21-3043-cv(L), 21-3047-cv(CON)

United States Court of Appeals

for the

Second Circuit

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

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, ERIC ADAMS, in his official capacity as Mayor 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

JOINT BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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SUMMARY OF ARGUMENT

On November 28, 2021, an expedited merits panel of this Court ("First Merits Panel") held that the New York City Department of Education ("DOE") likely violated the First Amendment by implementing a new vaccine mandate through a facially discriminatory religious exemption policy ("Accommodation Policy"). Thousands of employees were suspended pursuant to this policy the month before.

Rather than issue an order reinstating them, the First Merits Panel granted Respondents' eleventh-hour request to alternatively remand the case and have two weeks to provide "fresh consideration," at least to the fifteen named parties, after which the DOE promised to reinstate appellants who met statutory standards for religious accommodation with back pay. Plaintiffs-Appellants (the "Teachers") objected, asserting that the proposal was a thinly veiled attempt to whitewash the acknowledged religious discrimination, noting, among other concerns, that the "fresh consideration" was to be determined by Respondents' own defense attorneys, who are legally prohibited from being neutral, and no standards or criteria were defined to ensure their rights were protected this time. This Court dismissed those concerns, stating, "Plaintiffs' requests will be governed by Title VII and analogous state and city law, and the standards for those claims are well established." (A1063 (citing cases)).

Now, after all but one of the remanded employees were summarily denied on remand, with no further information provided than "does not meet criteria," the lower court, and a motions panel of this Court ("Second Motions Panel") use those same lack of criteria or procedural requirements as a sword – allowing the absurd auto-generated responses (even the one applicant who was accepted also got an email stating "reason: does not meet criteria") to somehow cure the proven discrimination in this case, and placing the burden on the Teachers to prove why they were once more denied accommodation, rather than on the Respondents, as required by this Court's orders, governing statutes, and binding precedent.

Justice does not permit any more delay in granting real injunctive relief. These and thousands of other working-class Teachers, deprived of income since October, have been attempting to secure their rights in federal courts now for four and a half months. Some already lost their homes, others have foreclosure notices and eviction notices. Families have been separated, children pulled out of college because their parents cannot pay the parental contribution, and the desperate Teachers and thousands of similarly situated colleagues struggle just to put food on the table each day while the legal proceedings drag on. Some became so desperate that they had to violate their most sacred religious beliefs against their will just to keep their jobs. Others face daily trauma from being forced to choose between survival and faith due to the City's discriminatory and unconstitutional conditions on their employment.

On Monday, many of those who have not violated their faith will be fired, losing their seniority, careers, and health insurance as well unless they agree to waive their right to continue this lawsuit. There is no more time.

The teachers have done everything this Court has asked of them and more. The ten volumes included in this appendix, which is only part of the record to date, show the sheer volume of the information they have provided, and the efforts they have made. This is the fourth time these Teachers will go before a panel of this Court in four months, trying to get basic injunctive relief to maintain the status quo (or what is left of it at this point).

This Court must now decide whether, having already found months ago that the Teachers First Amendment rights were clearly violated, and widespread discrimination inflicted, to give them real injunctive relief, or whether the Court will condone the continued constitutional abuse, and set the precedent that all the government or any employer need do, even after being caught red-handed in blatant discrimination, is invoke this case and ask that their defense attorneys be allowed two weeks to issue a statement that the applicant "does not meet criteria" with the result that all accountability to remedy the wrong, or even cease the bad behavior, will disappear, while fundamental rights are trampled, lives destroyed, and vulnerable minorities abused.

Appellants respectfully pray that this Court issue an injunction staying the denial of any religious accommodation issued to a DOE employee or contractor under the old Accommodation Policy or any new process adopted since then, pending resolution of this litigation, and reinstating the suspended and terminated employees to the payroll with full benefits and employment rights.

ISSUES PRESENTED

1. Whether the religious accommodation policies adopted by Respondents violate the First Amendment;
2. Who bears the burden of demonstrating that a religious accommodation decision is appropriate, and what standards must be employed; and
3. Whether irreparable harm is shown where constitutional rights are violated, and the state forces its employees to choose between their faith and their job.

JURISDICTION

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

STATEMENT OF THE CASE

Plaintiffs-Appellants ("Teachers" or "Appellants") are public school teachers, supervisors and staff employed by the New York City Department of

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

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

In late September, the DOE sent notices to its employees giving them a very short time to submit requests for exemption from the Mandate ("Initial Reviews"). Everyone was denied with an auto-generated message that it would be an "undue hardship" to accommodate any employee. The same form was even sent to employees who already worked remotely or who were easily able to work remotely. (*see, e.g.*, *Keil v. City of New York*, No. 1:21-cv-8773 (VEC) (S.D.N.Y.) (hereinafter

cited "SDNY 21-cv-8773", ECF 23[1]). Employees were given one day to appeal their denials ("SAMS Appeals"). Both the Initial Reviews (SDNY 21-cv-8773), ECF 28-2) and the SAMS Appeals were governed by procedures and standards that were first announced in an arbitral award dated September 10, 2021, but which were adopted more generally by the DOE and the City as their official Accommodation Policy. (A113-131). The procedures set forth in the Accommodation Policy formed the "exclusive" means of obtaining a religious exemption from the Mandate. (A126).

The Accommodation Policy incorporated standards and evidentiary requirements that were patently inconsistent with the DOE employees' First Amendment rights. (A113-131). For example, the Accommodation Policy standards specifically defined and limited requests for religious accommodations or exemptions:

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

[1] Because of the expedited nature of this case, this citation was omitted from the appendix. This citation can be found at the corresponding district court docket entry. A supplemental appendix will be provided.

Most of the Appellants, and thousands of other unvaccinated DOE employees submitted applications to the DOE's Initial Review process.[2] The record contains examples of persuasive applications that were submitted to the DOE in both the Initial Review and in the SAMS Appeals, yet were denied. (*See, e.g.*, SDNY 21-cv-8773, ECF 27.) Applicant Matthew Keil's application provides an example: as an ordained Deacon in the Orthodox Church, Keil has spent much time and effort sojourning in monasteries, studying the Christian scriptures, and learning spirituality from monks and other religious authorities from his faith. His path of study has led him to believe that through the sacrament of communion he shares in the blood of Christ physically in his own body, and that scriptural commands not to profane God's holy temple require him to abstain from injecting vaccines and other substances into his bloodstream. To do otherwise would cause him to be "judged by God." (2d. Cir, 21-2711, ECF No. 94, at 167-68). As a result, he has abstained from all vaccinations in his adult life and has also declined to vaccinate any of his six children. Each of the Appellants has his or her own unique religious story and specific religious beliefs that require them to refuse to obey the Mandate.

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

Unfortunately, the Respondents did not give a fair hearing to requests for religious exemptions. The Accommodation Policy made fair adjudications impossible by imposing standards that violated the Free Exercise Clause on their face. Potential appellants were required to submit clergy letters in support of their applications, which disqualified applications from persons who did not belong to a religious group that had clergy whose religious beliefs led them to oppose vaccination (or whose clergy were not available to write a letter on one day's notice). Potential appellants were required to support published materials in support of their beliefs, but not from the Internet. The Accommodation Policy said that appellants who belonged to religions that were known to oppose vaccination (expressly mentioning Christian Science) could receive exemptions, but not those who belonged to religious groups whose leaders have spoken publicly in favor of vaccination (e.g., Roman Catholics). (A-122). Additionally, religious exemptions would only be granted for members of recognized and established religious organizations.

Respondents' hostility towards religious opposition to vaccines made accommodation even harder. On October 4, 2021, the DOE began excluding all unvaccinated employees from school buildings. As denials were generated, the employees were placed on "leave without pay" ("LWOP"), which is involuntary suspension.

Approximately 7,000 out of 147,000 employees (3.4% of all employees) were initially placed on LWOP under the Accommodation Policy. (A785). 165 received accommodations, many of them after the motion for injunctive relief was filed. (A1578). Appellants submitted evidence to the district court that the arbitrators and City attorneys who participated in the SAMS Appeals regularly referred to the invalid Accommodation Policy standards in discussing the merits of DOE employees' exemption claims. (*See, e.g.*, SDNY 21-cv-8773, ECF 27 at 6, para. 33; ECF 28, at 4, paras. 27, 28, 31; ECF 30 at 4-5, paras. 22, 24, 26-28.)

The DOE went a step further, turning the appeals into what can only be properly called heresy inquisitions, and zealously arguing that employees should be denied accommodation because their beliefs run afoul of "established" orthodoxy and are not supported by Pope Francis, and other popular religious leaders. These arguments were levied not only against Roman Catholic appellants, but even Buddhists and non-denominational born-again Christians. (A273-292). Orthodox Jews have been told that their requests are suspect because a rabbi living in a different country (and under whose authority they are not bound) disagreed with their standpoint, despite letters of support from their own rabbis. (*See, e.g.*, USCA2 21-2678, ECF 65 at JA-313). Others who possessed the same beliefs were granted exemptions, though the DOE has remained silent on Appellants' speculation that

these were largely granted after they filed their motions pointing out the blatant religious discrimination.

Appellant Keil, who was ordained as a deacon in the Russian Orthodox Church, was told that his biblically based beliefs seemed merely personal, especially when other Orthodox Christians chose to get vaccinated. (USCA2 21-2678, ECF 65 at JA-376). It was suggested to Appellant Delgado that other Christian denominations' support of the vaccination made her objection somehow insincere when her own pastor never spoke in favor of it. (USCA2 21-2678, ECF 65 at JA-395, 396). And this is only the tip of the iceberg.

Despite submitting extensive materials in support of their religious exemption applications and appeals, (SDNY 21-cv-8773, ECF 25-1, 27-1, 27-2, 27-3, 28-1, 28-2, 28-3, 29-1, 29-2, 29-3, 30-1, 30-2, 30-3, 30-4), all but one of the Appellants was denied on appeal. The denials provided no detail, and simply had a checked box stating "denied." Denial of an exemption request triggered a cascade of adverse employment effects, according to the Accommodation Policy. In addition to being involuntarily suspended, denied employees faced a deadline to either "opt" for separation from employment with short-term continuation of insurance coverage and compensation for accrued paid time off by October 29, 2021, or "opt" to continue on LWOP status by November 30, 2021, losing compensation for accrued paid time off, but retaining insurance coverage for several months. Under this latter option,

employees are forbidden from earning any income while on LWOP, even from outside sources or unemployment compensation. Either option requires employees to waive all rights to challenge the DOE's actions in enforcing the Mandate. Those who choose neither option by the deadline are subject to termination for "misconduct"[3] and lose all rights to their accrued paid time off, which for some, amounts to tens of thousands of dollars. To date, employees who did not opt out have a misconduct notation in their file for refusing to be vaccinated, making it virtually impossible to find new employment even if they were allowed. (A1368-1561).

Contending that the Mandate facially, and as applied through the Accommodation Policy, restricted their religious freedom, violated the Establishment Clause, deprived them of due process, and violated multiple other laws, ten Appellants (the *Kane* Appellants) filed a motion to enjoin the Mandate on October 4, 2021 (A148-322 and A394-781), and asked the Court to issue a TRO or injunction against enforcement of the Mandate. The district court held oral argument on October 5, 2021 and denied the request for the TRO the same day. Supplemental briefing was ordered, and a hearing scheduled for October 12, 2021. Respondents

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

offered no witnesses and little factual material. Appellants offered voluminous factual support and 13 witnesses (two experts in public health, a witness who could testify about conditions in the schools due to the staffing crisis caused by placing Appellants and 7000 others on LWOP, and the 10 named plaintiffs). The district court limited the evidence and testimony that the *Kane* Appellants were permitted to present in support of their motion (refusing to permit them to present any testimony, including the proffered expert testimony, on whether Appellants presented a direct threat of COVID-19 to schoolchildren), heard oral argument, and denied the motion at the conclusion of arguments on October 12, 2021. (A798). The *Kane* Appellants appealed the decision and asked the Second Circuit for an immediate injunction staying enforcement of the district court's order. The Second Circuit referred the motion to a motions panel.

Concerned about the *Kane* court's failure to recognize the Respondents' blatant violation of their religious freedom rights, the *Keil* Appellants filed their own action on October 27, 2021, focusing on the clearly unconstitutional provisions of the Mandate as implemented in the Accommodation Policy (SDNY 21-cv-8773, ECF 10), and requesting a TRO and preliminary injunction, *id*. The district court immediately denied the motion without a hearing. *Id*. (Text Order dated October 28, 2021.) The *Keil* Appellants appealed to the Second Circuit and their motion was assigned to the same motions panel ("First Motions Panel") as the *Kane* motion.

