21-2678

United States Court of Appeals
for the Second Circuit

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

Plaintiffs-Appellants,

against

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEES

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November 19, 2021

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PRELIMINARY STATEMENT

Plaintiffs are public school teachers and administrators who claim that the City of New York has violated their First Amendment rights by denying them religious exemptions to the COVID-19 vaccination requirement for Department of Education employees. But the gravamen of their complaint lies not with the employee vaccination requirement itself, but rather with the appeals process for religious exemption requests established by awards issued by an independent arbitrator. The U.S. District Court for the Southern District of New York (Caproni, J.) denied plaintiffs' motions for preliminary injunctions, but a motion panel of this Court granted plaintiffs substantial provisional relief. Because that relief is more than sufficient to protect plaintiffs while the parties litigate the merits below, no further relief is required from this Court. This Court should therefore reaffirm the relief granted by the motion panel and remand for further proceedings.

The motion panel's order gives plaintiffs the option of having their requests for a religious accommodation considered anew by a three-member central citywide panel with representatives of the Commission on Human Rights, the Department of Citywide Administrative Human

Services, and the Office of the Corporation Counsel. This review will be governed by the standards of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law, not the criteria established by the arbitration awards that lie at the heart of plaintiffs' grievances. And while this new review is pending, plaintiffs will not be required to make a decision about their employment status, and the Department of Education will not take any steps to terminate their employment for noncompliance with the vaccination requirement. What is more, any plaintiff whose request is granted would receive backpay, compensating them for any lost wages during the time they were placed on leave without pay.

Plaintiffs' contention that their prior religious exemption appeals were denied by arbitrators referencing constitutionally suspect criteria has been addressed by the motion panel's order. Plaintiffs have not explained how this relief is insufficient to ensure that they will suffer no future irreparable harm due to their noncompliance with the vaccination requirement while the parties litigate the merits below. Nor do plaintiffs propose a concrete, alternative process. No further relief should be granted by this Court at this time.

ISSUE PRESENTED FOR REVIEW

Have plaintiffs failed to establish their entitlement to additional preliminary injunctive relief, where this Court has already ordered the City to grant plaintiffs a fresh review of their religious accommodation request through a process that will not be governed by the arbitration awards' allegedly unconstitutional criteria that plaintiffs have challenged?

STATEMENT OF THE CASE

A. The vaccination requirement for all employees of the City of New York's public school system

While we may have become accustomed to the fact more than a year and a half into the pandemic, COVID-19 remains a highly infectious and potentially deadly disease that spreads easily from person to person. The virus "has caused widespread suffering in the State, country, and world since early 2020." *We the Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 U.S. App. LEXIS 32880, at *5 (2d Cir. Nov.

4, 2021). And New York City—a dense metropolis—has been hit particularly hard, experiencing nearly 1.2 million cases and 35,000 deaths.[1]

The clouds are beginning to break, largely due to the availability of safe and highly effective vaccines—one with full regulatory approval for people age 16 or older.[2] But the need for greater vaccination coverage remains urgent, especially with the emergence of more transmissible variants, a rise in infections this month, and an anticipated surge in infections this winter, and increases in pediatric cases in areas with lower vaccination rates (A340-53).[3] Vaccination is crucial to safeguarding public health: it not only leads to better health outcomes for recipients, but also reduces the risk of transmission to others.[4] Put simply,

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[1] N.Y.C. Dep't of Health, *COVID-19 Data: Trends and Totals*, https://perma.cc/WT9U-B3SL (captured Nov. 17, 2021).

[2] FDA, *COVID-19 Vaccines*, https://perma.cc/N86U-TEMM (captured Nov. 17, 2021).

[3] N.Y.C. Dep't of Health, *COVID-19: Latest Data*, https://perma.cc/4U7J-CFGV (captured Nov. 19, 2021).; *We the Patriots*, 2021 U.S. App. LEXIS 32880, at *5 (acknowledging the "rapidly increasing infection rates related to the Delta variant"); NPR, U.S. COVID cases start to rise again as the holidays approach (Nov. 16, 2021), https://perma.cc/9TLL-9E73).

[4] CDC, Benefits of the Getting the COVID-19 Vaccine (Nov. 5, 2021), https://perma.cc/B3LR-FWCA; CDC, *Guidance for COVID-19 Prevention in K-12 Schools* (Nov. 19, 2021), https://perma.cc/AA6V-ZBW7.

"[v]accination is the leading public health prevention strategy to end the COVID-19 pandemic."[5]

Few settings present a more compelling need for vaccination than public schools, where our children regularly have extended contact with countless people in congregate indoor settings—at a time when no vaccine for children under the age of 16 has received full regulatory approval. According to the CDC, vaccination is "the most critical strategy to help schools safely resume full operations," and the agency has therefore recommended that educators and other school personnel be "vaccinated as soon as possible" (JA177).

Consistent with this recommendation, shortly after a vaccine for people age 16 or older received full regulatory approval, the Commissioner of the Department of Health and Mental Hygiene required employees of the public school system to show proof of having received one dose of vaccination by September 27, 2021[6] (JA175-79). The require-

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[5] CDC, *Guidance for COVID-19 Prevention in K-12 Schools* (Nov. 19, 2021), https://perma.cc/AA6V-ZBW7.

