutiny requires the State to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (internal quotation marks omitted). That standard "is not watered down"; it "really means what it says." *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021).

b. The Mandate in not applicable to the general public

The text of the Mandate itself demonstrates that it is not generally applicable. While requiring "all visitors to a DOE school building" to be vaccinated, it carves out the following exceptions from the definition of visitor:

> a. Students attending school or school-related activities in a DOE school setting;
> b. 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;
> c. Individuals entering a DOE school building for the limited purpose to deliver or pickup items;
> d. Individuals present in a DOE school building to make repairs at times when students are not present in the building;
> e. Individuals responding to an emergency, including police, fire, emergency medical services personnel, and others who need to enter

> the building to respond to or pick up a student experiencing an emergency;
> f. Individuals entering for the purpose of COVID-19 vaccination;
> g. Individuals who are not eligible to receive a COVID-19 vaccine because of their age; or
> h. Individuals entering for the purposes of voting or, pursuant to law, assisting or accompanying a voter or observing the election.

JA-184.

The sheer number of exemptions on the face of the Mandate itself belies any notion that this rule is of general applicability.

c. The Mandate allows for discretionary individualized exemptions

In *Fulton v. City of Philadelphia*, the United States Supreme Court held that a law is not generally applicable when it "'invite[s]' the government to consider the particular reasons for a person's conduct by providing a 'mechanism for individualized exemptions.'" *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990)). "[I]n circumstances in which individualized exemptions from a general requirement are available," like the Mandate at issue, "[a state actor] 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Church of Lukumi Babalu Aye*, 508 U.S. at 537, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). In describing this "compelling interest standard," also known as

"strict scrutiny," the Supreme Court explained that such a law or policy will survive "only in rare cases," *Church of Lukumi Babalu Aye*, 508 U.S. at 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472, because in order "[t]o satisfy the commands of the First Amendment," the state actor must "advance interests of the highest order," and the regulation at issue "must be narrowly tailored in pursuit of those interests." *Id*.

Here, both the Mandate and the Exemption Standards contain just the type of language to which *Smith* and its progeny take exception. The fact that the Mandate on its face provides for "*reasonable* accommodations" and creates "a mechanism for individualized exemptions" renders it not generally applicable. Likewise, the Exemption Standards Award state "[t]he City/DOE demonstrated recognition of the importance of these issues, particularly with regard to employees' *legitimate* medical or religious claims." JA-193. Needless to note the obvious, the Mandate and the Exemption Standards go beyond mere discretionary individualized exemptions by providing all sorts of blatant, express carveouts and exceptions.

The DOE's mechanism for evaluating religious exemption requests—namely, the use of the UFT Award has proven to be an exercise in unfettered and standardless discretion. It has allowed DOE officials who made the original determination regarding employees' exemption requests and arbitrators who decide the appeals (and whose decisions are later adopted by the DOE which subsequently places

employees who fail to obtain their exemptions on unpaid leave) to both strictly adhere to the terms of the UFT Award—which flagrantly violates the First Amendment rights of DOE employees as discussed *infra*—and to choose at random when to discard it, resulting in inconsistent results and the detriment of thousands of DOE employees.

Arbitrators and DOE officials in some instances have strictly abided by the UFT Award, and denied individuals a religious exemption when, for example, they did not have a clergy letter. JA-314. Arbitrators and DOE officials in other cases have granted an individual a religious exemption, despite their lack of clergy letter, even though the UTF Award specifically requires one. *Id.* This is the paradigm of arbitrary and capricious conduct.

With respect to another so-called "requirement" of the UTF Award—that one's First Amendment freedoms only warrant protection if there is membership in a religious group whose leader has not publicly supported the vaccine—DOE officials have stated repeatedly that the UTF Award has strict parameters, and they are bound by them. *See, e.g.*, JA-311 ¶ 17. They have thus denied numerous requests for exemption because the applicant happens to be a member of a denomination that has publicly supported the vaccine. *See, e.g.*, JA-376 ¶ 38. But an attorney speaking on behalf of the DOE in a separate court case challenging the Mandate before this

Court has called the UFT Award simply a framework and stated that "there have been Roman Catholic people who have had exemptions granted" even though "the Pope has come out for vaccines." JA-60.