At the hearing before the First Motions Panel, Respondents' attorney made no effort to argue that the Accommodation Policy was constitutionally compliant. To the contrary, she quickly conceded that the policy may be "constitutionally suspect" and pleaded with the panel to remand the case to give the DOE and the City a third opportunity to review Appellants' exemption applications, giving them a "fresh consideration" under the relevant statutory standards instead of the Accommodation Policy criteria (A2208). The panel asked counsel for both sides to submit proposed orders setting forth interim relief pending the merits hearing. Appellants' counsel requested injunctive relief benefitting all DOE employees suspended under the unlawful Accommodation Policy, while the Respondents proposed a remand for reconsideration of only the Appellants' accommodation requests, to be conducted by a newly invented "Citywide Appeals Panel" which would include, *inter alia*, attorneys employed in the City's Law Department, who represent them and the City in this litigation and had participated in the heresy inquisitions under the Accommodation Policy.

The First Motions Panel adopted the Respondents' draft virtually unaltered and ordered the Respondents to conduct a "fresh consideration" of Respondents' claims, staying Appellants' waiver and termination deadlines until after such reviews were completed. The Second Circuit ordered the Citywide Appeals Panel to "adhere to the standards established by Title VII of the Civil Rights Act of 1964, the

New York State Human Rights Law, and the New York City Human Rights Law." (A1316). *Inter alia*, those laws broadly protect employees from narrow definitions of religion and require employers that deny accommodations to "demonstrate" why the accommodation cannot be granted. (A1316). Appellants objected, noting their deep concern about appointing Respondents' defense attorneys to judge their applications a third time without providing any substantive relief and arguing that the order did not require the "fresh consideration" panel to explain its decisions, nor did it expressly require the panel's decisions to meet the standard of strict scrutiny that the First Amendment requires of all individualized discretionary government decision-making that imposes restrictions on religious exercise. (A2314)

The Second Circuit merits panel (the "First Merits Panel") issued an opinion, order, and judgment on November 28, 2021 (A2316), granting Appellants' motion in part and adopting the First Motion Panel's November 15 order (A2362). The panel addressed the concern that the order did not offer meaningful standards against which their requests for religious accommodation will be measured as follows: "But Plaintiffs requests will be governed by Title VII and analogous state and city law, and the standards for those claims are well established." (A1705, n.14). The First Merits Panel found that the Mandate was neutral toward religion on its face, and that the Appellants' evidence did not establish that it was surreptitiously motivated by anti-religious purposes. The panel found that the Mandate was "generally

applicable" on its face, reasoning that a law may be generally applicable if it applies to a specific "class" of persons. (A1752). Accordingly, the First Merits Panel declined to grant relief from the Mandate to any DOE employee except the Appellants. However, the panel found that "the procedures specified in the Arbitration Award and applied to plaintiffs are not neutral." (A1065). Citing variations in the extent to which arbitrators applied the Accommodation Standards to individual SAMS appeals, the panel found that the Accommodation Policy was not "generally applicable," vacated the denials that 14 individual plaintiffs had received, applied strict scrutiny to the Accommodation decisions, and ratified the First Motions Panel's order requiring the Defendants to give a fresh reconsideration to Appellants' accommodation requests, untainted by the Accommodation Policy.

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

The First Merits Panel also found that the Appellants had made a sufficient showing of irreparable harm by demonstrating "that they were denied religious accommodations — pursuant to what the City has conceded was a 'constitutionally suspect' process — and were consequently threatened with imminent termination if they did not waive their right to sue." (A1069). The panel declined to give broader relief, including reinstatement, to the Appellants, finding that the harm suffered from a loss of income is compensable by damages and therefore not irreparable so long as the City was not forcibly injecting Appellants against their faith. (A1072) However, the First Merits Panel clarified that this holding might not continue for denial of compensation as a penalty that lasts longer than a few weeks. Finally, the panel declined to extend relief to "similarly situated" DOE employees, noting that the City had offered to permit some DOE employees to submit new appeals to the Citywide Appeals Panel, and finding that extending relief beyond the Appellants was not appropriate under the precedents of this Court. (A1077-78.)

On remand, the Citywide Appeals Panel received administrative records from the Appellants' Initial Review submissions and SAMS Appeals, and any additional materials that the parties wished to provide for their review.[4] On December 8 and

[4] The "explanations" provided by Respondents' counsel shows that the Citywide Appeals Panel considered documentation submitted by "all parties." A1164-69. While Respondents had ample opportunity to review and respond to Appellants' submissions, the Appellants were never provided with copies of Respondents' submissions or any opportunity to respond to them.

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

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

[5] In their responding papers, counsel claimed that they intended to generate and send "reasons" for the denials through email. No prior indication had ever been given to counsel or

The District Court denied the motion on December 14, finding that the Appellants had failed to establish that they would suffer irreparable harm absent an injunction because the DOE was not forcibly vaccinating them in violation of their faith, but only applying economic penalties if they did not comply. The court further held that Appellants were not likely to succeed on the merits and that rational basis review would apply unless Appellants could "prove" that the "fresh consideration" process was irrational or infected with hostility towards religion. (SPA11).

A single Circuit Judge entered a temporary stay upon the filing of the Appellants' appeal and referred Appellants' injunction motion to a three-judge motions panel ("Second Motions Panel"). After briefing for the Second Motion Panel's hearing was complete, but before the date of the hearing, the DOE sent termination notices to its unvaccinated employees who had not appealed their decisions to the Citywide Appeals Panel, setting a termination date of February 11, 2022. (*Keil v. City of New York*, No. 21-3043 (2d Cir.) (hereinafter, "USCA2 21-

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Appellants that further reasons would be forthcoming, and the effort was clearly a response to Appellants' motion papers complaining of the summary denials. The ex-post-facto "reasons" – which were before this Court on appeal, A1164-69 – do not comply with statutory or constitutional standards. Though the "panel" claims to have found that each applicant had sincere religious beliefs, they denied most because they do not consider personally held religious reliefs to be valid, or because they questioned the accuracy of the beliefs at issue. This reasoning is just another reiteration of the unlawful Accommodation Policy standards and squarely violates the statutory and constitutional standards protecting personally held religious beliefs. For each denial, the "panel" also added a sentence concluding that in any event, it would be an undue hardship to accommodate anyone. They did not explain why they had been able to accommodate at least 165 other teachers but could not accommodate these 13 appellants. Nor did these statements comply with the Respondents' statutory obligations to "demonstrate" the reasons accommodation would have posed an undue hardship.

3043"), ECF 74-2). However, the DOE's website still invited the same employees to submit proof of vaccination and return to the workforce or waive their right to sue to stay on extended LWOP. The message was clear: unprotected by court orders, these employees – there are potentially still thousands of them – must now, finally, turn their back on their religious beliefs and submit to vaccination or lose their careers in education.

On February 3, 2022, the Second Motions Panel vacated the stay that protected the Appellants from discipline for refusing to comply with the Mandate. The panel noted that the Second Circuit had previously denied facial relief to the Appellants, and denied an injunction to the Appellants individually, finding that they had failed to meet their burden to show that the Citywide Appeals Panel had acted inappropriately in summarily finding that they did not "meet criteria:"

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

Though they were alerted to the February 11, 2022 termination deadline, the Second Motions Panel scheduled an expedited hearing on the merits of the appeal for February 24, 2022. On February 8, 2022, Appellants began receiving notices stating that because the Motions panel dissolved the stay of the termination deadline, they will be terminated effective February 14, 2022, unless they get vaccinated or surrender their right to continue this litigation before that date.

Respondents are now free to enforce the Mandate against the Appellants and other Class members, terminating their educational careers, nullifying their accrued rights including seniority and tenure, cutting them off from insurance coverage, and rendering them ineligible for unemployment insurance – unless they submit to vaccination and accept the DOE's invitation to return to work or at least terminate this litigation and retain health insurance for their families. This is the direct result of the Second Motions Panel's decision to dissolve the stay previously protecting the Appellants from termination pendente lite.

When a government forces an individual to choose between his or her obedience to God and his or her obedience to the State, this imposes irreparable harm. The Appellants and Class have been suffering this kind of pressure since last October, and with the loss of judicial protection, that pressure has now reached its greatest extent. Unless this Court acts now, everyone affected must choose either to

abandon their educational careers or – in their own eyes – to disobey their God. The daily trauma of being coerced into this choice is causing them irreparable harm.

PRIOR DECISIONS

The district court's order dated October 12, 2021, which denied the *Kane* plaintiffs' motion for a temporary restraining order or preliminary injunction is published at *Kane v. de Blasio*, 2021 U.S. Dist. LEXIS 210957 (S.D.N.Y. Oct. 12, 2021) (A798). The district court's unreported order dated October 28, 2021, denying the *Keil* plaintiffs' motion for a temporary restraining order or preliminary injunction is reprinted in USCA2 21-2711 (SPA-1). The district court's unreported order denying the *Keil* plaintiffs' motion for an injunction pending appeal is reprinted in SDNY 21-8773, ECF 54. The Second Circuit's decision, order and judgment granting in part the Appellants' motion for an injunction and remanding the case for additional administrative decision are published at *Kane v. de Blasio*, 2021 U.S. App. LEXIS 35102 (2d Cir. Nov. 28, 2021) and reprinted in A1316.

The district court's December 14, 2021, order on remand in both the *Kane* and *Keil* cases denying the motions of all appellants for an injunction pending appeal, is reported at *Kane v. de Blasio*, 2021 U.S. Dist. LEXIS 239124, __ F. Supp. 3d ___, 2021 WL 5909134 (S.D.N.Y. Dec. 14, 2021). The district court's unreported order denying the *Kane* and *Keil* plaintiffs' motion for an injunction pending appeal is reprinted in A1352. The Second Circuit's unpublished decision dated February 3,

2022, denying the Appellants' motion for an injunction pending appeal is reprinted in A2415.

STANDARD OF REVIEW

When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable harm absent injunctive relief, and (3) public interest weighing in favor of granting the injunction." *Agudath Isr. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020).

Where First Amendment and fundamental rights are at issue (as here), the test for obtaining preliminary injunctive relief reduces essentially 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, 73*3 F.3d 483, 488 (2d Cir. 2013). This is so because "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); protection of First Amendment rights is per se "in the public interest," *Id.* and the balance of hardships is entirely one-sided because "the Government does not have any interest in enforcing an unconstitutional law." *Id.*

The grant or denial of a preliminary injunction is reviewed for abuse of discretion. "Such an abuse occurs when the district court bases its ruling on an

incorrect legal standard or on a clearly erroneous assessment of the facts." *N.Y. Progress & Prot. PAC, 73*3 F.3d at 486.

ARGUMENT

Appellants hereby incorporate all the arguments they had previously raised before the First Motions Panel, the First Merits Panel and the Second Motions Panel. Appellants extensively argued before the First Motions Panel and the First Merits Panel that the Mandate was neither neutral nor generally applicable, that Title VII was inapplicable to Appellees as state actors, that the Mandate is subject to strict scrutiny and therefore facially unconstitutional, that hybrid rights subject the Mandate to strict scrutiny, and other reasons for determining that the Mandate itself is unconstitutional. It is Appellants' position that all those arguments apply with equal force in connection with the fresh review process ordered by the First Merits Panel. For the sake efficiency, Appellants herein limit their arguments to the latter process itself, but also renew all the arguments made to this court previously.

I. Appellants are Likely to Succeed on the Merits

"Government is not free to disregard the First Amendment in times of crisis...Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles." *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring). Where the state forgets such obligations, it is the job of the Courts to ensure they remember.

This Court already held two months ago that Appellants are likely to succeed on their claim that the City violated their constitutional rights by suspending them pursuant to a facially unconstitutional religious accommodation policy which requires discrimination against those with unorthodox religious beliefs. Nothing about the "fresh consideration" process ordered on remand rebuts their likelihood of success. The "fresh consideration" process itself violates the First Amendment and now presents another cause of action. In denying relief again on remand, the district court abused its discretion in two important ways:

1. The district court erred as a matter of law by applying rational basis review to the "fresh consideration" process;

2. The district court erred as a matter of law by placing the burden for demonstrating why religious accommodation is not available on Appellants rather than Appellees.

It is indisputably clear that Appellants are likely to succeed on the merits of their constitutional claims and that they are entitled to proper preliminary injunctive relief. Because the religious exemption policies are unconstitutional as to anyone who has been subjected to them, all denials of accommodation must be temporarily enjoined and the wrongfully suspended employees reinstated, pending the conclusion of litigation. This Court gave Respondents a chance to fix the problems. They elected instead to double down on their persecution of religious minorities.

The Court must now act to prevent serious injustice.

A. The "fresh consideration" process is subject to strict scrutiny, which it cannot withstand.

The district court erred by applying rational basis review to the "fresh consideration" process. Religious accommodation decisions made by government employers are subject to strict scrutiny. Because both the former Accommodation Policy and the "fresh consideration" policy substantially burden religious rights, they cannot be upheld. Moreover, Respondents have not met and cannot meet their burden of showing that suspending and terminating employees with religious objections to COVID-19 vaccines is the least burdensome option for meeting any compelling interest.