[6] The deadline was later extended to October 1, 2021, in connection with a separate challenge to the vaccination requirement. *See generally Maniscalco v. Dep't of Educ.*, No. 21-2343, 2021 U.S. App. LEXIS 30967 (2d Cir. Oct. 15, 2021).

ment is designed to safeguard the health of schoolchildren, educators, and everyone around them (JA177, 182). To be sure, masking and regular testing remain helpful tools in combatting COVID-19, but they are not sufficient, particularly in light of the conditions described above, against the emergence of more transmissible variants. *See Doe v. Mills*, No. 21-1826, 2021 U.S. App. LEXIS 31375, *28 (1st Cir. Oct. 19, 2021) (observing vaccination would be more effective than testing and masking in quelling spread of COVID-19).

And the vaccine requirement has proved effective in increasing vaccination rates. By October 8, 2021, 95 percent of Department of Education employees had complied with the Commissioner's order (A758). To build on this success, the Health Commissioner adopted the vaccination requirement to all City employees on October 20, 2021 (2d Cir. 21-2678 ECF No. 48-2). As a result, 93 percent of the City's workforce is now at least partially vaccinated.[7]

[7] N.Y.C. Office of the Mayor, *Transcript: Mayor de Blasio holds media availability*, November 15, 2021, https://perma.cc/DX6X-RKLD (captured November 19, 2021).

B. The arbitrations initiated by plaintiffs' union representatives and the resulting awards

The Health Commissioner's order required all employees of the public school system to get vaccinated; it did not contemplate exemptions for any reason, secular or religious (21-2711 Joint Appendix ("JA") 175-79). But plaintiffs' union representatives soon initiated arbitrations concerning the implementation of the order, culminating in a final determination by an independent arbitrator that created an expedited process for requesting religious and medical exemptions (JA187-222). While the parties were consulted during the course of the arbitration process and asked to propose language in response to interim rulings, the terms of the awards were—in the arbitrator's words—"[his] alone" (JA194, 211).

The arbitrator's awards contemplate a two-stage process for employees to request religious or medical exemptions to the vaccination requirement. At the first stage, as would usually be the case for any request for religious or medical accommodation, an initial determination would be made by the employer, the Department of Education (JA197-98, 214). Ordinarily, this would be the end of the accommodation pro-

cess: generally, an employer considers an accommodation request and renders a final determination itself.

But the awards tacked on an extra level of review by a panel of arbitrators (JA198-99, 214-16). Employees denied at the first stage would be able to appeal to an independent arbitrator (*id.*). The arbitration awards established criteria for making determinations on appeals requesting religious exemptions that included whether the employee had a letter from clergy, whether the leader of the employee's religion had spoken publicly in favor of the vaccine, and whether the employee was a member of a recognized and established religious organization (JA197, 213-14).

For employees who did not comply with the vaccination requirement or receive an exemption, the award set four major mileposts.

- *October 1, 2021:* Employees who were not in compliance as of this date[8] were placed on unpaid leave with health insurance effective the next business day (JA201, 218).

[8] As noted, the original deadline of September 27, 2021, was briefly extended as the result of a prior litigation (*see supra* n6; *see also* JA186).

- *October 29, 2021:* Through this date, employees could elect to resign their positions in exchange for special benefits and waiving any challenge to their separations (JA204, 220-21).
- *November 30, 2021:* Through this date, employees can opt-in to an extended leave without pay program, with health insurance, allowing them to stay at home through September 5, 2022. Employees would retain the option of complying with the vaccination requirement and then returning to work within a week or two (JA205, 221-22). Employees who opt into the extended leave option will also waive any challenge to their separation if they do not return to work by the end of the leave period (*id.*).
- *December 1, 2021:* Employees who reject the resignation and extended leave options will remain on leave without pay, with health insurance, until December 1, 2021, at which point steps may be taken to terminate their employment (JA205-06, 222).

Two of these mileposts lie in the past. As to the two that lie in the future, plaintiffs have been able to postpone any applicable deadlines by taking advantage of an additional accommodation review process, as described in further detail below (*see infra* at 15-17).

C. Resolution of applications for exemptions from the employee vaccination requirement

After the arbitrator's awards came down, the Health Commissioner issued an amended order clarifying that "[n]othing in this order shall be construed to prohibit any reasonable accommodations otherwise required by law" (JA184). Consistent with this understanding that other accommodation frameworks remained relevant, the Department of Education's initial determinations of exemption requests show that the agency did not view the challenged criteria in the arbitrator's awards to control its determinations. By plaintiffs' own account, "the most commonly cited reason for the denial of such requests was 'undue hardship'"—a concept that comes from Title VII of the Civil Rights Law of 1964 and its state and local counterparts—not the absence of a sincerely held religious belief (21-2711 Brief and Special Appendix for Plaintiffs-Appellants ("*Keil* Br.") at 12; *see also* JA103). The *Kane* plaintiffs acknowledge, for example, that the Department did not deny any of their religious accommodation requests based on a failure to demonstrate a sincerely held religious belief. (21-2678 Brief and Special Appendix for Plaintiffs-Appellants ("*Kane* Br.") at 13).

In actuality, plaintiffs' grievance in these appeals lies not with the initial determinations by the Department of Education, but rather the determinations made on administrative appeal by independent arbitrators. But there we confront a practical problem. The expedited process imposed by the awards enabled requests to be resolved quickly—no small consideration given the volume of requests and the fact that the school year was underway—but it also created challenges for identifying the basis for any denied appeal. Under the arbitrator's awards, appeal determinations would be expedited without full written opinions (JA199, 216). And while appeal arbitrators had the option of holding virtual hearings, they were not recorded (JA198-99, 215-16). As a result, to excavate the foundation for a denied appeal, we would have to probe the memory of the arbitrator who decided each appeal, glean any available insights from documentation submitted by the parties, and if a virtual hearing was held, compare that information to the recollection of the parties who participated.