The devastating impact of this boundless discretion is twofold; thousands of workers lose their livelihoods, their paychecks, and potentially their health insurance, while their religious freedom rights are trampled. 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.*, JA-313. Others who possessed the same beliefs were granted exemptions. *Id*. Some religious individuals have had to listen while their religious beliefs, denomination, or sect were conflated with those of another religious belief, denomination, or sect. JA-311. Appellant Matthew Keil, who was ordained in the Russian Orthodox Church, was told that his biblically based beliefs seemed merely personal, especially when other Orthodox Christians chose to get vaccinated. 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. JA-395, 396. And others have been questioned at length and even coerced into defending the validity of their deeply held beliefs, which is a realm the government is forbidden to

enter at all, let alone with a discretionary power. *See*, *e.g.*, JA-312, 315, 355 375; *see id.* at 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

Ultimately, this has resulted in baffling and inconsistent results, with the arbitrators and DOE officials even coming to separate and distinct conclusions under substantially similar facts. JA-314. Such infinite discretion warrants the highest standard of scrutiny.

d. The Mandate is not generally applicable as implemented

The Exemption Standards give the DOE discretion to determine which religious reasons for not being vaccinated are worthy of having an exemption granted. Indeed, DOE officials and arbitrators were given an unconstitutional framework for making these individualized assessments. Such framework, which was set forth in the Exemption Standards, is not generally applicable on its face and includes the following provisions:

- 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).

- Religious Exemptions 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 online 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).

Determining whether applicants satisfy each of these criteria requires DOE officials and arbitrators to engage in individualized assessments which unquestionably makes the policy—on its face alone—not one of general application.

The DOE itself admitted that in applying the Exemption Standards, the determination of whether to grant a religious exemption was done on an individual basis. 2d Cir., 21-2711, ECF No. 34 at 9 (describing the process as a "case-by-case application of the accommodation process"); *id*. at 10 (explaining that "different requests have led to different outcomes, as one would expect for a case-specific inquiry"); *id*. at 27 ("[a]t best, plaintiffs can show that the process is unfolding on a case-by-case basis"); *id*. at 30 (describing the process a "case-specific applications of the accommodation frameworks"); JA-41 (explaining that each exemption request is "evaluated by the arbitrator based on the individual's belief, which are personal" and that "each person's personal religious belief would require different kinds of evidence and different kinds of statements. And it's up to the arbitrator, in the first instance, to determine whether that belief is sincerely held . . . ."). Such statements demonstrate that the Mandate was not generally applicable as implemented.

Even if this Court was to somehow find that the Mandate is facially neutral, the lack of consistent application by DOE officials subjects it to strict scrutiny. *Litzman v. New York City Police Dep't*, 2013 U.S. Dist. LEXIS 162968, *8 (S.D.N.Y. 2013) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) ("'[f]acial neutrality is not determinative' when the record shows that Plaintiff was terminated pursuant to a policy that is not uniformly enforced"); *id*. at *9 ("because there is evidence that the NYPD exercises discretion with respect to a facially neutral rule in a discriminatory fashion, strict scrutiny is appropriate").

For example, Orthodox Jews—all of whom were told by various DOE officials that their sincerely held religious beliefs were questionable since a rabbi they had never met and who lived in a different country supported the vaccine—received different determinations by the arbitrator, even though they possessed substantially similar beliefs. JA-312, 313. A Christian employee who attends Church at the Rock in Brooklyn and submitted a clergy letter from her pastor was denied while another parishioner at Church at the Rock who submitted a clergy letter from the very same pastor, was granted his exemption. JA-321, 323. And, a devout Catholic DOE employee did not submit a clergy letter and was granted an exemption in her appeal, while another devout Catholic with substantially the same beliefs as

the first Catholic employee was denied her appeal, despite her submission of a clergy letter. JA-314.

Such disparate and arbitrary applications of the same standards show the unfettered discretion exercised by the DOE and arbitrators, which subjects the Mandate and the Exemption Standards to the highest level of scrutiny.

3. The Mandate fails strict scrutiny

Even assuming Appellees have a compelling government interest in denying Appellants their religious exemption requests in order to "potentially save lives, protect public health, and promote public safety," JA-172, 177, 182, such denials are not the least restrictive means of fulfilling such a government interest.

The very fact that the City previously allowed workers in other industries (including healthcare) to test in lieu of vaccination, currently allows teachers whose religious and/or medical exemption requests were granted to test in lieu of vaccination, and only recently made an agreement with DC 37, doubtless inspired by this lawsuit, that unvaccinated DC 37 employees whose religious exemption applications were previously denied now have the option to appeal such denial subject to, *inter alia*, weekly testing, 2d Cir., 21-2711, ECF No. 65-2, demonstrates that its draconian means of firing teachers whose requests were unconstitutionally denied is not narrowly tailored. At any time, the DOE can offer the option of weekly

testing pending a determination of the underlying appeal on the merits.