1. Strict Scrutiny Should Have Been Applied to the "Fresh Consideration" Policy.

Strict scrutiny applies to any discretionary religious accommodation policy adopted by a government employer. The Second Motions Panel of this Court recognized that Judge Caproni erred in applying rational basis review to the fresh consideration process instead:

> THE COURT: One of the things that Judge Caproni did is that she -- she basically said that this was generally applicable and neutral and, therefore, subject to rational basis. And I don't see how you -- how you can get there…I mean, it seems to me that this is the same argument as before, which is that this is a process that is flawed, and it singles out religious people and subjects them to this highly discretionary, idiosyncratic process of getting or having denied religious exemptions. Why isn't that strict scrutiny? (A2391-2392).

No real answer was provided, and there is no valid answer other than that strict scrutiny must apply. Any religious exemption determination decided by a state actor, including the "fresh consideration" purportedly given on remand, must survive strict scrutiny review. They are the *precise* type of inquiry that can never fall under *Smith's* lesser standard of review for general laws that only incidentally burden religion.

Religious exemption reviews are expressly about religion, and they are not generally applicable, but rather highly specific discretionary decisions, and therefore, they must be vigorously analyzed to prevent government overreach. "The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1879 (2021); *see also Bear Creek Bible Church v. EEOC*, 2021 US Dist. LEXIS 210139, at *71 (N.D. Tex. 2021) ("Because Title VII is not a generally applicable statute due to the existence of individualized exemptions, the Court finds that strict scrutiny applies").

Thus, when state actors make religious accommodation determinations pursuant to Title VII or any other policy, either about the sufficiency of someone's religious objection, or about which accommodation to grant, the government bears the burden of establishing compliance with the statutory criteria but also bears the

burden under constitutional analysis of showing that their religious accommodation decisions are justified because they further a compelling governmental interest in the least burdensome manner. Lesser statutory standards cannot be applied in lieu of strict scrutiny for a government employer. "In most of the cases alleging religious discrimination under Title VII, the employer is a private entity rather than a government, and the first amendment to the Constitution is therefore not applicable to the employment relationship." *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995). But when the employer is a government actor, and a litigant has mounted a constitutional challenge, a court is "constrained to apply" a constitutional standard "and not Title VII standards." *United Black Firefighters Ass'n v. Akron*, 976 F.2d 999, 1012 (6th Cir. 1992).

As this Court acknowledged, "Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 455 (2008). The First Merits Panel held that the First Amendment also applies to the "fresh consideration." "It is, of course, true that the citywide panel must abide by the First Amendment. By ordering the citywide panel's proceedings to abide by other applicable law, the Motions Panel Order does not (and could not) suggest that the First Amendment is somehow inapplicable to those proceedings." (App. 1724); *see also Putaro v. Carlynton Sch. Dist.*, No. 2:07-cv-817, 2007 U.S. Dist. LEXIS 107326 (W.D. Pa. Dec. 12, 2007):

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

Here, the constitutional claims must be assessed alongside statutory requirements. The district court made a fundamental error of law by failing to apply strict scrutiny to the "fresh consideration" process.

2. The "fresh consideration" process cannot survive strict scrutiny review.

The government bears the burden, under strict scrutiny, of establishing that its religious accommodation policy and decisions meets strict scrutiny. They have not met that burden here.

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

level of generality," but rather must show a compelling interest "in denying an exception" to "particular religious claimants." *Id.* at 1882.

a. The Process Itself is Unconstitutional.

The "fresh consideration" process is unconstitutional because no safeguards were put in place to avoid further discrimination against unorthodox religions or to prevent improper inquiry. Specifically, the fact that the panel is not required to offer a detailed written decision, or that the government does not provide a written policy establishing criteria, standards and procedure, render this entire process facially unconstitutional.

This policy creates too much risk of arbitrary and unconstitutional infringement of religious rights. That would be true even if there were a neutral decision maker, but it is particularly true here, where the panels for "fresh review" are run by the City's own defense attorneys, who have a vested interest in attempting to escape liability for the proven discriminatory suspensions by claiming that accommodations are not possible.

The lack of any defined safeguards, standards, criteria or procedure, and the lack of a requirement to provide a written decision demonstrating the reasons for each decision, not only puts religious people seeking accommodation at unreasonable risk of being arbitrarily denied, but also precludes any meaningful judicial review of such denials. The district court and Second Motion Court's

reluctance to provide judicial review on the ground that no written decisions were issued or standards provided perfectly illustrates how this process infringes the Teachers religious rights.

The summary denials issued through the process also fail under strict scrutiny, and render the policy unconstitutional. By their own admission, Respondents have granted at least 165 religious accommodations and bear the burden of showing why they cannot grant the same accommodation to these employees, at the very least. No information has been provided about why these Teachers cannot be accommodated, and yet one hundred and sixty-five others, who were accepted under the discriminatory Accommodation Policy, can be. The Teachers are likely to succeed on this basis alone.

In response to Appellants' motion challenging the City's failure to demonstrate a valid basis for denial of accommodation, counsel for Respondents generated and sent an email several days after the fact (and after the district court's denial of relief) purporting to give fuller "reasons" for each decision. The summary denials Respondents issued to each of the Teachers explicitly stated that they constituted the final decisions and there was no indication further process or information would be provided. Nor was there any "agreement among counsel" that the reasons would be sent later, as Respondents' counsel alleged, but did not support with any evidence or sworn statement. Appellants object to counsel's assertions

about some "agreement" to send these emails later. This never occurred, and it is wholly unsupported by anything in the record.

As an initial matter, these reasons, which were emailed from attorney Paulson, who is the Respondents' defense attorney in this case, cannot cure the deficient denials. As the Second Motions Panel pointed out, they are conclusory statements that appear to be generated in anticipation of litigation.

To the extent that defense counsel's purported "reasons" are considered, they only further emphasize that the Citywide Appeals Panel failed to meet the basic statutory standards. In fact, they show that the Citywide Appeals Panel once more employed unconstitutional and discriminatory standards.

Targeting religious minority groups, including those who hold personal religious objections rather than orthodox ones, in response to real or perceived threats, no matter how well-intentioned the reason, is forbidden under our laws and cannot withstand strict scrutiny review as a matter of law. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling Korematsu v. United States, 323 U.S. 214 (1944)).

The emailed reasons confirmed that religious sincerity was not being challenged. The primary "reasons" given for most of the Appellants' denials was instead that the religious beliefs are personally held or invalid. This was precisely what the First Merits Panel found unconstitutional about the Accommodation Policy. While some nonreligious people might see guidance from prayer or following one's

moral conscience as a "personal choice," that does not mean it can be deemed "nonreligious" under Title VII, or First Amendment standards, which both fiercely protect personally held religious views just as much as religious views that comport with popular religious orthodoxy.

It is black letter law that personally held religious beliefs are protected. Title VII provides that the "term 'religion' includes all 42 U.S.C. § 2000e(j) observance and practice." *Id.* EEOC guidelines further define religious practices to "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views . . .. The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee." 29 C.F.R. § 1605.1. The EEOC adopted its expansive definition in *United States v. Seeger*, 380 U.S. 163, 85 (1965) and *Welsh v. United States*, 398 U.S. 333 (1970), which defined religion broadly for purposes of addressing conscientious-objector provisions to the selective service law, and certainly found it to include personally held beliefs.

Furthermore, the DOE not only misstated Appellants' beliefs (and formed conclusions based on these misstatements), but they challenged the factual accuracy of them, which is a realm the government is forbidden to enter. *Smith v. Bd. of Educ.*,

844 F.2d 90, 93 (2d Cir. 1988) ("Generally it is not proper for courts to evaluate the truth or correctness of an individual's sincerely held religious beliefs").

Even EEOC guidance warns that an "employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief" and is only justified in seeking additional supporting information if it has "an objective basis for questioning" it. Section 12: Religious Discrimination, Equal Employment Opportunity Commission, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination (last visited Feb. 6, 2022) (emphasis added).

This advice is particularly important for government employers. Considering the broad legal definition of what "religious" includes, Government employers should not, as a general rule, act as arbiters of what constitutes a valid religion and what should be considered secular. A policy that grants state actors overbroad discretion to pass judgment on what constitutes "religious" versus "not religious" is likely to be found unconstitutional absent sufficient safeguards against arbitrary and capricious results. For example, in *Cantwell v. Connecticut*, the Supreme Court held that a solicitation statute was facially invalid under the First and Fourteenth Amendment because it allowed local officials broad discretion to determine which causes were "religious" in nature and which were not for purposes of licensing solicitors. *Cantwell v. Conn.*, 310 U.S. 296, 310 (1940). The Court flatly rejected the

states' argument that judicial review of any wrongly determination was a sufficient remedy. Noting the real risk of harm, and arbitrary enforcement, that results from vesting such broad discretion in a government official, the Supreme Court held that the existence of such a broad discretionary grant was sufficient to facially invalidate the whole law. *Id.* at 904. The relevant inquiry was not, did the official get it wrong in this case. The relevant inquiry was, does a policy which could allow for such unbridled discretion for a state actor to decide what is "religious" create too much risk of arbitrary and unconstitutional application, as a general matter? The answer was, yes, in that case and it is the same here.

b. Less Restrictive Measures are Available.

Even without the evidence of discrimination, Respondents' decision to suspend and exclude most of their employees with religious objections to vaccines is unlikely to survive strict scrutiny. It is not enough to assert a compelling interest in stopping the spread of COVID-19. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures imposing lesser burdens on religious liberty would fail to achieve the government's interests." *Agudath Isr.*, 983 F.3d at 633.

First, nothing in the Mandate itself requires the City to exclude unvaccinated teachers from classrooms. Rather, the Mandate, on its face, notes that it does not preclude religious and medical accommodation. Thus, decisions about what

accommodations can be granted are subject to strict scrutiny, since by the terms of Title VII and other governing statutes, they not only allow, but require the government to make an individualized determination about whether they can deviate from otherwise neutral and generally applicable policies in consideration of an employee's religious beliefs.

Respondents have presented no evidence that would permit the conclusion that the 3% of employees seeking a religious exemption from the Mandate pose a direct threat to others such that they must be excluded from all school buildings. The DOE's decision to terminate rather than accommodate these employees after discretionary review cannot meet strict scrutiny.

There is no evidence that excluding these teachers could even achieve a compelling interest, leave aside that it is the least restrictive method of achieving a permissible goal. Appellants, on the other hand, presented voluminous evidence that they are not a direct threat. It is well-established by now that vaccination cannot meaningfully mitigate infection and transmission of COVID-19 but is instead primarily effective for personal symptom management. *See, e.g.*, Harvard Study (A1107) analyzing data from 68 countries and 2947 U.S. counties and concluding "there appears to be no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases."

Public health officials have reached consensus that virtually everyone will eventually get infected with COVID-19, regardless of vaccination status, rendering policies such as the Mandate useless. (A1090) (citing NPR article). Respondents' own publicly available data support these points. The DOE publishes regular updates on the number of infected students and in-person staff working in New York City schools. That data shows that excluding unvaccinated staff has not decreased the percentage of staff infected with COVID-19 at all (in fact, when the motion was argued last month, there were over a thousand currently infected, fully vaccinated staff members, whereas before exclusion of the unvaccinated, there were typically only a few dozen infected staff among all staff). (A1090) (citing DOE daily case map). The infection rates have followed the same curve as rates in the greater community, whether unvaccinated individuals are excluded or not.

Perhaps most shocking, because such a large percentage of the fully vaccinated staff is currently infected with COVID-19, the DOE adopted the policy that actively infected teachers with mild symptoms should return while still infectious to mitigate the staffing crisis. (A1090) (citing Business Insider article "Short-staffed NYC schools are asking teachers with mild COVID symptoms to return to the classroom.") If it is an acceptable risk to allow infected teachers who can spread and transmit COVID-19 to the students to teach in classrooms, certainly

unvaccinated teachers who test negative for COVID-19 infection should be allowed to teach in classrooms.

No other school district in the state has vaccine mandates for their staff. Respondents can easily safely accommodate Teachers and their colleagues who need an exemption. As the Teachers' expert witnesses pointed out in their sworn declarations, many less burdensome measures exist short of firing and segregating unvaccinated employees whose religious beliefs prevent them from taking a COVID-19 vaccine. (A-242-272). State law already provides for testing and symptom checks, for example, which can be employed alongside all the other tools that these schools have used for the last year and a half to keep everyone safe while still respecting minority religious views. In the alternative, there is no reason why Respondents cannot at least reinstate the employees to remote work pending judicial review. At oral arguments before the Second Motions Panel, DOE's attorneys conceded that New York City now offers a remote option and many students need online support. There is no reason why Appellants and their colleagues cannot teach these children remotely to free up the critically understaffed in person workforce to attend to the children who desperately need them.