But even with such challenges, the record casts serious doubt on plaintiffs' contentions that the challenged criteria in the arbitration awards were controlling in the administrative appeals. As of October 8,

2021, over 100 religious exemptions had been granted to employees of more than 20 different faiths, including employees identifying as Roman Catholic, Jewish, Buddhist, Baptist, Muslim, Christian, Evangelical Christian, Orthodox Christian, "Jew following Christ," Sabbath Day Adventist, Esin Orisa Ibile, Greek Orthodox, Church of God (Seventh Day), Universal Life Church, Krishna, Apostolic Pentecostal, and Kemetic, as well as Christian Scientists, Seventh Day Adventists, and individuals whose specific religion is not identifiable (21-2678 Joint Appendix ("A") 758-59). Appeal arbitrators granted exemptions in circumstances where the criteria in the awards were not satisfied, as when an employee did not submit a letter from a clergy member or adhered to a faith whose leader had spoken publicly in favor of the vaccine (JA308-16). And one of the *Kane* plaintiffs obtained an accommodation through the arbitration appeal process (A936).

D. Plaintiffs' delay and the district court's denial of their motions for preliminary injunctions

The employee vaccination requirement was announced nearly three months ago (JA175-79). Since then, it has been the subject of several lawsuits. When those suits have been pursued with some urgency,

courts have been able to act promptly. Consider *Maniscalco v. New York City Department of Education*, where this Court rejected a challenge to the same requirement on substantive due process and equal protection grounds: there, the plaintiffs brought suit and sought injunctive relief on September 10, 2021 (EDNY 21-cv-05055 ECF Nos. 1-2); the district court denied a preliminary injunction on September 23, 2021 (EDNY 21-cv-05055 ECF No. 16); this Court denied an injunction pending appeal on September 27, 2021 (2d Cir. 21-2343 ECF No. 27); Justice Sotomayor denied a writ of injunction on October 1, 2021 (U.S. 21A50, Oct. 1, 2021); and this Court upheld the denial of a preliminary injunction on October 15, 2021 (2d Cir. 21-2343 ECF No. 81).

The story of these two cases has been very different. The plaintiffs in *Kane v. de Blasio* waited until September 21, 2021—nearly a month after the vaccination requirement was announced—to bring suit (A13-77). The *Kane* plaintiffs then let the vaccination deadline pass on October 1, 2021 without seeking any relief. Three days after the deadline, on October 4, 2021, they moved for a temporary restraining order and preliminary injunction (A118-20). The district court (Vyskocil, J.) denied a temporary restraining order the next day (A293-94). And on October 12,

2021, the district court (Caproni, J.) denied a preliminary injunction (A858-79). After noting it was "absolutely baffled by plaintiffs' delay in seeking a preliminary injunction" (A865), the court went on to find that plaintiffs had failed to establish a likelihood of success on the merits and that the equities were against them (A858-79).

The *Kane* plaintiffs then sat on their hands for two weeks. On October 25, 2021, plaintiffs noticed an appeal (A883), and sought and obtained a stay of further proceedings in the district court (A884-87). The next day—weeks after the district court had ruled against them, they moved for an injunction pending appeal (2d Cir. 21-2678 ECF No. 16).

It was at this juncture, on October 27, 2021—over two months after the employee vaccination requirement had been announced and almost four weeks after the vaccination deadline had passed—that the plaintiffs in *Keil v. City of New York* first brought suit and moved for preliminary injunctive relief (JA86-161). The following day, the district court (Caproni, J.) denied the motion for the same reasons it had denied the motion in *Kane* (JA8). The *Keil* plaintiffs then noticed an appeal and moved for an injunction pending appeal (JA472; 2d Cir. 21-2711 ECF No. 17).

E. The motion panel's order tracking the City's proposed solution for providing plaintiffs with a process untainted by the criteria they challenge

Both sets of plaintiffs moved for injunctions pending appeal, and oral argument on the motions was held on November 10, 2021. After argument, the Court directed the parties to submit letters and proposed orders addressing the scope of any provisional relief. For its part, the City proposed relief tailored to the plaintiffs' professed concerns that the denials of their exemption requests at the arbitration appeal stage were tainted by the challenged criteria set forth in the arbitrator's awards (2d Cir. 21-2678 ECF No. 53; 2d Cir. 21-2711 ECF No. 70).

The Court granted plaintiffs relief pending consideration by the merits panel, largely tracking the City's proposal (2d Cir. 21-2678 ECF No. 58; 2d Cir. 21-2711 ECF No. 76). The order granted plaintiffs fresh consideration of their requests for a religious accommodation by an already existing three-member central citywide panel—with representatives of the Commission on Human Rights, the Department of Citywide Administrative Human Services, and the Office of the Corporation Counsel—that was constituted to review similar appeals relating to a subsequent vaccination requirement for all city employees announced in

October 2021. The citywide panel's review will be governed by the well-worn standards of Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law, not the challenged criteria from the arbitration award (*id.*).

The Court's order requires plaintiffs to submit any materials or information they wish to be considered by the citywide panel by no later than November 29, 2021, with a decision to be issued by the citywide panel within two weeks of receipt of plaintiffs' submissions (*id.*). The Court's order stays the November 30, 2021, deadline to opt-in to the extended leave program and enjoins the City from taking any steps to terminate plaintiffs' employment for noncompliance with the vaccination requirement (*id.*). And as proposed by the City, the Court directed an award of backpay for any plaintiff whose request is granted by the citywide panel, running from the date on which they were placed on leave without pay (*id.*).