Lastly, the underinclusiveness of the requirement—as set forth in the previous discussion of the myriad of exceptions to the rule—also demonstrates that it is not the least restrictive means. In short, the Mandate fails strict scrutiny.

H. The District Court erred in concluding that Appellants' Establishment Clause claims are unlikely to succeed on the merits

District Judge Caproni erred in concluding implicitly that Appellants were not likely to prevail on the merits of their Establishment Clause claim. In *Everson v. Board of Education*, Justice Hugo Black set forth the principles that inform Establishment Clause jurisprudence:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. ***Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs***, for church attendance or non-attendance.

330 U.S. 1, 15-16 (1947) (emphasis added).

The allegations set forth in Appellants' Second Claim for Relief show that on their very face, the Vaccine Mandate and the Exemption Standards offend against the Establishment Clause. Paragraphs 74 and 75 of the Verified Complaint set forth that claim with clarity. JA-114.

This is not the first time that a court in this Circuit has examined vaccine exemption standards that ran afoul of the Establishment Clause. In *Sherr*, 672 F. Supp. 81, the court found that the Establishment Clause prohibited a local school district from basing its religious exemptions to an earlier vaccine mandate upon the following set of requirements:

> This section shall not apply to children whose parent, parents, or guardian[s] are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate [of immunization] shall be required as a prequisite [sic] to such children being admitted or received into school or attending school.

See id. at 84.

Like the law challenged in *Sherr*, the Exemption Standards expressly require, *inter alia* that "[e]xemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists)." The *Sherr* court's analysis of the local law before it shows many disturbing parallels to the one at play in the instant appeal:

> The primary effect of § 2164(9)'s limiting clause is manifestly the inhibiting of the religious practices of those individuals who oppose vaccination of their children on religious grounds but are not actually members of a religious organization that the state recognizes. While bona fide members of such religious groups may maintain a mode of life for their children in accordance with their religious precepts, other persons who oppose inoculations on religious grounds confront the

> dilemma of having to flout the dictates of their beliefs if they wish to educate their children and conform to the requirements of state law. As the Supreme Court remarked in *Everson*, 330 U.S. at 15, HN15 "The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, and all religions, or prefer one religion over another."
>
> Also, § 2164(9)'s restriction of the exception to "recognized religious organizations" clearly requires that the government involve itself in religious matters to an inordinate degree.

Id. at 89-90. Considering that much of New York City lies within the jurisdiction of the U.S. District Court for the Eastern District of New York, one would have expected Appellees' lawyers to have considered the holding of that court in *Sherr* before they permitted Appellees to enforce the Exemption Standards. *See also McCarthy v. Ozark Sch. Dist.*, 359 F.3d 1029 (8th Cir. 2004) (legislature amended law requiring "recognized religion" for exemption due to Establishment Clause violation).

I. The District Court erred in failing to address Appellants' Procedural Due Process claim

Procedural due process "encompasses the right to be informed in advance of the hearing of "those current substantive criteria which will govern Board decisions.'" *Avard v. Dupuis*, 376 F. Supp. 479, 483 (D.N.H. 1974). "The public has the right to expect its officers to observe prescribed standards and to make

adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse." *Hornsby v. Allen*, 326 F.2d 605, 610 (5th Cir. 1964). A hearing is not constitutionally '"meaningful" if prior thereto the plaintiff was unaware of the "grounds" upon which a decision would be rendered. *Raper v. Lucey*, 488 F.2d 748, 753 (1st Cir. 1973). "[T]he establishment of written, objective, and ascertainable standards is an elementary and intrinsic part of due process." *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976).

Here, Appellants have been afforded no meaningful standards against which adjudication can be measured or considered. On its face, the phrase "[n]othing in this Order shall be construed to prohibit any reasonable accommodations otherwise required by law" does not authorize a particularized religious exemption. Indeed, it authorizes nothing more than unbridled discretion. The phrase merely states that the Mandate does not prohibit anything already required by law—that it does not on its face require violation of the law. As such, Appellants' procedural due process rights have not been met by the NYC DOE, and the Court erred in addressing or ruling on these asserted rights.