B. The District Court Abused its Discretion by Improperly Shifting the Burden

The district court abused its discretion by placing the burden on the Teachers to create a record sufficient to understand why they were denied relief by after "fresh

consideration." Unfortunately, the Second Motions Panel affirmed this error, denying relief (other than ordering an expedited merits panel to convene), on the grounds that they had "'almost no information about the process before the Citywide Appeals Panel' or the standards the Citywide Appeals Panel used to assess Appellants' applications for religious exemptions," A1590, and complaining that the Teachers did not provide details about the "process and rules used to assess Appellants' applications –let alone pinpoint their alleged deficiencies[,]" *Agudath Isr.*, 983 F.3d at 633

1. The Absence of More Defined Criteria has Been Unfairly Placed on Appellants

The Teachers specifically objected to the First Merits Panel that the remand order for this "fresh consideration" was vague and did not set forth the process or rules or criteria that would be used to determine their applications. (*See, e.g.*, USCA2 21-2711, ECF 73.) The First Merits Panel summarily dismissed these concerns, stating: "Plaintiffs' requests will be governed by Title VII and analogous state and city law, and the standards for those claims are well established." A1754.

In their motion for injunctive relief, Applicants informed the court that they were not given any further information about the criteria, process or rules used to determine their applications. (A1092). Nor were they provided any clarity about the reasons for denial. They simply received autogenerated denial letters that stated "does not meet criteria" and that the determination constituted the final

determination of the Citywide Appeals Panel. (*Id*.) Respectfully, using the lack of standards as a sword by shifting the burden to demonstrate a sufficient (or insufficient) reason for denial of accommodation the Teachers is a clear error of law, particularly after this same court dismissed objections by stating that the vague standards referenced in the court's remand order are so "well-established" they did not need to be defined on remand. This holding sets dangerous precedent under which all an employer need do to prevent judicial review is to provide no information as to the criteria it will use or the basis or reason for denial of religious accommodation decisions.

The injustice of this holding is compounded by the fact that these particular employers have already been caught red-handed engaging in widespread religious discrimination by adopting a written policy requiring discrimination against religious minorities.

It is bad enough that instead of issuing injunctive relief immediately upon that finding, the Teachers had to submit to a third round of religious inquisition, spearheaded not by a neutral party, but by Respondents' own defense attorneys. This Court must not compound that order now by violating binding precedent in discrimination cases. As set forth more fully below, the burden is on the employer to rebut the prima facie claim of religious discrimination, and to "demonstrate" why accommodation cannot be made, and they have not met this burden.

The Teachers, on the other hand, have amply met their burden of developing a record upon which relief must be granted. They have already submitted over a hundred pages of briefing to this Court and hundreds of pages of factual submissions to the district court and have now had three sets of oral arguments (this will be the fourth) before the circuit court and two in the district court. The ten volumes that make up the relevant record on appeal show the diligence with which these working class Teachers have attempted to pursue their claims.

After the summary denials on remand, the Teachers reasonably understood that there were no more facts necessary to renew their motion for injunction after remand, given the Second Circuit's prior decision that no standards or criteria would be provided, and the DOE's representations that the grossly inadequate summary denials on remand were the "final determination." At this stage, there is nothing more the Teachers are required to provide.

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

- Each of the *Keil* Applicants' initial religious exemption requests and appeals, which included lengthy personal statements, letters from clergy, and other relevant materials. (USCA2 21-2711 JA352-363, JA370-454).

- Each of the *Keil* Applicants' responses to the City's request for supplemental information. A1842-47.
- Declarations from 21 DOE employees, including all of the *Kane* Applicants, swearing under oath that they held sincerely held religious beliefs. (A273-322). The Kane applicants asked to present testimony about their beliefs at the hearing on October 12, 2021, but were denied, as the district court did not find that their testimony would be relevant.

In their letter motion to renew motions for preliminary injunctive relief in December, the Teachers included declarations from counsel, explaining as much as they knew about the process and criteria – which, as they'd complained before remand, was virtually nothing. A1161, 1092, 1836-38. Pursuant to the remand order, the "fresh consideration" process involved review by two City employees and one member of the City's (and the DOE's) defense counsel, who did not reveal the criteria employed or the basis of their decisions to deny all but one employee on the grounds of "does not meet criteria."

Furthermore, the 14 denial letters stated that the Teachers had only three business days to submit proof of vaccination. Clearly, they did not have time to engage in extensive discovery (which would have been precluded anyway given the district court's decision to stay the case (over Applicants' objection) until two weeks

after the "fresh consideration" process concluded). Nor did they have the burden to do so, even under statutory standards.

2. The Law Places the Burden on Appellees

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

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

The City's autogenerated summary denials issued after "fresh consideration cannot even meet the statutory requirements imposed by the remand order, leave aside pass strict scrutiny review. Title VII and the New York State Human Rights Law and New York City Human Rights Law

Title VII places the burden on the employer to demonstrate that it cannot reasonably accommodate the employee's religious practice. *See, e.g., Ansonia Bd. of Educ. v. Philbrook,* 479 U.S. 60, 68 (1986) ("The employer violates the statute unless it 'demonstrates that [it] is unable to reasonably accommodate . . . an employee's . . . religious observance or practice without undue hardship on the

conduct of the employer's business.' 42 U. S. C. § 2000(e)(j)"); *see also Patterson v. Walgreen Co.*, 140 S. Ct. 685, 686 (2020) (Alito, J., concurring) ("Title VII prohibits employment discrimination against an individual 'because of such individual's . . . religion,' §§ 2000e–2(a)(1) and (2), and the statute defines 'religion' as 'includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.' § 2000e (j).").

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

The term "demonstrates" is defined by statute to mean "meets the burden of production and persuasion." 42 U.S.C.A. § 2000(e)(m) (West). The district court was right that the cursory email each Applicant received stating only "does not meet

criteria" without any explanation of why, or what standards or criteria were employed is grossly insufficient to understand whether a denial was properly issued. However, under the governing statutes, the burden of persuasion and documentation was squarely on the Respondents. Because they did not meet it, Applicants are likely to succeed on the merits and should be issued injunctive relief.

b) Binding precedent shifts the burden, in a discrimination claim, to defendants after a prima facie case of discrimination is established.

Because this is a discrimination case, and the Teachers already established at minimum a prima facie case for discrimination in the overall suit, binding precedent requires that "the burden … must shift to the employer to *articulate* a legitimate, nondiscriminatory reason" for its actions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (emphasis added).

Respondents had already admitted, in prior proceedings in this court, that they did not challenge the sincerity of the Applicants' religious beliefs, and that they could not articulate a legitimate non-discriminatory reason for any of the denials. Applicants were clearly entitled to real injunctive relief, but instead another panel of this court gave Respondents yet another opportunity to try to come up with a defense by allowing Respondents' own attorneys to spearhead a third review of the religious accommodation applications.

Despite this opportunity, Respondents still failed to rebut Plaintiffs' discrimination claims. Instead, once again, they issued cookie-cutter summary denials with no explanation other than failure to "meet criteria." In direct disobedience to controlling law, they chose to *obfuscate,* not "articulate." Bare legal conclusions are not enough to rebut a prima facie case of discrimination. "To prevent summary judgment in favor of the plaintiff at this stage, that explanation must, if taken as true, *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 123 (2d Cir. 2004) (citations omitted). Once defendants fail to rebut, no further evidence is required of plaintiffs, even in the more exacting summary judgment context. Rather, at this stage, "the plaintiff may, depending on how strong it is, rely upon the same evidence that comprised her prima facie case, without more." *Id.* at 124. Because Respondents have offered no rebuttal to the likelihood of success that was already found by this Court, the Teachers remain likely to succeed.[6]

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

Ultimately, though, this matter is not a Title VII case, or a statutory case. It is a constitutional case. As such, it must be analyzed under strict scrutiny, as discussed

[6] *After* the record had closed on Appellants' motion, Respondents offered a lawyer's letter containing someone's "summary" of (still defective) reasons why the panel made their decisions. The timing may have been intentional. By delaying their proffer of reasons - inadmissible except perhaps as an admission – they even deprived Appellants of any opportunity to attack this figment of facticity in their motion papers.

above. The government bears the burden, under strict scrutiny, of establishing that its religious accommodation policy and decisions can withstand this rigorous standard. *See, e.g.,* F*isher v. Univ. of Tex.,* 570 U.S. 297, 312 (2013) (holding that strict scrutiny shifts the burden from the plaintiff to the government.).

C. Facial Unconstitutionality Warrants Broad Relief

Regardless of whether entire Mandate is facially unconstitutional, there is no doubt that the religious accommodation policies officially adopted by the DOE are facially unconstitutional because of the widespread evidence of discrimination and abuse. All denials of accommodation should therefore be stayed pending further litigation. The blatantly discriminatory Accommodation Policy is still in effect, under which hundreds of people are getting terminated today who never had "fresh consideration." Moreover, the "fresh consideration" afforded to some but not all employees is unconstitutional as a matter of policy, because it has no standards or criteria to protect employees from further discrimination and it functions with the Accommodation Policy to impose special disabilities on religious minorities.

When a law is generally applied through unconstitutional policies or well-established practices, a facial challenge is appropriate, regardless of what the text of the policy says. "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." *Forsyth Cnty. v. Nationalist Movement*, 505

U.S. 123, 131 (1992); *see also MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000) ("When evaluating a First Amendment challenge of this sort, we may examine not only the text of the ordinance, but also . . . we are permitted — indeed, required — to consider the well-established practice of the authority enforcing the ordinance"); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir. 2006) ("Administrative interpretation and implementation of a regulation are . . . highly relevant to [facial constitutional] analysis").

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

II. Plaintiffs will suffer irreparable harm if no injunction is granted

The deprivation of First Amendment rights itself, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Nevertheless, the district court and the First Merits Panel decision that it relied upon

erroneously discarded this *per se* rule as applied to the Applicants because, "'[t]he City is not threatening to vaccinate Applicants against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Applicants instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations[.]'" (SDNY 21-cv-8773, ECF No. 54, at 7) (citing USCA2 21-2711, ECF 117-1, at 34-36). By assuming that the only harm to Applicants here is economic, the First Merits Panel completely misstated the standard for what constitutes a Free Exercise violation and misapprehends the constitutional harms at issue here.

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

Here, the DOE's coercion comes in the form of loss of health insurance and income, and the anticipated modification of behavior is Applicants getting vaccinated. The loss of First Amendment freedoms in this context is no less *per se* irreparable harm because the government uses economic harms to do it. *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 717-18 (1981) ("[w]here the state

conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon Free Exercise is nonetheless substantial"); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2277 (2020) (internal quotation marks omitted) ("the government tests the Free Exercise Clause whenever it conditions receipt of an important benefit upon conduct proscribed by a religious faith, or . . . denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against Appellant for her Saturday worship"); *Smith*, 844 F.2d at 91 (holding that "to demonstrate an infringement on his free exercise rights, an individual must have shown the coercive effect of the enactment as it operated against him in the practice of his religion" and that "[t]his coercion can be either direct or indirect"); *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996) (finding irreparable harm due to religious

exercise violation when inmate was given choice between violating his sincerely held beliefs or adhering to them and enduring medical keeplock).

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

Indeed, in one of the cases that the First Merits Panel cited and upon which the district court relied, the court found no irreparable harm *only* because the alleged harm was unrelated to the constitutional violation. In *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988), public employees sought to prevent their termination on the basis of their political affiliations. In declining to find irreparable harm, this Second Circuit stated,

> [t]he precise question thus becomes whether respondents' discharge pending the outcome of their case before the district court would have a chilling effect on respondents' First Amendment rights sufficient to constitute irreparable harm. Since the source of the 'chill' is the permanent loss of respondents' jobs, retaining those positions pending resolution of the case will do nothing to abate that effect.

Id. at 67-68.

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

III. The balance of equities favors granting a preliminary injunction

Typically, "the movant must show that the harm which he would suffer from the denial of his motion is 'decidedly' greater than the harm his opponent would suffer if the motion was granted." *Buff. Forge Co. v. Ampco-Pitt. Corp.*, 638 F.2d 568, 569 (2d Cir. 1981). But in a First Amendment case, the balance of hardships is entirely one-sided because "the Government does not have any interest in enforcing an unconstitutional law." *N.Y. Progress & Prot. PAC, 73*3 F.3d at 488. In any event, given the fact that COVID positive teachers are being invited back into the schools as well as the schizophrenic "scientific" COVID standards, the ever-changing executive orders, the disparate rules for different classes or groups of people, and the chaotic stab-in-the-dark enforcement "procedures," the equities weigh heavily in favor of the tried and true First Amendment and the ability for Applicants and their families to have health insurance, earn a living, and live comfortably with their faith.