On November 15, 2021, the City informed plaintiffs, through counsel, that plaintiffs would be able to submit their requests for additional consideration through the Department of Education's digital portal. The next day, the City provided plaintiffs with a link to the portal,

along with step-by-step instructions for uploading materials and information to be considered by the citywide panel. The City invited plaintiffs to submit any materials or information showing that their compliance with the vaccination requirement would contravene a sincerely held religious observance, practice, or belief, whether traditional or non-traditional. And it advised plaintiffs that documentation from a religious official (if applicable) is not required, though they are free to submit such documentation, and directed them to specify the accommodations they are seeking in their application.

F. Plaintiffs' belated and misguided attempts to expand the scope of the litigation

Following the motion panel's order, plaintiffs have undertaken efforts to replead in the district court. Evidently concerned about the gap between the small number of named plaintiffs and their demand for sweeping systemwide relief, the *Keil* plaintiffs asked the district court to lift the stay they had requested to permit them to file an amended complaint adding class action allegations (SDNY 1:21-cv-08773 ECF No. 41). The district court has not acted on this application. The *Kane* plaintiffs simply filed an amended complaint on November 16, 2021,

styled as a class action complaint (A888-949), even though all proceedings had been stayed at their request (A887). No class has been certified in either case.

G. The City's expansion of the additional review process to other Department of Education employees.

As noted in a prior submission, the City has been working on making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious exemptions pursuant to the appeals process (2d Cir. 21-2678 ECF No. 53; 2d Cir. 21-2711 ECF No. 70). That opportunity will be communicated to eligible employees, who will be notified that they have an option to appeal the denial of their religious exemption requests to a central citywide panel. These employees will be informed that they may submit their appeal via SOLAS any time before December 3, 2021. They may rely upon their original appeal application or supplement it with additional documentation, which may, but need not, include documentation from a religious official. While their appeals are pending, these employees will remain on leave-without-pay status and will have seven

days after their new appeals are resolved to apply for an extension of this status.

SUMMARY OF ARGUMENT

By the time plaintiffs sought provisional relief below, the vaccination requirement had already become effective and had been implemented across the school system. Because plaintiffs now seek to "disrupt the status quo," they "must meet a heightened legal standard"—one even more stringent than the already demanding standard for obtaining preliminary injunctive relief. *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (cleaned up).

Specifically, plaintiffs bear the burden of establishing (1) a "clear or substantial likelihood" of success on the merits; (2) a "strong showing" of irreparable harm; (3) no substantial injury to the non-moving parties; and (4) furtherance of the public interest. *See A.H. v. French*, 985 F. 3d 165, 176 (2d Cir. 2021); *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). Because the government is the defendant here, the third and fourth factors effectively merge into one. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiffs have failed to make a "strong showing" of irreparable harm. The relief ordered by the motion panel—which affords plaintiffs an opportunity for a fresh review of their accommodation request while staying the deadlines for them to choose to remain on extended leave or be subject to termination—is more than adequate to avoid any future harm, reparable or irreparable. And any interim harm, like the loss of wages, can be addressed by damages and other make-whole relief should any plaintiff prevail. Moreover, plaintiffs' own delay strongly counsels against the extraordinary equitable relief they seek here.

As to the likelihood of success on the merits, the employee vaccination requirement itself is a neutral regulation of general applicability that easily satisfies rational basis review. And to the extent that the plaintiffs allege that the religious exemption appeals process established by an arbitrator's awards violates their First Amendment rights, the additional review process provided under the motion panel's order renders these objections largely academic. In any event, the challenged appeals process, which was established by an independent arbitrator and resulted in final determinations by independent arbitrators, resulted in the grant of exemptions to people associating with a wide range of

religious practices. Plaintiffs have not established a clear or substantial likelihood of success on their claims.

Finally, the district court providently exercised its discretion in concluding that the balance of the equities favors denying an injunction. Plaintiffs do not face any imminent or irreparable harm where they have been offered an opportunity for a new review of their accommodation requests and relief from any deadlines for related employment actions resulting from their vaccination status while their request are pending. The public's interest in safely continuing school operations with minimal disruptions to students' education and caregivers' planning far outweighs plaintiffs' individual objections to vaccination.

ARGUMENT

The question before this Court is whether plaintiffs are entitled to preliminary injunctive relief while they try to prove their claims in the district court. *See* Federal Practice & Procedure § 2947 (3d ed.) (noting that the point of a preliminary injunction is to "protect plaintiff from irreparable injury and preserve the court's power to render a meaningful decision after a trial on the merits"). At this stage, once an appropriate

provisional remedy has been ascertained, the judicial function is at an end. The task is not to make a determination on the merits.

Plaintiffs do not grapple with this point. Their briefs all but ignore that a motion panel of this Court has already granted them an opportunity for fresh consideration of their religious exemption appeals, untainted by the allegedly unconstitutional criteria in the arbitrator's awards that they have challenged in these lawsuits. All plaintiffs have to do is avail themselves of this option and they will face no further job-related consequences for their noncompliance with the vaccination requirement until their requests are resolved. And if their requests are granted, plaintiffs will receive backpay—a remedy that goes well beyond traditional provisional relief.

This relief reflects a real solution to plaintiffs' contentions that their administrative appeals to independent arbitrators were denied based on constitutionally suspect criteria. Even crediting those contentions, the motion panel has addressed the matter: plaintiffs can have their requests reviewed anew through a process that will not be governed by those criteria. Plaintiffs make no serious attempt to explain how this relief is insufficient to ensure that they will suffer no future ir-

reparable harm while they try to prove their claims below. Nor do they make a concrete proposal for an alternative remedy. One can only wonder whether plaintiffs are more interested in retaining an appellate forum for broadcasting their grievance about allegedly complete constitutional violations than they are in finding a real-world solution to govern here while the district court confronts the merits on remand.

