21-3043

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,

against

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, in his official capacity as Health Commissioner of the City of New York, MEISHA PORTER, 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

BRIEF FOR APPELLEES

RICHARD DEARING
DEVIN SLACK
SUSAN PAULSON
of Counsel

February 18, 2022

GEORGIA M. PESTANA
Corporation Counsel
of the City of New York
Attorney for Appellees
100 Church Street
New York, New York 10007
212-356-0821 or -0817
spaulson@law.nyc.gov

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Page(s)

Rules

Treatises

PRELIMINARY STATEMENT

A motions panel of this Court has already unanimously held that plaintiffs have no likelihood of success on their current request for a preliminary injunction against the COVID-19 vaccination requirement for New York City Department of Education (DOE) employees. As the motions panel observed, plaintiffs "simply failed to carry their burden" below (2d Cir. 21-3043 ECF 85). Their page-and-a-half letter request "offered no legal argument"; failed to "pinpoint" any "deficiencies" in defendants' actions; and failed to "say what relevance" their "sundry" attached exhibits had to their claims (*id.* at 4). It is hard to see how plaintiffs could have done less to justify enjoining a significant public health measure.

Plaintiffs' approach is yet more puzzling in light of the prior appellate history here. The Court previously issued a lengthy and detailed opinion rejecting nearly all of plaintiffs' contentions. To be sure, the Court did hold that plaintiffs were likely to succeed on a single claim challenging specific criteria that governed arbitrators' review of requests for religious accommodations from the vaccine requirement. But the Court also ordered a specific remedy—reconsideration of those requests by new

decisionmakers without using the challenged criteria—and that remedy has now been carried out.

Plaintiffs' cursory application in the district court for a new and broad injunction came before that review process was fully completed—and failed to identify any way in which it fell short of what the Court had ordered. Plaintiffs made no showing that the challenged criteria utilized in the earlier process played any role in the denial of their renewed requests. Nor did they identify any other global defect in the new process that might support prospective relief across the board. What's worse, after the district court denied the application and pointed out its shortcomings, plaintiffs barreled headlong into this second appeal rather than shoring up their record or presenting any meaningful argument below.

Having failed to create a record pointing to any constitutional infirmity in the new process, plaintiffs now offer an appellate brief littered with misinformation and filled with unpreserved and unsupported legal points. They argue, for example, that the mere existence of a religious accommodation process triggers strict scrutiny. But they did not properly present that argument below, and, in any event, this Court has already rejected it. Even if the argument were open to be pressed now, it makes

no sense to suggest that providing for religious accommodations in a measure somehow renders it suspect under the Free Exercise Clause.

At times, plaintiffs suggest that a strict scrutiny framework should even be mapped onto individual accommodation determinations, but they never explain how that would work or cite any authority for that proposition. For individual determinations, the questions are simply whether an employee has a sincere religious objection to COVID-19 vaccination and whether an accommodation exists that would not pose an undue hardship. These are straightforward factual determinations, entirely unsuited to strict scrutiny analysis. Most fundamentally, plaintiffs have presented no evidence that the new process itself or any of the individual determinations made pursuant to that process were infected with religious animus. That is the end of the matter.

Equally misguided is plaintiffs' argument that it was defendants' burden to establish that the new accommodation process was constitutional, rather than their burden to demonstrate that it likely suffers from a constitutional infirmity. Plaintiffs, again, did not make that argument below. In any case, they are the ones seeking a preliminary injunction. It

is their burden to demonstrate their entitlement to such extraordinary relief, and they patently failed to carry it.

Finally, recent developments conclusively refute plaintiffs' theory of irreparable harm—by itself a sufficient basis for resolving this appeal. Plaintiffs' theory of irreparable harm is that they face a "coercive termination deadline" when they will lose their jobs after failing to comply with the vaccination requirement for months. But that deadline is the day of this brief's filing. It will be passed by the time this appeal is heard, and plaintiffs' coercion theory will thus fail even on its own terms.

ISSUE PRESENTED FOR REVIEW

Did the district court providently exercise its discretion to deny plaintiffs' second motion for a preliminary injunction, where their one-and-a-half-page letter motion made no serious attempt to establish their entitlement to preliminary injunctive relief?