J. The Emergency Motion Panel's Order is deficient in several ways

1. The inclusion of Corporation Counsel in the citywide panel is improper under Rule 4.2(a) of the N.Y. Rules of Professional Conduct

Paragraph 1 of the order, as proposed by Appellees' attorneys and adopted verbatim by the prior panel, provided that:

> Plaintiffs shall receive fresh consideration of their requests for a religious accommodation by a central citywide panel consisting of representatives of the Department of Citywide Administrative Services, the City Commission on Human Rights, ***and the Office of the Corporation Counsel.*** (emphasis added)

While no such "central citywide panel" apparently actually yet exists except within the imagination of Appellees' counsel, it is disturbing that a prior panel of this Court accepted the notion that the *ad hoc* panel's composition would include representatives of *the Office of Corporation Counsel*. That office, of course, includes the attorneys who are defending against Appellants' claims in the District Court and on the instant appeal.

The attorneys and all other persons involved in the Office of Corporation Counsel are ethically prohibited from involvement in any panel to be formed for the purpose of adjudicating Appellants' exemption requests. Rule 4.2(a) of the N.Y. Rules of Professional Conduct bars them, providing as follows:

> In representing a client, a lawyer shall not communicate or cause

> another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

"Approved by the New York State Bar Association and then enacted by the Appellate Divisions, the Code of Professional Responsibility is essentially the legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline…." *Niesig v. Team I*, 76 N.Y.2d 363, 369, 559 N.Y.S.2d 493, 495 (1990). The rule "fundamentally embodies principles of fairness." The general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel . . . ." *Id.*, 76 N.Y.2d at 370, 559 N.Y.S.2d at 495-96.

It would not be a sufficient defense to say that the Office of Corporation Counsel might assign to the *ad hoc* citywide panel different individuals than those who are actively involved in the instant litigation, or even in any matters related to the vaccine Mandate. All employees of the Office of Corporation Counsel should be disqualified from serving on such an *ad hoc* panel. For purposes of the Rules of Professional Conduct, "lawyers employed in . . . a government law office" are considered to be part of a "firm" of lawyers. Rules of imputed disqualification arise "from the premise that a firm of lawyers is essentially one lawyer for purposes of

the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." N.Y. Rules of Professional Conduct, Rule 1.10, comments 1, 2. All personnel in the Office of Corporation Counsel are constructively adverse to Appellants, who are involved in active litigation against the clients of the Office of Corporation Counsel. They are legally incapable of being unprejudiced against Appellants, whose interests in the instant litigation threaten the interests of their clients, including the NYC DOE. It would be wholly improper for this Court to empower Appellees' attorneys to decide Appellants' exemption requests.

2. Title VII is not the appropriate mechanism for reviewing Appellant's exemption applications

Appellants have asserted no Title VII claim, yet Appellees have, in light of the Mandate's blatant and conceded unconstitutionality, proposed a new, fresh alternative—but one which yet attempts to distance themselves from the First Amendment[8]—Title VII; and the Motion Panel has adopted this standard.

"Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." *CBOCS W., Inc. v. Humphries*,

[8] [U]ndue hardship is a lower standard than compelling state interest. *United States v. Bd. of Educ. for Sch. Dist.*, 911 F.2d 882, 890 (3d Cir. 1990).

553 U.S. 442, 455 (2008). Indeed, "[i]n 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).

When a litigant has mounted a constitutional challenge and not a Title VII 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 Appellants have only asserted a constitutional challenge, Title VII standards are inapplicable.

Even if Appellants *had* asserted a Title VII claim, it would not obviate Appellees' obligation to comply with First Amendment standards—which is what Appellees should be employing in considering and reviewing religious exemption applications.

> 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.

Putaro v. Carlynton Sch. Dist., No. 2:07-cv-817, 2007 U.S. Dist. LEXIS 107326 (W.D. Pa., Dec. 12, 2007, No. 2:07-cv-817) (W.D. Pa. Dec. 12, 2007). Here, too, Appellants' cause of action under § 1983 for violations of the Free Exercise Clause is in no way affected by Title VII.

3. The Order should have covered all similarly situated individuals

Appellants recognize that "[a]n injunction is an exercise of a court's equitable authority, and the exercise of that authority, in the vindication of any legal protection, including the First Amendment, must sensitively assess all the equities of the situation, including the public interest. We have implemented that principle in the context of the exercise of First Amendment rights." *Million Youth March v. Safir*, 155 F.3d 124, 125 (2d Cir. 1998). Consequently, as noted *supra*, Appellants did not see the broadest relief available, a blanket stay of enforcement of the Mandate. Instead, Appellants sought to specifically address Appellants' minimal needs while respecting Appellee's broader concerns and goals.