A. Plaintiffs have failed to show an entitlement to preliminary injunctive relief above and beyond the substantial relief ordered by the motion panel.

Plaintiffs will not suffer irreparable harm absent additional preliminary injunctive relief. The relief already granted by the motion panel avoids any immediate future harm to plaintiffs as a result of their noncompliance with the vaccination requirement (2d Cir. 21-2678 ECF No. 58; 2d Cir. 21-2711 ECF No. 76). Plaintiffs have been given the option of having their requests for a religious accommodation considered anew (*id.*). And while this review is pending, plaintiffs will not be required "to choose between their faith and their jobs," as they contend (*Keil* Br. at 1). The November 30, 2021, deadline will be stayed: plaintiffs will not be required to make a decision about remaining on extended leave and no steps will be taken to terminate their employment for

noncompliance with the vaccination requirement while their requests are pending. Indeed, plaintiffs whose requests are granted will even be made whole for lost wages through automatic backpay awards (2d Cir. 21-2678 ECF No. 58; 2d Cir. 21-2711 ECF No. 76).

The Court could stop there. Plaintiffs' vague and half-hearted objections to the court-ordered process go nowhere. Plaintiffs' religious accommodation requests will be reviewed anew 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. This is not a "shadowy ad hoc panel," as the *Keil* plaintiffs contend (*Keil* Br. at 2). The panel already exists: indeed, it is the same panel that is reviewing the denial of any vaccination exemption requests that have been submitted by thousands of municipal workers within the City's workforce (2d Cir. 21-2678 ECF No. 48-2).

Although the *Kane* plaintiffs complain that the City has "offered no real details about the process they propose" (*Kane* Br. at 39), the Court's order explicitly states that the review not be governed by the criteria that plaintiffs have challenged and will instead adhere to the standards established by Title VII and the New York State and City

Human Rights Laws (2d Cir. 21-2678 ECF No. 58; 2d Cir. 21-2711 ECF No. 76). These standards are well-established and informed by specific pandemic-related guidance from the EEOC, which the plaintiffs cite in their own briefing (*Kane* Br. at 26; *Keil* Br. at 34).

And although the *Keil* plaintiffs appear to suggest that even these standards would be inadequate, they never explain how or offer a concrete alternative (*Keil* Br. at 23-24). In fact, they previously argued that "a more narrowly drawn and unambiguous policy that respects the rights of religiously motivated employees to an adjudication of their exemption requests according to constitutional standards and fairly designed procedures" would address the alleged constitutional violation (2d Cir. 21-2711 ECF No. 49-1 at 37). And contrary to the *Keil* plaintiffs' claim that the panel applies standards that apply to no one else (*Keil* Br. at 2), these standards apply to City employees who were required to be vaccinated under the Health Commissioner's October 20, 2021, order (2d Cir. 21-2678 ECF No. 48-2). In the end, neither set of plaintiffs has explained how these well-worn statutory standards are inadequate; if anything, the *Kane* plaintiffs suggest the opposite (*Kane* Br. at 29-30;

Kane Reply Mot. for Temp. Inj. Pending Appeal (2d Cir. 21-2678 ECF No. 42) at 5n2).

There is no merit to the *Kane* plaintiffs' suggestion that review by the citywide panel does not afford them notice and an opportunity to be heard.[9] They have received clear notice of what the panel will decide—their requests for an employment-related religious accommodation—and the standard under which the panel will decide it (2d Cir. 21-2678 ECF No. 58; 2d Cir. 21-2711 ECF No. 76). And they have been given the opportunity to submit any material they wish to in support of their request for an accommodation (*id.*).

Otherwise, plaintiffs complain that the motion panel's order confines relief to the actual plaintiffs in these actions. That is entirely appropriate. "[T]he usual rule is that litigation is conducted by and on behalf of the individual named parties only," and a party seeking an ex-

[9] To the extent plaintiffs complain that the citywide panel would run afoul of attorney ethical rules because it would entail direct communication between the Office of the Corporation Counsel and represented plaintiffs, they are mistaken (*Keil* Br. 55-57; *Kane* Br. 40). As plaintiffs' attorneys were informed before their filings, communications from the panel will be channeled through counsel, unless plaintiffs elect otherwise. More broadly, the inclusion of a Corporation Counsel representative in a panel reviewing employment accommodation requests makes good sense, where the office is the City's authority on statutory and constitutional standards governing public employment.

ception to that rule ordinarily does so via a class action. *WalMart Stores, Inc. v. Dukes*, 564 U.S. 338, 389 (2011). These are not class actions. Indeed, plaintiffs' post-appeal efforts to amend their complaints to add class allegations (JA10, A888-949), only confirms that neither case was styled as a class action at the relevant time. In any case, neither case has actually been certified as a class action, and that is reason enough to limit any relief at this point to the named plaintiffs. *See M.R. v. Dreyfus*, 697 F.3d 706, 738-39 (9th Cir. 2012) (remanding and limiting injunctive relief to plaintiffs even though the case could implicate systemic issues, highlighting the absence of class certification). Injunctive relief "should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). The motion panel properly limited relief "to apply only to named plaintiffs." *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996).