STATEMENT OF THE CASE

A. The City of New York's requirement that public-school employees be vaccinated against COVID-19

1. The Health Commissioner's order requiring vaccination of public-school employees

As the Omicron variant made clear, COVID-19 is a highly infectious and potentially deadly disease that "has caused widespread suffering in

the State, country, and world." *We the Patriots USA, Inc. v. Hochul*, Nos. 21-2179, 21-2566, 2021 U.S. App. LEXIS 32880, at *5 (2d Cir. Nov. 4, 2021). New York City has been hit particularly hard, with over 2.2 million cases and 39,000 deaths.[1]

Thanks to safe and highly effective vaccines, individuals who contract COVID-19 are less likely to become seriously ill or die.[2] But the need to increase vaccination rates remains.[3] "Vaccination is the leading public health prevention strategy to end the COVID-19 pandemic,"[4] improving health outcomes for recipients and reducing the risk of transmission to others.[5] While masking and regular testing are helpful, they are insufficient, especially with highly transmissible variants with short incubation periods like Omicron. *Cf. Doe v. Mills*, 16 F.4th 20, 28 (1st Cir. 2021). And the unvaccinated are particularly vulnerable to the highly transmissible

---

[1] N.Y. Times, *Tracking Coronavirus in New York City, N.Y.* (captured Feb. 17, 2022), https://perma.cc/W2ZE-Q72M.

[2] FDA, *Learn More About COVID-19 Vaccines from the FDA* (captured Feb. 17, 2022), https://perma.cc/9JWZ-KRM6.

[3] N.Y.C. Dep't of Health, *COVID-19: Latest Data* (captured Feb. 17, 2022), https://perma.cc/CJJ2-RLQM.

[4] CDC, *Guidance for COVID-19 Prevention in K-12 Schools* (captured Feb. 18, 2022), https://perma.cc/2ZHV-B9VU.

[5] CDC, *Benefits of the Getting the COVID-19 Vaccine* (captured Feb. 17, 2022), https://perma.cc/L3H8-EUEM.

new variants, with the CDC reporting that they are about six times more likely to contract the virus (and thus potentially spread it), nine times more likely to be hospitalized, and 14 times more likely to die from COVID-related complications.[6]

Public schools present a particularly compelling need for vaccination, as children regularly have extended contact with countless people indoors. Per the CDC, vaccination is "the most critical strategy to help schools safely resume full operations," and thus educators and other staff should be "vaccinated as soon as possible" (Joint Appendix ("A") 156).[7] In addition to reducing severe disease and hospitalization of students and staff alike, vaccination also minimizes educational disruptions when infections do occur.[8]

---

[6] Healthline, *Unvaccinated bearing the brunt of the surge* (captured Feb. 17, 2022), https://perma.cc/9E4M-ZCRB.

[7] Although plaintiffs designated the appendix as "joint," they made no attempt to confer with defendants on its content, as required. *See* Fed. R. App. P. 30(b). The bulk of the materials included were not even annexed to their letter motion to the district court, and plaintiffs' indiscriminate reference to all prior papers in the litigation hardly make every filing in this case a part of the record. Making matters worse, plaintiffs moved to supplement the record two days before defendants' briefing deadline, to add entirely new materials that were never presented to the district court and thus can have no bearing on that court's exercise of discretion.

[8] *See* note 5, *supra*.

Shortly after a vaccine for people aged 16 or older received full regulatory approval, the Commissioner of the New York City Department of Health and Mental Hygiene ("Health Commissioner") required public-school employees to receive one dose of vaccination by September 27, 2021, later extended to October 1 (A154-58). The requirement has dramatically increased vaccination rates among public-school employees (A388, 785). Today, around 99.3% of DOE personnel have been vaccinated. Building on this success, the Health Commissioner later required vaccination for all City employees, which has similarly resulted in a dramatic increase in vaccination (A2237-41).

2. The arbitration awards establishing a process for seeking religious and medical exemptions

The vaccination requirement is subject to such accommodations as are required by law (A329-332). After negotiations between DOE and plaintiffs' unions reached an impasse on how to process accommodation requests for potentially tens of thousands of employees, an independent labor arbitrator established certain procedures for requesting and evaluating expedited requests for religious and medical exemptions (A224-41).

Under this process, DOE made initial eligibility determinations, while appeals of such determinations were heard by independent arbitrators (A229-36). DOE's initial eligibility determinations were based on the standards of Title VII and state and local human rights laws. When the agency denied religious accommodation requests, the overwhelming reason was that allowing the unvaccinated employee to work in a school would pose a direct threat to health and safety and offering another worksite as an accommodation would impose an undue hardship (*see* A274, 281, 299, 309, 314).