IV. A Preliminary Injunction is in the Public Interest

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

983 F.3d at 637. "No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Id.* Additionally, while there is no evidence that draconian and discriminatory policies are advancing public health, substantial evidence establishes that the staffing crisis caused by the removal of thousands of qualified teachers from the already struggling New York City school system has caused chaos, trauma, and loss of needed services and programming which is severely harming children. The public interest strongly supports broad injunctive relief. This element is therefore unmistakably satisfied.

CONCLUSION

For the reasons stated in this application, Appellants respectfully request that the Circuit Justice or the Court issue an injunction staying all denials of religious accommodation from the vaccine Mandate for DOE employees and issue an order reinstating them with back pay.

Dated this 11th Day of February 2022.

Respectfully submitted.

/s/ Sujata S. Gibson

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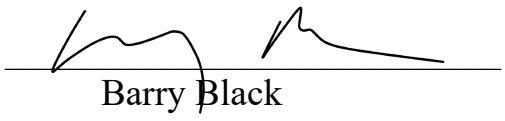
CERTIFICATE OF COMPLIANCE

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 12,234 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
February 11, 2021



Barry Black

SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, et al.,

Plaintiff,

-v.-

BILL DE BLASIO, et al.,

Defendants.

21 Civ. 7863 (MKV)

ORDER

MARY KAY VYSKOCIL, United States District Judge:

Plaintiffs filed this action today. Along with their complaint, Plaintiffs filed an application for a temporary restraining order and preliminary injunction [ECF No. 12]. The motion was referred to me as the Part One judge.

The Court will hold a hearing on the application for a temporary restraining order tomorrow, October 5, 2021, at 9:00AM in Courtroom 18C of the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York. The proceeding is open to the public, but members of the public and media may attend telephonically by dialing 888-278-0296 and entering access code 5195844#. Defendants may file any opposition to the motion seeking a temporary restraining order by 8:00PM today.

The parties must be prepared to address the impact of noncompliance with the mandate on Plaintiffs. Specifically, the parties should address when, if, and how Plaintiffs' employment with the Department of Education could be terminated under the relevant orders and agreements if Plaintiffs are not able to secure an exemption to the vaccination mandate.

SPA-2

Plaintiffs are directed to serve a copy of this order by email on Defendants and their counsel by no later than 2:45PM today.

SO ORDERED.

Date: October 4, 2021
New York, NY

MARY KAY VYSKOCIL
United States District Judge

SPA-3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

VALERIE CAPRONI, United States District Judge:

WHEREAS a hearing on Plaintiff's application for a preliminary injunction is scheduled for Tuesday, October 12, 2021 at 11:00 A.M., Dkt. 33;

IT IS HEREBY ORDERED that by no later than **Friday, October 8, 2021**, the parties must inform the Court whether they plan to call witnesses or introduce exhibits at the hearing. If the parties plan to call witnesses or introduce exhibits, they must include a witness and exhibit list in the submission.

SO ORDERED.

Date: October 6, 2021
New York, New York

VALERIE CAPRONI
United States District Judge

SPA-4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO, Plaintiffs, -against- BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK; DAVID CHOKSHI, IN HIS OFFICIAL CAPACITY OF HEALTH COMMISSIONER OF THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION, Defendants.	:	21-CV-7863 (VEC)
MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, Plaintiffs, -against- THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, MEISHA PORTER, Defendants.	:	21-CV-8773 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on October 12, 2021, the Court denied a motion by Plaintiffs in *Kane et al. v. de Blasio, et al.*, 21-CV-7863 (the "*Kane* Plaintiffs") for a preliminary injunction seeking to enjoin Defendants from enforcing the City's vaccine mandate against employees of the New

York City Department of Education ("DOE") with sincere religious objections to the vaccine, 21-CV-7863, Dkt. 60;

WHEREAS on October 25, 2021, the *Kane* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-7863, Dkt. 67;

WHEREAS on October 25, 2021, the Court stayed the *Kane* matter pending resolution of Plaintiffs' appeal to the Second Circuit, 21-CV-7863, Dkt. 70;

WHEREAS on October 28, 2021, the Court denied a motion by Plaintiffs in *Keil et al. v. City of New York, et al.*, 21-CV-8773 (the "*Keil* Plaintiffs") for a temporary restraining order and preliminary injunction that raised arguments similar to those raised by the *Kane* Plaintiffs, 21-CV-8773, Oct. 28, 2021 text entry;

WHEREAS on October 28, 2021, the *Keil* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-8773, Dkt. 33;

WHEREAS on November 1, 2021, the Court stayed the *Keil* matter pending resolution of the Plaintiffs' appeal to the Second Circuit, 21-CV-8773, Dkt. 40;

WHEREAS on November 14, 2021, the Second Circuit motions panel entered an interim order (the "Motions Panel Order") requiring Defendants to provide the named Plaintiffs in both cases with the opportunity for reconsideration of their requests for religious accommodation by a central citywide panel (the "Citywide Panel"), 21-CV-7863, Dkt. 77 at 47–48; 21-CV-8773, Dkt. 43 at 47–48;

WHEREAS the Second Circuit heard the two appeals in tandem and, on November 28, 2021, entered an opinion on the merits of the appeals, 21-CV-7863, Dkt. 77; 21-CV-8773, Dkt. 43;

WHEREAS the Second Circuit vacated the Undersigned's orders denying preliminary injunctive relief and enjoined the Defendants consistent with the Motions Panel Order, *id.* at 45;[1]

WHEREAS the Second Circuit ordered the injunction to remain in place during the reconsideration of Plaintiffs' requests for religious accommodations by the Citywide Panel and required the parties to inform the Undersigned of the results of those proceedings within two weeks of their conclusion, *id.*;

WHEREAS the Second Circuit remanded the case to the Undersigned for further proceedings consistent with its opinion and instructed the Undersigned that she may alter the terms of the preliminary relief, "as circumstances and further development of the record may require," *id.* at 46;

WHEREAS on November 30, 2021, the Second Circuit issued mandates remanding the cases to the Undersigned, 21-CV-7863, Dkt. 81; 21-CV-8773, Dkt. 48;

WHEREAS on November 30, 2021, the Court continued the stay in the two cases pending the parties' report to the Court within two weeks of the conclusion of Plaintiffs' proceedings before the Citywide Panel, 21-CV-7863, Dkt. 80; 21-CV-8773, Dkt. 47;

WHEREAS on December 11, 2021, Plaintiffs in both cases filed a joint letter motion informing the Court that the proceedings before the Citywide Panel have concluded, 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1;

WHEREAS counsel for the *Kane* Plaintiffs provided copies of the decisions of the Citywide Panel as to eight of the ten Plaintiffs named in *Kane*, 21-CV-7863, Dkt. 85-3;[2]

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[1] Like the Undersigned, the Second Circuit rejected the Plaintiffs' facial challenge to the vaccine mandate. *See* Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 2, 17–24. Because Plaintiffs' current application focuses on their as applied challenges, the Court does not discuss Plaintiffs' facial challenges to the vaccine mandate.

[2] The Citywide Panel approved the request of William Castro, one of the named Plaintiffs in *Kane* matter, although the e-mail approving his request, oddly, also states that he did not meet the criteria for an accommodation.

WHEREAS counsel for the *Keil* Plaintiffs provided copies of the decisions as to all five named Plaintiffs, whose requests for religious accommodations were denied, 21-CV-8773, Dkt. 50-4;

WHEREAS Plaintiffs in both matters seek (1) a preliminary injunction "enjoining enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation;" (2) provisional certification of "a class of all DOE employees who assert religious objections to the vaccine mandate;" and (3) an order requiring "Defendants to immediately reinstate Plaintiffs and all proposed Class members to their original positions prior to the enforcement of the vaccine mandate," 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2;

WHEREAS on December 13, 2021, Defendants responded in opposition to Plaintiffs' requests, 21-CV-7863, Dkt. 87; 21-CV-8773, Dkt. 52, and the Plaintiffs replied in support of their requests, 21-CV-7863, Dkt. 88; 21-CV-8773, Dkt. 53;

WHEREAS no party opposes consolidation of these two cases pursuant to Rule 42 of the Federal Rules of Civil Procedure, 21-CV-7863, Dkt. 85 at 1, Dkt. 87 at 1; 21-CV-8773, Dkt. 50 at 1, Dkt. 52 at 1;

WHEREAS to be entitled to a preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2) that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction; (3) that the balance of hardships tips in Plaintiffs' favor; and (4) that an

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Decisions, 21-CV-7863, Dkt. 85-3 at 6. In its response, Defendants clarified that Mr. Castro's request had been approved. City's Resp., 21-CV-7863, Dkt. 87 at 3.

Plaintiffs' counsel did not provide any information about the status of the requests of the two remaining named Plaintiffs in *Kane*, Robert Gladding and Amaryllis Ruiz-Toro. Decisions, 21-CV-7863, Dkt. 85-3. It appears, however, that their applications were both denied. City's Resp. at 3 (noting that with the exception of Mr. Castro, each of Plaintiffs' applications has been denied).

injunction is in the public interest, *see Capstone Logistics Holdings, Inc. v. Navarrete*, 736 F. App'x 25, 25–26 (2d Cir. 2018);[3] and

WHEREAS to be entitled to class certification, Plaintiffs must satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure (numerosity, commonality, typicality, and adequacy of representation) and of Rule 23(b) of the Federal Rules (question of law or fact common to class members predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy), *see* Fed. R. Civ. P. 23; *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017).

IT IS HEREBY ORDERED that this Court's stay of both cases is lifted and Plaintiffs' application for a preliminary injunction is DENIED. "A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quotation omitted). A harm alleged to be irreparable must be "one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Id.* (internal citation omitted). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005).

Plaintiffs have neither attempted to nor have they demonstrated irreparable harm. As a threshold matter, Plaintiffs' letter motion seeking an injunction cites no case law and makes very few arguments generally and as to irreparable harm specifically. In the Second Circuit's opinion

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[3] That burden is even higher when a party seeks "a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (cleaned up). To meet that higher burden, a party seeking a mandatory injunction must show a "clear or substantial likelihood of success on the merits." *Doninger v. Neihoff*, 527 F.3d 41, 47–48 (2d Cir. 2008) (cleaned up).

The Court takes no position on whether Plaintiffs are seeking a mandatory or prohibitive preliminary injunction. The Court need not resolve that question because, for the reasons discussed *infra*, the Court's conclusions are the same under either standard.

entering an injunction pending the review by the Citywide Panel, the Second Circuit found that Plaintiffs would suffer irreparable harm absent the relief ordered by the Motions Panel. Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 30–31. But in reaching that conclusion, the Second Circuit made clear that it was not casting "doubt on the well-established principle that loss of employment does not usually constitute irreparable injury." *Id.* at 31 n.18 (cleaned up) (collecting cases). The Second Circuit found that principle did not apply given the facts before it because: (1) Plaintiffs had demonstrated a likely violation of their First Amendment rights resulting from the procedure implemented by the arbitration awards; and (2) the City had consented to the entry of an injunction that would allow Plaintiffs' claims to be reconsidered promptly pursuant to procedures that are not constitutionally infirm. *Id.*

Although Plaintiffs' current request for injunctive relief incorporated "all prior papers submitted in this matter to this Court and the Second Circuit Court of Appeals," *see* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1, nowhere in any submission do Plaintiffs address whether the factors on which the Second Circuit relied in finding irreparable harm remain applicable. The Court concludes that they do not. The Motions Panel Order required that fresh consideration of Plaintiffs' requests for religious accommodation be considered pursuant to "the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law." Second Circuit Opinion at 48. The Order further clarified that the consideration "shall not be governed by the challenged criteria set forth in Section IC of the arbitration award for United Federation of Teachers members." *Id.* Accordingly, given that the criteria in the arbitration awards were not being used and given that the City has appeared to have completed its reconsiderations of Plaintiffs' claims and is opposing the injunctive relief sought, neither factor that the Second Circuit relied on in finding irreparable harm continues to apply.

Instead, the Second Circuit's well-reasoned point that Plaintiffs had not proven irreparable harm with respect to their request for reinstatement and backpay applies to their current request for injunctive relief. As the Second Circuit explained:

> The City is not threatening to vaccinate Plaintiffs against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Plaintiffs instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations. "It is well settled, however, that adverse employment consequences," like the loss of income accompanying a suspension without pay, "are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294–95 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021) (citing *Sampson v. Murray*, 415 U.S. 61, 91–92 (1974); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)). Because those harms "could be remedied with money damages, and reinstatement is a possible remedy as well," *id.*, they do not justify an injunction reinstating Plaintiffs. *See Savage*, 850 F.2d at 68 ("Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief.") . . . .
>
> For that reason, this case is different from other pandemic-era cases that have found irreparable harm based on First Amendment violations. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67– 68 (2020); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636–37 (2d Cir. 2020). Those cases involved restrictions on worshippers' rights to attend religious services and so directly prohibited them from freely exercising their religion. *See Agudath*, 983 F.3d at 636 ("The Free Exercise Clause protects both an individual's private right to religious belief and the performance of (or abstention from) physical acts that constitute the free exercise of religion, including assembling with others for a worship service.").
>
> Not so here. Plaintiffs are not required to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable. *See Sampson*, 415 U.S. at 91, 92 n.68, ("[L]oss of income[,] ... an insufficiency of savings or difficulties in immediately obtaining other employment ... will not [ordinarily] support a finding of irreparable injury, however severely they may affect a particular individual.").