In any case, the City is making an opportunity for fresh consideration available more broadly to Department of Education employees who unsuccessfully sought religious exemptions pursuant to the arbitration award's appeal process. Those employees will be granted the

same opportunity that has been granted to the plaintiffs, to have their religious accommodation requests considered by the central citywide panel under the standards established by Title VII and the New York State and City Human Rights Laws.

The relief granted by the motion panel—renewed consideration untainted by the challenged criteria, a stay of applicable deadlines while requests are pending, and the availability of backpay awards—fundamentally changes the landscape of these proceedings. Any disagreements plaintiffs have with this new review process are best directed to the district court where they can be addressed with an appropriately developed factual record. *Cf. Hund v. Bradley*, 845 F. App'x 78, 79 (2d Cir. 2021) (remanding "in light of arguably changed circumstances" where plaintiffs challenged state guidance on First Amendment grounds and the State represented that the guidance had been amended); *Cooper v. City of Tucson*, 649 F. App'x 624, 626-27 (9th Cir. 2016) (remanding where municipality amended challenged ordinance to arguably speak to plaintiffs' concerns); *DeBremaecker v. Short*, 433 F.2d 733, 735 (5th Cir. 1970) (remanding in light of passage of superseding ver-

sion of challenged ordinance, citing the "change of circumstance and the necessarily forward looking nature of any injunctive relief").

B. Plaintiffs have failed to make a "strong" showing of irreparable harm.

Even assuming that the motion panel's order did not resolve the issue entirely, plaintiffs are wrong to assume that irreparable harm should be presumed because they assert constitutional claims (*see* 21-2678 Brief and Special Appendix for Plaintiffs-Appellants ("*Kane* Br.") at 35-38; *Keil* Br. 15-16). As explained below, plaintiffs have no clear or substantial likelihood of success on their facial challenge to the requirement (*see infra* at 36-39). And it makes no sense to presume irreparable harm when the potential injuries are susceptible to make-whole relief, even when a constitutional claim is in play. *See generally Vaqueria v. Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 465, 484-85 (1st Cir. 2009) ("It cannot be said that violations of plaintiffs' rights to due process and equal protection *automatically* result in irreparable harm."). That is especially true in the public employment context, where this Court has adopted "a particularly stringent standard for irreparable injury." *Am. Postal Workers Union v. USPS*, 766 F.2d 715,

721 (2d Cir. 1985). Indeed, the Court has found no irreparable harm where "reinstatement and money damages could make [plaintiffs] whole for any loss suffered" during any loss of employment, even when a First Amendment violation is alleged. *Savage v. Gorski*, 850 F.2d 64, 67-68 (2d Cir. 1988).

Moreover, to the extent that the *Kane* plaintiffs now argue that they will suffer financial hardship, they offer no concrete evidence—indeed, they cite no evidence at all (*Kane* Br. at 38). And neither financial distress nor the inability to find other employment are generally sufficient for irreparable harm. *Stewart v. INS*, 762 F.2d 193, 199 (2d Cir. 1985). "[A]n insufficiency of savings or difficulties in immediately obtaining other employment … will not support a finding of irreparable injury, however severely they may affect a particular individual." *Sampson v. Murray*, 415 U.S. 61, 92 (1974). Plaintiffs have not shown irreparable harm, much less made the "strong" showing required.

Finally, plaintiffs' own delay strongly counsels against the extraordinary equitable relief they seek. "Preliminary injunctions are generally granted under the theory that there is an urgent need to protect the plaintiffs' rights. Delay in seeking enforcement of those rights,

however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). Here, notwithstanding the fact that both sets of plaintiffs asserted facial challenges to the requirement and arbitration appeal process, they delayed in bringing suit and made no effort to avoid having their religious exemption appeal considered under the challenged criteria in the first place. Instead, they ran down the clock until the consequences of remaining unvaccinated were imminent and then asked the court for emergency relief. The district court was appropriately "baffled" by this delay and disturbed by the "apparent gamesmanship" (A865). *See Tom Doherty Assocs., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 39 (2d Cir.1995) (courts should consider delay when assessing preliminary injunctive relief).

This leads to a key point: in their briefs, plaintiffs continue to emphasize their "facial" challenges to the arbitration award's appeal criteria. But the typical remedy on a facial challenge is to enjoin infirm requirements on a going forward basis. *See, e.g., American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003) (enjoining enforcement of a statute by Attorney General because it was found unconstitutional).

The plaintiffs did not seek to do so. Now, after the arbitration appeals have been concluded, we are left to wonder what role, if any, the challenged criteria played in individual outcomes, especially where the *Kane* plaintiffs, for example, concede that DOE's initial determination of their requests was not based on any judgment about the sincerity of their claimed religious objections to COVID-19 vaccination. Plaintiffs' rhetoric about "facial" challenges ignores the complexities created by their own delays, as well as the compelling case for the motion panel's approach of affording a fresh opportunity for review of their accommodation requests that is plainly unaffected by the challenged criteria.

C. Plaintiffs have not established a "clear" or "substantial" likelihood of success on their claims.

Not only do plaintiffs fail to make a "strong showing" of irreparable harm, they also fail to demonstrate a "clear or substantial likelihood" of success on the merits of their First Amendment claims. *See A.H.*, 985 F.3d at 176.

1. Plaintiffs have not made a clear or substantial showing that the process contemplated by the arbitration awards is unconstitutional.

Plaintiffs root their First Amendment challenges in the appeal process established by the arbitration awards (*see Kane* Br. at 27; *Keil* Br. at 23-24). But their objections to this process are largely academic—at least when it comes to preliminary injunctive relief.