Om the other hand, "[a] facial challenge is a species of third party (*jus tertii*) standing by which a party seeks to vindicate not only his own rights, but those of

others who may also be adversely impacted by the statute in question." *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir. 2007) (internal quotation marks omitted); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) (finding that "we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper'").

Thus, while Appellants do not request blanket injunction of the Mandate's enforcement, the same relief granted to the named Appellants should be made applicable to all those similarly situated.[9] It would be inequitable and abhorrent to the United States Constitution to allow the continued application of concededly unconstitutional Exemption Standards to thousands of New York City educators who ask for no more than to be allowed to continue the same while not being forced to relinquish their Free Exercise rights.

Appellants respectfully ask this Court to order the following relief, *pendente lite*:

> *Appellees shall reinstate Appellants and all direct and indirect NYC DOE employees who applied for a religious exemption and were denied to their positions with full retroactive pay seniority, pension rights, insurance, benefits, etc., subject to the condition that Appellees shall not be required to admit such persons physically into any school buildings where school children are present;*

[9] Plaintiffs have submitted a Verified Amended Complaint to the District Court and a letter motion asking the Court to lift the stay in that court to permit Appellants to file the amended complaint "as a matter of course" pursuant to F. R. Ci. P. 15(a)(1). The proposed amended complaint formally adds class action allegations to the initial complaint. JA-10.

The November 30 and December 1, 2021 deadlines set forth in the Arbitration Award dated September 10, 2021 between the Board of Education of the City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO ("UFT Award"), the Arbitration Award dated September 15, 2021 between the Board of Education of the City School District of the City of New York and the Council of Supervisors and Administrators ("CSA Award"), and the agreements reached between District Council 37, AFSCME, AFL_CIO and the Board of Education of the City School District of the City of New York on or about October 7, 2021 ("DC-37 Agreements") relating to the implementation 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 issued on September 15, 2021, as amended ("Order") are hereby stayed for all employees of the New York City Department of Education;

Appellees are enjoined from terminating, separating, or placing on unpaid leave, or depriving entitlements from, or discontinuing their provision to any persons of their employment, salary and all benefits or impairing the employment relationship in any way of any direct or indirect employee pursuant to any of the following:

the Order;

the UFT Award;

the CSA Award;

the DC-37 Agreements; or

any substantially similar arbitration award, agreement or order affecting persons who are or who have been employed directly or indirectly by the New York City Department of Education (NYC DOE")

or in buildings that are owned or controlled or occupied by NYC DOE; and it is further

ORDERED, that Appellees are enjoined from terminating, suspending, disciplining, penalizing or sanctioning any persons who have been placed on leave from their positions pursuant to the Order, the UFT Award, the CSA Award, the DC-37 Agreements or any substantially similar arbitration award, agreement or order affecting persons who are or who have been employed directly or indirectly by the New York City Department of Education (NYC DOE") or in buildings that are owned or controlled or occupied by NYC DOE, for engaging in gainful employment while in leave status pending the resolution of the instant litigation.

IX. CONCLUSION

Each day leading up to and including November 30, 2021, Appellants will confront the unfortunate dilemma of choosing between faith and job. "[A] society that truly values religious pluralism cannot compel [the faithful] to make the cruel choice of surrendering their religion or their job." *TWA v. Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J., dissenting). Appellants respectfully request that this Court Reverse the District Court's denial of Appellants' motion for preliminary relief and grant the same for Appellants and all those similarly situated.

Dated: New York, New York
November 17, 2021

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Second Circuit Rule 32.1(a)(4)(A), which is authorized by Federal Rule of Appellate Procedure 32(e), because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 13,734 words, as determined by the word-count function on Microsoft Word.
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: New York, NY
November 17, 2021

Barry Black

SPECIAL APPENDIX

SPECIAL APPENDIX
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SPA-1

10/28/2021		ORDER denying 8 Proposed Order to Show Cause With Emergency Relief. This complaint raises many of the same claims as those raised by plaintiffs in 21-CV-7863, Kane et al v. de Blasio et al. On October 12, 2021, the Court denied plaintiffs' application for a preliminary injunction in that case. See 21-CV-7863, Dkts. 60, 65. For the same reasons as discussed in that matter, Plaintiffs' application for a temporary restraining order and a preliminary injunction in this case is DENIED. SO ORDERED. (HEREBY ORDERED by Judge Valerie E. Caproni) (Text Only Order) (anc) (Entered: 10/28/2021)