Second Circuit Opinion at 34–36 (cleaned up).

Although Plaintiffs do not provide much explanation about the supposed irreparable harm that they will suffer without injunctive relief, they do complain that they now have the choice

either to be vaccinated or "possibly [to] face various penalties including the loss of health insurance and other benefits." Letter Requests, 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2. Additionally, in the emails denying the named Plaintiffs' requests for accommodations, the Citywide Panel[4] informed the applicants whose appeals were denied that they "now have three business days from the date of this notice to submit proof of vaccination" and "[i]f [they] do not do so, [they] will be placed on leave without pay." Decisions, 21-CV-7863, Dkt. 85-3 (emphasis omitted); Decisions, 21-CV-8773, Dkt. 50-4 (emphasis omitted). Accordingly, the only alleged harm is economic, and it can be remedied by money damages, were the Plaintiffs to prevail on the merits of the litigation. In short, Plaintiffs are not entitled to injunctive relief because they have not demonstrated irreparable harm.

But even had Plaintiffs proven irreparable harm, they have not shown a likelihood of success on the merits. The Court has almost no information about the process before the Citywide Panel.[5] Although Plaintiffs' counsel in both cases have submitted declarations in which they assert that the Plaintiffs submitted their applications for review by the Citywide Panel on November 29, 2021, *see* Gibson Decl., Dkt. 85-1 ¶ 3; Black Decl., Dkt. 50-1 ¶ 3, no one bothered to provide copies of those applications to the Court.[6] Additionally, only the *Keil* Plaintiffs provided copies of the supplemental materials provided to the Citywide Panel on December 10, 2021, in response to a request from the Panel for additional information. *See* Supp. Materials, 21-CV-8773, Dkt. 50-3. With so few facts before the Court, Plaintiffs have not

[4] The Citywide Panel appears to refer to itself as the "City of New York Reasonable Accommodation Appeals Panel." *See* Decisions, 21-CV-7863, Dkt. 85-3; Decisions, 21-CV-8773, Dkt. 50-4.

[5] The City represented that written decisions from the Panel as to each of the Plaintiffs are forthcoming and will be provided promptly to Plaintiffs' counsel once received. City Resp. at 2 n.1

[6] The letter motion for injunctive relief was not accompanied by an affidavit from any Plaintiff.

shown that the Citywide Panel's process was not neutral and rational.[7] *See also* Second Circuit Opinion at 48 (requiring the Citywide Panel to consider the requests pursuant to the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law). Because Plaintiffs have not established, at least at this stage, that the process used by the Citywide Panel was not neutral or generally applicable, rational basis review applies. *See* Second Circuit Opinion at 23 (collecting cases). For the same reasons that the Second Circuit and the Undersigned found the vaccine mandate to be rational on its face, the Court has no facts before it on which it could conclude that the Citywide Panel's process was irrational in any way or infected with hostility to religion. *See id.* at 23–24 (finding that requiring vaccination for all DOE staff, in line with CDC guidance, was a reasonable exercise of the State's power to act to protect public health); *see also* Denial of Preliminary Injunction, 21-CV-7863, Dkt. 65 at 65–66 (finding that the order represents a rational policy decision about how to best protect children during a global pandemic (citing *Maniscalco v. New York City Dep't of Educ.*, 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021)).

Additionally, both sets of Plaintiffs provided the Court with the Citywide Panel's request for supplemental information from the named Plaintiffs. *See* Email Chain, 21-CV-7863, Dkt. 85-2 at 2; Email Chain, 21-CV-8773, Dkt. 50-2 at 2. The Panel requested that each named Plaintiff provide additional information about (1) whether the employee has previously been vaccinated, (2) other substances that the employee considers foreign or impermissible and that violate the employee's religious beliefs; (3) whether the employee takes other medications developed or tested using fetal cell derivative lines; and (4) other occasions that the employee

[7] The *Kane* Plaintiffs do provide three exhibits with quotations from or purported information about Mayor de Blasio. *See* Ex. 8, Dkt. 85-10 (transcript from a press conference held on September 23, 2021); Ex. 9, Dkt. 85-11 (media article from 2015); Ex. 10, Dkt. 85-12 (media article from June 2020). But none of those exhibits discusses the Citywide Panel or the criteria it used to evaluate Plaintiffs' requests for religious accommodations; nor could they as they all predate the establishment of the Citywide Panel in November 2021.

has acted in accordance with the employee's cited religious beliefs outside the COVID-19 context. *Id.*

It appears that such information is geared towards developing a factual basis for reaching a conclusion as to whether any particular Plaintiff's beliefs are sincerely held and religious in nature,[8] both of which are permissible inquiries and questions of fact. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . ."); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987) (finding that "although the Sherrs [were] clearly genuinely opposed to immunization, the heart of their opposition does not in fact lie in theological considerations [and accordingly,] their claims of a sincerely religious basis for their objections to inoculation are not credible"). Without additional facts about the Citywide Panel, about the information each Plaintiff provided it, and about its decisions to deny Plaintiffs' applications, Plaintiffs have not proven that they are likely to prevail in their argument that the Panels' decisions are constitutionally or otherwise suspect. In short, Plaintiffs have not shown that they are likely to succeed on the merits.

Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits,[9] their motion for a preliminary injunction is DENIED. With no basis for a preliminary

[8] The Court expects to have more clarity about the bases for the Citywide Panel's denials of the Plaintiffs' applications for religious accommodations once the Panel issues written decisions.

[9] Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits, the Court need not consider whether Plaintiffs have made an adequate showing with respect to the two remaining factors — that the balance of hardships tips in their favor and that an injunction is in the public interest.

injunction, the Court also denies Plaintiffs' motion that Defendants be ordered to immediately reinstate them to their original positions prior to the enforcement of the vaccine mandate.[10]

IT IS FURTHER ORDERED that Plaintiffs' motion to certify a class of all DOE employees who assert religious objections to the vaccine mandate is DENIED without prejudice because it is premature. As a threshold matter, the operative complaint in neither case includes class allegations. The *Kane* Plaintiffs filed an amended complaint as a putative class action, *see* First Am. Compl. ("FAC"), 21-CV-7863, Dkt. 74, but they did so without leave of Court and despite the fact that the Court had stayed these proceedings. *See* Order, 21-CV-7863, Dkt. 75 (ordering the *Kane* Plaintiffs to show cause why the FAC should not be stricken given that Plaintiffs did not have leave of Court to file the pleading). The Court has yet to resolve that issue. *See* Endorsement, Dkt. 80 (noting that the "Court will address the issue of Plaintiffs' first amended complaint once the stay has been lifted").[11] And with respect to the *Keil* Plaintiffs, they sought leave to file a First Amended Complaint, but later withdrew their request. *See* Letter, 21-CV-8773, Dkt. 41 (seeking leave); Letter, Dkt. 45 (withdrawing request); Endorsement, Dkt. 47

[10] In their reply in support of their motion, the *Keil* Plaintiffs argue that the Second Circuit's preliminary injunction entered on November 28, 2021 is still in effect. *See* Reply, Dkt. 53 at 2 ("This Court has the power to modify the injunction, but it has not done so, and until this Court or the Circuit Court modifies the injunction, it remains in place by its own terms."). The Court disagrees. The Second Circuit ordered that the "injunction will remain in place during reconsideration of Plaintiffs' renewed requests for religious accommodations." Second Circuit Opinion at 45. As Plaintiffs acknowledge, at least as to them, "the proceedings before the Citywide panel have concluded." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1. Accordingly, the Second Circuit's injunction is no longer in place.

[11] The Court questions whether the FAC filed by the *Kane* Plaintiffs was procedurally proper. Plaintiffs claim that they filed the FAC as a matter of course pursuant to Rule 15 of the Federal Rules of Civil Procedure. *See* Letter, Dkt. 76 at 1. But Rule 15(a)(1) allows a Plaintiff to amend its pleading once as a matter of course within 21 days of serving it or 21 days after service of a responsive pleading. Fed. R. Civ. P. 15. Plaintiffs served their original complaint on October 7, 2021, making any amended pleading due by October 28, 2021. *See* Executed Summons, 21-CV-7863, Dkts., 40–42. The FAC was filed more than two weeks after that deadline, on November 16, 2021. FAC, 21-CV-7863, Dkt. 74. Additionally, as no responsive pleading has been filed, the 21-day clock has not yet started running. Plaintiffs contend that this means "there is no basis for objecting to an amendment as a matter of course." Letter, Dkt. 79 at 1. Plaintiffs fail to cite any caselaw to support that proposition. In any event, as the Court has not yet ruled on the issue, the operative complaint remains the original complaint at docket entry 1.

(granting Plaintiffs' application to withdraw their request). Accordingly, the operative complaint in the *Keil* matter is the original complaint, which does not include class allegations. Moreover, neither of the operative complaints, nor the invalid First Amended Complaint in *Kane*, nor the First Amended Complaint that was proposed but then withdrawn in *Keil* contains *any* factual allegations regarding the Citywide Panel, the decisions from which Plaintiffs now appear to be challenging — and may want to challenge on a class-wide basis.

Additionally, no adequately supported motion for class certification has actually been filed. The *Kane* Plaintiffs filed a request for leave to file a motion for class certification, *see* Request, Dkt. 83, which the Court denied because the Citywide Panel had not reached its decisions at the time the request was made, *see* Endorsement, Dkt. 84.[12] The *Keil* Plaintiffs have not filed any requests related to class certification beyond the letter request at issue in this order.

Without an operative complaint containing class allegations and a proposed class definition,[13] and without a fully briefed motion for class certification, it is premature to certify a class.[14] There are difficult questions of commonality, typicality, and predominance and without

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[12] The Court has every intention of ordering Plaintiffs to file a consolidated amended complaint that will, hopefully, put in one place the factual allegations on which they base their individual claims and, if they so choose, class claims. *See* Endorsement, 21-CV-7863, Dkt. 84 (requiring the parties inform the Court whether they are requesting leave to file amended complaints and to propose a briefing schedule on any motion for class certification).

[13] It is not entirely clear whether these Plaintiffs can allege a single class. All of the named Plaintiff pursued appeals through the Citywide Panel, so they would have standing to complain about what happened during that review. Plaintiffs' counsel's letters, however, seem to suggest that they envision a class that includes any employee of DOE who asserts a religious objection to the COVID-19 vaccine, even if the person did not ever apply to the DOE for an exemption. *See* Reply, 21-CV-8773, Dkt. 53 at 2 ("[The City's position] ignores the many members of the proposed class who were either denied the opportunity to submit an appeal to [the Citywide Panel], or who declined to do so given the patently unconstitutional framework for [the Citywide Panel] appeals, or who declined to submit initial applications to the DOE because of the unconstitutional standards put in place for the application process by the arbitration orders.").

[14] Plaintiffs request that the Court "issue an order provisionally certifying a class," "pending the Court's review of the motion papers filed herewith on a briefing schedule to be proposed jointly with opposing counsel on or before the deadline set by this Court last Friday." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1–2; Letter Request, 21-CV-8773, Dkt. 50 at 1–2. But Plaintiffs cite no case law — and the Court is aware of none — that

full briefing and facts, the Court is not well placed to make such a decision. Accordingly, the Court denies Plaintiffs' request for provisional certification of a class of all DOE employees who assert religious objections to the vaccine mandate. Because the Court has not certified the class, it lacks the power to order Defendants to take action regarding persons beyond the named Plaintiffs. Accordingly, Plaintiffs request that all proposed class members be reinstated to their original positions prior to the enforcement of the vaccine mandate is DENIED.

IT IS FURTHER ORDERED that 21-CV-7863 and 21-CV-8773 are CONSOLIDATED pursuant to Rule 42 of the Federal Rules of Civil Procedure. No party disputes that consolidation is proper in this case. *See* Letter Request, 21-CV-7863, Dkt. 85 at 1; City Resp., 21-CV-7863, Dkt. 87 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1; City Resp., 21-CV-8773, Dkt. 52 at 1. Accordingly, given the overlap between the two cases, the Court finds that consolidation is appropriate.[15]

The Clerk of Court is respectfully directed to consolidate 21-CV-7863 and 21-CV-8773 and designate 21-CV-7863 as the lead case. The Clerk is further directed to close the open motions at 21-CV-7863, Dkt. 85 and 21-CV-8773, Dkt. 50.