In any case, the challenged criteria were applied by independent arbitrators during the arbitration appeal process, not by the Department of Education. As the *Keil* plaintiffs concede, the Department of Education's own initial eligibility determinations—which neither set of plaintiffs challenge in these appeals—were based on Title VII standards (*Keil* Br. at 12). Plaintiffs' religious accommodation requests were explicitly denied because allowing unvaccinated employees to work in a school building would pose a direct threat to health and safety and offering another worksite as an accommodation would impose an undue hardship on the DOE and its operations (*see,* JA318, 354, 374, 402, 414-15). And contrary to the *Kane* plaintiffs' claim that the Department of Education was zealously advocating for a religiously intolerant approach (*Kane* Br. at 16), as the *Kane* plaintiffs acknowledge, the De-

partment did not deny any of plaintiffs' religious accommodation requests based on a failure to demonstrate a sincerely held religious belief (*Kane* Br. at 13).

In addition, the challenged criteria were established by an independent arbitrator through a process initiated by plaintiffs' unions, and the appeals decisions were made by independent arbitrators (JA198-99, 215-16). Although plaintiffs contend that Department employees advocated for strict adherence to these criteria at the appeal hearings (*Keil* Br. at 35-37; *Kane* Br. at 16), the hearings were not recorded and the decisions were issued without a statement of reasons (JA198-99, 215-16). On this record, it is not clear that there would by any basis for holding the City liable for any harm arising out of the application of these criteria.

Moreover, the record suggests that the arbitrators did not strictly adhere to the standards set forth in the awards and granted a broad range of religious exemptions consistent with Title VII. Contrary to the *Kane* plaintiffs' contention that the process protects adherents to only two specific religions (*Kane* Br. at 21), the process has already resulted in accommodations to employees adhering to at least 20 different reli-

gious practices (A758-59). Plaintiffs acknowledge that arbitrators granted religious exemptions to employees who did not submit a letter from clergy and who adhered to a faith whose religious leader had spoken publicly in favor of the vaccine (JA308-16).

In any event, plaintiffs still have not laid the proper foundation to challenge the arbitration awards. They have not explained how they have standing to launch a direct attack on the terms of awards arising out of arbitrations initiated by their own unions without first alleging a breach of the duty of fair representation. *Cf. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 260 (2009) (holding that unions were free to negotiate a departure from federal statutory scheme on behalf of their members).[10] To the extent that the *Keil* plaintiffs argue that the arbitration awards do not permit review of religious exemption appeals under any standards other than those set forth in the awards (*Keil* Br. at 23-25), they do not explain why the unions would not be necessary parties to this attack on the arbitration awards. *See* Fed. R. Civ. P. 19(a)(1)(B)(i).

[10] The *Keil* plaintiffs rely on *Barrentine v. Arkansas-Best Freight Systems*, 450 U.S. 728, 737 (1981), without acknowledging how it is called into question by *Pyett*.

For these reasons as well, plaintiffs have not demonstrated a "clear or substantial likelihood" of success on the merits.

2. Plaintiffs have not made a clear showing that the Commissioner's order is unconstitutional.

Ultimately, plaintiffs' attacks on the Commissioner's order itself are half-hearted, as their real grievance lies with the arbitration appeal process. The *Keil* plaintiffs do not seek to enjoin the enforcement of the requirement itself (*Keil* Br. at 25, 60), focusing instead on the appeal criteria established by the arbitration awards (*id.* at 3). And while the *Kane* plaintiffs frame their argument as a challenge to the constitutionality of the Commissioner's order, they too rely on the criteria established by the arbitration awards to argue that the requirement violates the First Amendment (*Kane* Br. at 26-27). This is not surprising given the fundamental weakness of their challenge to the constitutionality of the Commissioner's vaccination requirement.

Courts have upheld vaccination requirements in the face of constitutional challenges for well over a century, with or without religious exemptions. The leading case remains *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), where the Supreme Court held a vaccination require-

ment compelling all competent adults in the City of Cambridge to submit to vaccination for smallpox on pain on criminal prosecution did not invade "any right given, or secured, by the Constitution." *Id.* at 25-26. As the Court recognized, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members," and the police power allows state and local governments to impose restraints on personal liberty in furtherance of that "common good." *Id.* at 25-27. And just recently, this Court held that New York's vaccination mandate for health care workers, which does not include a religious exemption but does not foreclose Title VII accommodations, does not violate the free exercise clause. *We the Patriots USA,* 2021 U.S. App. LEXIS 32880, at *22-45. The Commissioner's order falls firmly within these precedents.

The Commissioner's order itself is a neutral regulation of general applicability, subject to rational basis review. *See Commack Self-Serv. Kosher Meets, Inc. v. Hooker*, 680 F.3d 194, 212 (2d Cir. 2012). Contrary to the *Keil* plaintiffs' contention, the City did not concede that this order is constitutionally suspect (*Keil* Br. at 25). It merely acknowledged that

the criteria established in the arbitration award for appeal determinations may be so.

On its face, the Commissioner's order is neutral as to religion. It does not address religion—explicitly or implicitly—treating all unvaccinated employees the same, regardless of whether they are unvaccinated due to inertia, political objections, disinformation, fear of needles, or religion (2d Cir. 21-2678 ECF No. 16 at 31-34).

And plaintiffs have failed to make a clear showing that the vaccination requirement is driven by animosity toward religion. The *Kane* plaintiffs suggest that statements attributed to the Mayor reflect religious animus (*Kane* Br. at 8, 12-13, 24). But the statements reflect no such thing and, in any event, the Mayor simply had no meaningful role in establishing or implementing the accommodation process. The process was determined by an independent arbitrator, in the context of an arbitration involving plaintiffs' unions and the City's Office of Labor Relations (JA188-222). And employees' requests were reviewed first by Department of Education staff, who made initial eligibility determinations based on Title VII standards, and then by arbitrators who reviewed any appeals of those determinations (JA197-200, 213-16).