SO ORDERED.

Date: December 14, 2021
New York, New York

VALERIE CAPRONI
United States District Judge

supports the conclusion that there is such a thing as a "provisional class certification" outside the settlement context or that a "provisional" class certification requires less proof than class certification.

[15] The *Kane* Plaintiffs argue that because Defendants support consolidation given the common questions of fact and law between the two cases, it "makes no sense" that those same Defendants oppose class certification. Reply, 21-CV-7863, Dkt. 88 at 1. But the *Kane* Plaintiffs ignore that consolidation pursuant to Rule 42 and class certification pursuant to Rule 23 serve two different purposes and involve two different legal standards.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, STEPHANIE DI CAPUA, ROBERT GLADDING, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, AMARYLLIS RUIZ-TORO, Plaintiffs, -against- BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK; DAVID CHOKSHI, IN HIS OFFICIAL CAPACITY OF HEALTH COMMISSIONER OF THE CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF EDUCATION, Defendants.	:	21-CV-7863 (VEC)
MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, Plaintiffs, -against- THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, MEISHA PORTER, Defendants.	:	21-CV-8773 (VEC)

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS on October 12, 2021, the Court denied a motion by Plaintiffs in *Kane et al. v. de Blasio, et al.*, 21-CV-7863 (the "*Kane* Plaintiffs") for a preliminary injunction seeking to enjoin Defendants from enforcing the City's vaccine mandate against employees of the New

York City Department of Education ("DOE") with sincere religious objections to the vaccine, 21-CV-7863, Dkt. 60;

WHEREAS on October 25, 2021, the *Kane* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-7863, Dkt. 67;

WHEREAS on October 25, 2021, the Court stayed the *Kane* matter pending resolution of Plaintiffs' appeal to the Second Circuit, 21-CV-7863, Dkt. 70;

WHEREAS on October 28, 2021, the Court denied a motion by Plaintiffs in *Keil et al. v. City of New York, et al.*, 21-CV-8773 (the "*Keil* Plaintiffs") for a temporary restraining order and preliminary injunction that raised arguments similar to those raised by the *Kane* Plaintiffs, 21-CV-8773, Oct. 28, 2021 text entry;

WHEREAS on October 28, 2021, the *Keil* Plaintiffs appealed the Court's denial of their motion to the Second Circuit, 21-CV-8773, Dkt. 33;

WHEREAS on November 1, 2021, the Court stayed the *Keil* matter pending resolution of the Plaintiffs' appeal to the Second Circuit, 21-CV-8773, Dkt. 40;

WHEREAS on November 14, 2021, the Second Circuit motions panel entered an interim order (the "Motions Panel Order") requiring Defendants to provide the named Plaintiffs in both cases with the opportunity for reconsideration of their requests for religious accommodation by a central citywide panel (the "Citywide Panel"), 21-CV-7863, Dkt. 77 at 47–48; 21-CV-8773, Dkt. 43 at 47–48;

WHEREAS the Second Circuit heard the two appeals in tandem and, on November 28, 2021, entered an opinion on the merits of the appeals, 21-CV-7863, Dkt. 77; 21-CV-8773, Dkt. 43;

WHEREAS the Second Circuit vacated the Undersigned's orders denying preliminary injunctive relief and enjoined the Defendants consistent with the Motions Panel Order, *id.* at 45;[1]

WHEREAS the Second Circuit ordered the injunction to remain in place during the reconsideration of Plaintiffs' requests for religious accommodations by the Citywide Panel and required the parties to inform the Undersigned of the results of those proceedings within two weeks of their conclusion, *id.*;

WHEREAS the Second Circuit remanded the case to the Undersigned for further proceedings consistent with its opinion and instructed the Undersigned that she may alter the terms of the preliminary relief, "as circumstances and further development of the record may require," *id.* at 46;

WHEREAS on November 30, 2021, the Second Circuit issued mandates remanding the cases to the Undersigned, 21-CV-7863, Dkt. 81; 21-CV-8773, Dkt. 48;

WHEREAS on November 30, 2021, the Court continued the stay in the two cases pending the parties' report to the Court within two weeks of the conclusion of Plaintiffs' proceedings before the Citywide Panel, 21-CV-7863, Dkt. 80; 21-CV-8773, Dkt. 47;

WHEREAS on December 11, 2021, Plaintiffs in both cases filed a joint letter motion informing the Court that the proceedings before the Citywide Panel have concluded, 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1;

WHEREAS counsel for the *Kane* Plaintiffs provided copies of the decisions of the Citywide Panel as to eight of the ten Plaintiffs named in *Kane*, 21-CV-7863, Dkt. 85-3;[2]

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[1] Like the Undersigned, the Second Circuit rejected the Plaintiffs' facial challenge to the vaccine mandate. *See* Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 2, 17–24. Because Plaintiffs' current application focuses on their as applied challenges, the Court does not discuss Plaintiffs' facial challenges to the vaccine mandate.

[2] The Citywide Panel approved the request of William Castro, one of the named Plaintiffs in *Kane* matter, although the e-mail approving his request, oddly, also states that he did not meet the criteria for an accommodation.

WHEREAS counsel for the *Keil* Plaintiffs provided copies of the decisions as to all five named Plaintiffs, whose requests for religious accommodations were denied, 21-CV-8773, Dkt. 50-4;

WHEREAS Plaintiffs in both matters seek (1) a preliminary injunction "enjoining enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation;" (2) provisional certification of "a class of all DOE employees who assert religious objections to the vaccine mandate;" and (3) an order requiring "Defendants to immediately reinstate Plaintiffs and all proposed Class members to their original positions prior to the enforcement of the vaccine mandate," 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2;

WHEREAS on December 13, 2021, Defendants responded in opposition to Plaintiffs' requests, 21-CV-7863, Dkt. 87; 21-CV-8773, Dkt. 52, and the Plaintiffs replied in support of their requests, 21-CV-7863, Dkt. 88; 21-CV-8773, Dkt. 53;

WHEREAS no party opposes consolidation of these two cases pursuant to Rule 42 of the Federal Rules of Civil Procedure, 21-CV-7863, Dkt. 85 at 1, Dkt. 87 at 1; 21-CV-8773, Dkt. 50 at 1, Dkt. 52 at 1;

WHEREAS to be entitled to a preliminary injunction, Plaintiffs must show: (1) a likelihood of success on the merits; (2) that Plaintiffs are likely to suffer irreparable harm in the absence of an injunction; (3) that the balance of hardships tips in Plaintiffs' favor; and (4) that an

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Decisions, 21-CV-7863, Dkt. 85-3 at 6. In its response, Defendants clarified that Mr. Castro's request had been approved. City's Resp., 21-CV-7863, Dkt. 87 at 3.

Plaintiffs' counsel did not provide any information about the status of the requests of the two remaining named Plaintiffs in *Kane*, Robert Gladding and Amaryllis Ruiz-Toro. Decisions, 21-CV-7863, Dkt. 85-3. It appears, however, that their applications were both denied. City's Resp. at 3 (noting that with the exception of Mr. Castro, each of Plaintiffs' applications has been denied).

injunction is in the public interest, *see Capstone Logistics Holdings, Inc. v. Navarrete*, 736 F. App'x 25, 25–26 (2d Cir. 2018);[3] and

WHEREAS to be entitled to class certification, Plaintiffs must satisfy the requirements of Rule 23(a) of the Federal Rules of Civil Procedure (numerosity, commonality, typicality, and adequacy of representation) and of Rule 23(b) of the Federal Rules (question of law or fact common to class members predominate over any questions affecting only individual members and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy), *see* Fed. R. Civ. P. 23; *In re Petrobras Sec.*, 862 F.3d 250, 260 (2d Cir. 2017).

IT IS HEREBY ORDERED that this Court's stay of both cases is lifted and Plaintiffs' application for a preliminary injunction is DENIED. "A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quotation omitted). A harm alleged to be irreparable must be "one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Id.* (internal citation omitted). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 510 (2d Cir. 2005).

Plaintiffs have neither attempted to nor have they demonstrated irreparable harm. As a threshold matter, Plaintiffs' letter motion seeking an injunction cites no case law and makes very few arguments generally and as to irreparable harm specifically. In the Second Circuit's opinion

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[3] That burden is even higher when a party seeks "a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (cleaned up). To meet that higher burden, a party seeking a mandatory injunction must show a "clear or substantial likelihood of success on the merits." *Doninger v. Neihoff*, 527 F.3d 41, 47–48 (2d Cir. 2008) (cleaned up).

The Court takes no position on whether Plaintiffs are seeking a mandatory or prohibitive preliminary injunction. The Court need not resolve that question because, for the reasons discussed *infra*, the Court's conclusions are the same under either standard.

entering an injunction pending the review by the Citywide Panel, the Second Circuit found that Plaintiffs would suffer irreparable harm absent the relief ordered by the Motions Panel. Second Circuit Opinion, 21-CV-7863, Dkt. 77 at 30–31. But in reaching that conclusion, the Second Circuit made clear that it was not casting "doubt on the well-established principle that loss of employment does not usually constitute irreparable injury." *Id.* at 31 n.18 (cleaned up) (collecting cases). The Second Circuit found that principle did not apply given the facts before it because: (1) Plaintiffs had demonstrated a likely violation of their First Amendment rights resulting from the procedure implemented by the arbitration awards; and (2) the City had consented to the entry of an injunction that would allow Plaintiffs' claims to be reconsidered promptly pursuant to procedures that are not constitutionally infirm. *Id.*

Although Plaintiffs' current request for injunctive relief incorporated "all prior papers submitted in this matter to this Court and the Second Circuit Court of Appeals," *see* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; 21-CV-8773, Dkt. 50 at 1, nowhere in any submission do Plaintiffs address whether the factors on which the Second Circuit relied in finding irreparable harm remain applicable. The Court concludes that they do not. The Motions Panel Order required that fresh consideration of Plaintiffs' requests for religious accommodation be considered pursuant to "the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law." Second Circuit Opinion at 48. The Order further clarified that the consideration "shall not be governed by the challenged criteria set forth in Section IC of the arbitration award for United Federation of Teachers members." *Id.* Accordingly, given that the criteria in the arbitration awards were not being used and given that the City has appeared to have completed its reconsiderations of Plaintiffs' claims and is opposing the injunctive relief sought, neither factor that the Second Circuit relied on in finding irreparable harm continues to apply.

Instead, the Second Circuit's well-reasoned point that Plaintiffs had not proven irreparable harm with respect to their request for reinstatement and backpay applies to their current request for injunctive relief. As the Second Circuit explained:

> The City is not threatening to vaccinate Plaintiffs against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Plaintiffs instead face economic harms, principally a loss of income, while the City reconsiders their request for religious accommodations. "It is well settled, however, that adverse employment consequences," like the loss of income accompanying a suspension without pay, "are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages." *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294–95 (2d Cir.), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021) (citing *Sampson v. Murray*, 415 U.S. 61, 91–92 (1974); *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)). Because those harms "could be remedied with money damages, and reinstatement is a possible remedy as well," *id.*, they do not justify an injunction reinstating Plaintiffs. *See Savage*, 850 F.2d at 68 ("Since reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury is plainly reparable and appellees have not demonstrated the type of harm entitling them to injunctive relief.") . . . .
>
> For that reason, this case is different from other pandemic-era cases that have found irreparable harm based on First Amendment violations. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67– 68 (2020); *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636–37 (2d Cir. 2020). Those cases involved restrictions on worshippers' rights to attend religious services and so directly prohibited them from freely exercising their religion. *See Agudath*, 983 F.3d at 636 ("The Free Exercise Clause protects both an individual's private right to religious belief and the performance of (or abstention from) physical acts that constitute the free exercise of religion, including assembling with others for a worship service.").
>
> Not so here. Plaintiffs are not required to perform or abstain from any action that violates their religious beliefs. Because Plaintiffs have refused to get vaccinated, they are on leave without pay. The resulting loss of income undoubtedly harms Plaintiffs, but that harm is not irreparable. *See Sampson*, 415 U.S. at 91, 92 n.68, ("[L]oss of income[,] ... an insufficiency of savings or difficulties in immediately obtaining other employment ... will not [ordinarily] support a finding of irreparable injury, however severely they may affect a particular individual.").

Second Circuit Opinion at 34–36 (cleaned up).

Although Plaintiffs do not provide much explanation about the supposed irreparable harm that they will suffer without injunctive relief, they do complain that they now have the choice

either to be vaccinated or "possibly [to] face various penalties including the loss of health insurance and other benefits." Letter Requests, 21-CV-7863, Dkt. 85 at 2; 21-CV-8773, Dkt. 50 at 2. Additionally, in the emails denying the named Plaintiffs' requests for accommodations, the Citywide Panel[4] informed the applicants whose appeals were denied that they "now have three business days from the date of this notice to submit proof of vaccination" and "[i]f [they] do not do so, [they] will be placed on leave without pay." Decisions, 21-CV-7863, Dkt. 85-3 (emphasis omitted); Decisions, 21-CV-8773, Dkt. 50-4 (emphasis omitted). Accordingly, the only alleged harm is economic, and it can be remedied by money damages, were the Plaintiffs to prevail on the merits of the litigation. In short, Plaintiffs are not entitled to injunctive relief because they have not demonstrated irreparable harm.

But even had Plaintiffs proven irreparable harm, they have not shown a likelihood of success on the merits. The Court has almost no information about the process before the Citywide Panel.[5] Although Plaintiffs' counsel in both cases have submitted declarations in which they assert that the Plaintiffs submitted their applications for review by the Citywide Panel on November 29, 2021, *see* Gibson Decl., Dkt. 85-1 ¶ 3; Black Decl., Dkt. 50-1 ¶ 3, no one bothered to provide copies of those applications to the Court.[6] Additionally, only the *Keil* Plaintiffs provided copies of the supplemental materials provided to the Citywide Panel on December 10, 2021, in response to a request from the Panel for additional information. *See* Supp. Materials, 21-CV-8773, Dkt. 50-3. With so few facts before the Court, Plaintiffs have not

[4] The Citywide Panel appears to refer to itself as the "City of New York Reasonable Accommodation Appeals Panel." *See* Decisions, 21-CV-7863, Dkt. 85-3; Decisions, 21-CV-8773, Dkt. 50-4.

[5] The City represented that written decisions from the Panel as to each of the Plaintiffs are forthcoming and will be provided promptly to Plaintiffs' counsel once received. City Resp. at 2 n.1

[6] The letter motion for injunctive relief was not accompanied by an affidavit from any Plaintiff.

shown that the Citywide Panel's process was not neutral and rational.[7] *See also* Second Circuit Opinion at 48 (requiring the Citywide Panel to consider the requests pursuant to the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law). Because Plaintiffs have not established, at least at this stage, that the process used by the Citywide Panel was not neutral or generally applicable, rational basis review applies. *See* Second Circuit Opinion at 23 (collecting cases). For the same reasons that the Second Circuit and the Undersigned found the vaccine mandate to be rational on its face, the Court has no facts before it on which it could conclude that the Citywide Panel's process was irrational in any way or infected with hostility to religion. *See id.* at 23–24 (finding that requiring vaccination for all DOE staff, in line with CDC guidance, was a reasonable exercise of the State's power to act to protect public health); *see also* Denial of Preliminary Injunction, 21-CV-7863, Dkt. 65 at 65–66 (finding that the order represents a rational policy decision about how to best protect children during a global pandemic (citing *Maniscalco v. New York City Dep't of Educ.*, 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021)).

Additionally, both sets of Plaintiffs provided the Court with the Citywide Panel's request for supplemental information from the named Plaintiffs. *See* Email Chain, 21-CV-7863, Dkt. 85-2 at 2; Email Chain, 21-CV-8773, Dkt. 50-2 at 2. The Panel requested that each named Plaintiff provide additional information about (1) whether the employee has previously been vaccinated, (2) other substances that the employee considers foreign or impermissible and that violate the employee's religious beliefs; (3) whether the employee takes other medications developed or tested using fetal cell derivative lines; and (4) other occasions that the employee

[7] The *Kane* Plaintiffs do provide three exhibits with quotations from or purported information about Mayor de Blasio. *See* Ex. 8, Dkt. 85-10 (transcript from a press conference held on September 23, 2021); Ex. 9, Dkt. 85-11 (media article from 2015); Ex. 10, Dkt. 85-12 (media article from June 2020). But none of those exhibits discusses the Citywide Panel or the criteria it used to evaluate Plaintiffs' requests for religious accommodations; nor could they as they all predate the establishment of the Citywide Panel in November 2021.

has acted in accordance with the employee's cited religious beliefs outside the COVID-19 context. *Id.*

It appears that such information is geared towards developing a factual basis for reaching a conclusion as to whether any particular Plaintiff's beliefs are sincerely held and religious in nature,[8] both of which are permissible inquiries and questions of fact. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case. It is, of course, a question of fact . . . ."); *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987) (finding that "although the Sherrs [were] clearly genuinely opposed to immunization, the heart of their opposition does not in fact lie in theological considerations [and accordingly,] their claims of a sincerely religious basis for their objections to inoculation are not credible"). Without additional facts about the Citywide Panel, about the information each Plaintiff provided it, and about its decisions to deny Plaintiffs' applications, Plaintiffs have not proven that they are likely to prevail in their argument that the Panels' decisions are constitutionally or otherwise suspect. In short, Plaintiffs have not shown that they are likely to succeed on the merits.

Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits,[9] their motion for a preliminary injunction is DENIED. With no basis for a preliminary

[8] The Court expects to have more clarity about the bases for the Citywide Panel's denials of the Plaintiffs' applications for religious accommodations once the Panel issues written decisions.

[9] Because Plaintiffs have not shown irreparable harm or a likelihood of success on the merits, the Court need not consider whether Plaintiffs have made an adequate showing with respect to the two remaining factors — that the balance of hardships tips in their favor and that an injunction is in the public interest.

injunction, the Court also denies Plaintiffs' motion that Defendants be ordered to immediately reinstate them to their original positions prior to the enforcement of the vaccine mandate.[10]

IT IS FURTHER ORDERED that Plaintiffs' motion to certify a class of all DOE employees who assert religious objections to the vaccine mandate is DENIED without prejudice because it is premature. As a threshold matter, the operative complaint in neither case includes class allegations. The *Kane* Plaintiffs filed an amended complaint as a putative class action, *see* First Am. Compl. ("FAC"), 21-CV-7863, Dkt. 74, but they did so without leave of Court and despite the fact that the Court had stayed these proceedings. *See* Order, 21-CV-7863, Dkt. 75 (ordering the *Kane* Plaintiffs to show cause why the FAC should not be stricken given that Plaintiffs did not have leave of Court to file the pleading). The Court has yet to resolve that issue. *See* Endorsement, Dkt. 80 (noting that the "Court will address the issue of Plaintiffs' first amended complaint once the stay has been lifted").[11] And with respect to the *Keil* Plaintiffs, they sought leave to file a First Amended Complaint, but later withdrew their request. *See* Letter, 21-CV-8773, Dkt. 41 (seeking leave); Letter, Dkt. 45 (withdrawing request); Endorsement, Dkt. 47

[10] In their reply in support of their motion, the *Keil* Plaintiffs argue that the Second Circuit's preliminary injunction entered on November 28, 2021 is still in effect. *See* Reply, Dkt. 53 at 2 ("This Court has the power to modify the injunction, but it has not done so, and until this Court or the Circuit Court modifies the injunction, it remains in place by its own terms."). The Court disagrees. The Second Circuit ordered that the "injunction will remain in place during reconsideration of Plaintiffs' renewed requests for religious accommodations." Second Circuit Opinion at 45. As Plaintiffs acknowledge, at least as to them, "the proceedings before the Citywide panel have concluded." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1. Accordingly, the Second Circuit's injunction is no longer in place.

[11] The Court questions whether the FAC filed by the *Kane* Plaintiffs was procedurally proper. Plaintiffs claim that they filed the FAC as a matter of course pursuant to Rule 15 of the Federal Rules of Civil Procedure. *See* Letter, Dkt. 76 at 1. But Rule 15(a)(1) allows a Plaintiff to amend its pleading once as a matter of course within 21 days of serving it or 21 days after service of a responsive pleading. Fed. R. Civ. P. 15. Plaintiffs served their original complaint on October 7, 2021, making any amended pleading due by October 28, 2021. *See* Executed Summons, 21-CV-7863, Dkts., 40–42. The FAC was filed more than two weeks after that deadline, on November 16, 2021. FAC, 21-CV-7863, Dkt. 74. Additionally, as no responsive pleading has been filed, the 21-day clock has not yet started running. Plaintiffs contend that this means "there is no basis for objecting to an amendment as a matter of course." Letter, Dkt. 79 at 1. Plaintiffs fail to cite any caselaw to support that proposition. In any event, as the Court has not yet ruled on the issue, the operative complaint remains the original complaint at docket entry 1.

(granting Plaintiffs' application to withdraw their request). Accordingly, the operative complaint in the *Keil* matter is the original complaint, which does not include class allegations. Moreover, neither of the operative complaints, nor the invalid First Amended Complaint in *Kane*, nor the First Amended Complaint that was proposed but then withdrawn in *Keil* contains *any* factual allegations regarding the Citywide Panel, the decisions from which Plaintiffs now appear to be challenging — and may want to challenge on a class-wide basis.

Additionally, no adequately supported motion for class certification has actually been filed. The *Kane* Plaintiffs filed a request for leave to file a motion for class certification, *see* Request, Dkt. 83, which the Court denied because the Citywide Panel had not reached its decisions at the time the request was made, *see* Endorsement, Dkt. 84.[12] The *Keil* Plaintiffs have not filed any requests related to class certification beyond the letter request at issue in this order.

Without an operative complaint containing class allegations and a proposed class definition,[13] and without a fully briefed motion for class certification, it is premature to certify a class.[14] There are difficult questions of commonality, typicality, and predominance and without

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[12] The Court has every intention of ordering Plaintiffs to file a consolidated amended complaint that will, hopefully, put in one place the factual allegations on which they base their individual claims and, if they so choose, class claims. *See* Endorsement, 21-CV-7863, Dkt. 84 (requiring the parties inform the Court whether they are requesting leave to file amended complaints and to propose a briefing schedule on any motion for class certification).

[13] It is not entirely clear whether these Plaintiffs can allege a single class. All of the named Plaintiff pursued appeals through the Citywide Panel, so they would have standing to complain about what happened during that review. Plaintiffs' counsel's letters, however, seem to suggest that they envision a class that includes any employee of DOE who asserts a religious objection to the COVID-19 vaccine, even if the person did not ever apply to the DOE for an exemption. *See* Reply, 21-CV-8773, Dkt. 53 at 2 ("[The City's position] ignores the many members of the proposed class who were either denied the opportunity to submit an appeal to [the Citywide Panel], or who declined to do so given the patently unconstitutional framework for [the Citywide Panel] appeals, or who declined to submit initial applications to the DOE because of the unconstitutional standards put in place for the application process by the arbitration orders.").

[14] Plaintiffs request that the Court "issue an order provisionally certifying a class," "pending the Court's review of the motion papers filed herewith on a briefing schedule to be proposed jointly with opposing counsel on or before the deadline set by this Court last Friday." *See* Letter Request, Dkt. 21-CV-7863, Dkt. 85 at 1–2; Letter Request, 21-CV-8773, Dkt. 50 at 1–2. But Plaintiffs cite no case law — and the Court is aware of none — that

full briefing and facts, the Court is not well placed to make such a decision. Accordingly, the Court denies Plaintiffs' request for provisional certification of a class of all DOE employees who assert religious objections to the vaccine mandate. Because the Court has not certified the class, it lacks the power to order Defendants to take action regarding persons beyond the named Plaintiffs. Accordingly, Plaintiffs request that all proposed class members be reinstated to their original positions prior to the enforcement of the vaccine mandate is DENIED.

IT IS FURTHER ORDERED that 21-CV-7863 and 21-CV-8773 are CONSOLIDATED pursuant to Rule 42 of the Federal Rules of Civil Procedure. No party disputes that consolidation is proper in this case. *See* Letter Request, 21-CV-7863, Dkt. 85 at 1; City Resp., 21-CV-7863, Dkt. 87 at 1; Letter Request, 21-CV-8773, Dkt. 50 at 1; City Resp., 21-CV-8773, Dkt. 52 at 1. Accordingly, given the overlap between the two cases, the Court finds that consolidation is appropriate.[15]

The Clerk of Court is respectfully directed to consolidate 21-CV-7863 and 21-CV-8773 and designate 21-CV-7863 as the lead case. The Clerk is further directed to close the open motions at 21-CV-7863, Dkt. 85 and 21-CV-8773, Dkt. 50.

SO ORDERED.

Date: December 14, 2021
New York, New York

VALERIE CAPRONI
United States District Judge

supports the conclusion that there is such a thing as a "provisional class certification" outside the settlement context or that a "provisional" class certification requires less proof than class certification.

[15] The *Kane* Plaintiffs argue that because Defendants support consolidation given the common questions of fact and law between the two cases, it "makes no sense" that those same Defendants oppose class certification. Reply, 21-CV-7863, Dkt. 88 at 1. But the *Kane* Plaintiffs ignore that consolidation pursuant to Rule 42 and class certification pursuant to Rule 23 serve two different purposes and involve two different legal standards.