The Commissioner's order is also generally applicable: it applies equally to all "DOE staff," covering all full or part-time employees, interns, or volunteers who work in-person in a DOE school setting where instruction is provided (JA181-84). The order seeks to protect the health of schoolchildren, staff, and the community by mandating vaccination for people who spend their workdays in buildings with children, many of whom are not yet vaccinated (JA182). And the fact that the order does not extend to people who do not work for the public school system or in a Department of Education building in the same way that other covered individuals do and do not present the same risk of transmission to unvaccinated children does not undermine that purpose (*see Kane* Br. at 27-28; *Keil* Br. at 42-43). It certainly raises no free exercise problem. As this Court has recognized, the "mere existence of an exemption procedure, absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny." *We the Patriots USA*, 2021 U.S. App. LEXIS 32880, at *43 (internal quotations and citation omitted).

D. The equities, including the interest in providing one million schoolchildren with a safe and predictable education, weigh in defendants' favor.

While plaintiffs fail to show they would suffer any irreparable harm while this appeal is being litigated, the public interest would be seriously undermined by granting the broad relief plaintiffs request. Even if plaintiffs' submissions to this Court had demonstrated that a particular plaintiff's request was denied despite what would indisputably be a sincerely held religious belief, that harm has been addressed by the opportunity for a fresh review not governed by the challenged criteria and would not justify a sweeping injunction in any event. And plaintiffs offer no credible explanation why thousands of other employees must be afforded sweeping relief now to protect their rights pending appeal.

Plaintiffs' challenges reduce to disagreements with case-specific applications of the arbitration appeals process to their religious accommodation requests. But plaintiffs have been granted relief in this regard through the Court's November 15 order, which allows them to have their religious accommodation requests considered anew without being governed by the criteria set forth in the arbitration awards (2d Cir. 21-

2678 ECF No. #; 2d Cir. 21-2711 ECF No. 76). To the extent that any further relief is appropriate, the merits panel should continue the motion panel's temporary order.

The balance of equities tips strongly against any broader relief. Plainly, enjoining the City's vaccination requirement, as the *Kane* plaintiffs ask this Court to do, is not in the public interest. The vaccination requirement addresses a matter of pressing public significance: the conditions for safely conducting in-person, full-day public education, in light of COVID-19 and the Delta variant. The CDC has recommended that schoolteachers and staff be "vaccinated as soon as possible" because vaccination is "the most critical strategy to help schools safely resume [sic] full operations" (JA177).[11] And the City is not alone in following the CDC's advice. Vaccination is required for school staff not only in the City's public district schools and charter schools, but also in many of the City's independent schools through individual school-imposed mandates. There are also several other school districts across the country

[11] *See* n.4, *supra* (CDC has advised that "COVID-19 vaccines can reduce the risk of people spreading the virus that causes COVID-19.").

that similarly require vaccination,[12] including Los Angeles, Portland, St. Louis, and Seattle, to name a few.[13]

Returning to in-person public education is crucially important, yet at the same time brings an enormous number of unrelated individuals into extended daily contact in an indoor setting during this continuing pandemic. While the *Kane* plaintiffs contend that they were safely teaching unvaccinated for the last year and a half without issue (*Kane* Br. at 9, 15, 34-35, 39), they ignore the fact that there was not full in-person instruction for the majority of this time period, and the segments where there was partial in-person schooling were plagued by repeated school closings due to the number of infections.[14] And although social distancing, mask wearing, and testing provide some protection, vaccination provides more. *See Doe*, 2021 U.S. App. LEXIS 31375, at *28. Be-

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[12] *See* Education Week, *Where Teachers Are Required to Get Vaccinated Against COVID-19*, Updated October 15, 2021, https://perma.cc/E6TY-Z39K.

[13] *See* LA Times, *97% of LAUSD teachers, administrators meet COVID-19 vaccination deadline*, Howard Blume, October 15, 2021, https://perma.cc/LZQ4-9NQW; the74million.org, *By the Numbers — How 100 School Systems Are (and Aren't) Adapting to COVID: Vaccine Requirements, Testing Options & Incentives for Getting the Shot*, Travis Pillow, October 31, 2021, https://perma.cc/KF4G-RXAB.

[14] *See* N.Y. Times, *Schools in New York City fully reopen after 18 months of pandemic restrictions*, Eliza Shapiro, September 13, 2021, https://perma.cc/6PS8-7C42.

cause the speed of the Delta variant's transmission outpaces reliable test results, regular testing has been found to be insufficient to protect against the Delta variant. *Id.* at *39.

Enjoining the requirement would threaten the continued safe operation of in-person schooling for the City's nearly one million students—hundreds of thousands of whom only recently became eligible to be vaccinated. It would also upset the reliance interests of parents and caregivers—who need clear and sound safety protocols when they send their children to public schools day after day. And it would increase the risk to the community from the spread of COVID-19. Ultimately, not only do plaintiffs' claims fail to conceivably support the broad relief they request, but the balance of the equities strongly favors defendants.

CONCLUSION

This Court should reaffirm the relief granted by the motion panel and remand the matter to the district court for further proceedings.

Dated: New York, NY
November 19, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 7,827 words, not including the table of contents, table of authorities, this certificate, and the cover.

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