Appeals from the denied accommodation requests were heard by various arbitrators who were instructed by the terms of the arbitration award to consider the three criteria challenged earlier in this litigation, including whether an employee had a letter from clergy, whether an employee was a member of a recognized and established religious organization, and whether a religious leader representing the employee's faith had spoken publicly in favor of vaccination (A233-34).

Employees who had not complied with the vaccination requirement or received an exemption were placed on unpaid leave with health insurance on October 4, 2021 (A236-37, 333). They were also offered special

separation and extended leave options, which required waiving any claims against DOE existing at the time of their election of one of these options (A239-40). Employees in the extended leave program can remain unvaccinated through this school year but may also submit proof of vaccination any time before September 5, 2022 and return to work (A240).

3. Plaintiffs' prior appeals and this Court's order granting plaintiffs fresh consideration of their religious accommodation requests

This is not the first time that plaintiffs have sought a preliminary injunction. Earlier in the litigation, the district court denied plaintiffs' motions seeking to enjoin the vaccination requirement, both facially and as applied to them through the arbitration appeal process (A798-99, 800-910). Plaintiffs appealed, and a motions panel of this Court directed DOE to afford plaintiffs fresh consideration of their religious accommodation requests by an existing Citywide Panel adhering to the standards of Title VII and its state and local counterparts, without being governed by the three criteria in the arbitration awards that plaintiffs had challenged (2d Cir. 21-2678 ECF 58; 2d Cir. 21-2711 ECF 76).

The Citywide Panel had already been created to review accommodation requests relating to non-DOE employees subject to the citywide

vaccination requirement (A2242-47); it was not "newly invented" for purposes of this litigation, as plaintiffs contend (Joint Brief for Plaintiffs-Appellants ("App. Br.") 13). In reviewing religious accommodation requests, the three-member Panel is comprised of representatives of the Commission on Human Rights, the Department of Citywide Administrative Services, and the Office of the Corporation Counsel (A2242).

This Court's merits panel reaffirmed the motion panel's relief in a thorough, 46-page opinion (A986-1031). As an initial matter, the Court held that plaintiffs were unlikely to succeed on their facial challenge to the vaccination requirement itself (A989, 1002-09, 1030). The Court concluded that the Commissioner's order is "neutral on its face" as its restrictions "apply equally to those who choose to remain unvaccinated for any reason" (A1003). And the Court likewise rejected plaintiffs' various arguments that the requirement was not generally applicable (A1005-07). Finally, the Court noted that no court had ever suggested that a law must apply "to all people, everywhere, at all times, to be 'generally applicable," as plaintiffs contend (A1007-08).

The Court did, however, conclude that plaintiffs were likely to succeed on their narrower as-applied challenge to the three specific criteria

stated in the arbitration awards (A1009-1016, 1033). To address plaintiffs' complaints, the Court reaffirmed the motions panel's relief, such that plaintiffs would have their religious accommodation requests addressed through the Citywide Panel process, which would not be governed by the challenged criteria (A1029-30). And the Court rejected plaintiffs' arguments that this relief was inadequate because lawyers from the Office of the Corporation Counsel sit on the Citywide Panel and because the Panel would apply the standards of Title VII (and the state and city human rights laws) (A1027-30).

Though the Court held that plaintiffs were entitled to renewed consideration of their requests, it did "not suggest that plaintiffs are in fact entitled to their preferred religious accommodation—or even any religious accommodation, for that matter—under Title VII (or the First Amendment)" (A1029-30). And the Court limited the relief to the named plaintiffs, rebuffing their efforts to make "an end run" around class certification by claiming that their unsuccessful facial challenge entitled them to class-wide relief (A1023-27).

Implementing this Court's ruling, the Citywide Panel reviewed plaintiffs' renewed accommodation requests over a period of two weeks

(*see* A1033). While plaintiffs failed to create a complete record of the contours of that process below, the bird's eye view is this. Plaintiffs submitted renewed applications for the Panel's consideration. And, consistent with the EEOC's published guidelines for reviewing requests for religious accommodations to COVID-19 vaccine requirements,[9] the Panel sought additional information from plaintiffs, through counsel, to confirm that their objections to receiving a COVID-19 vaccine were religious in nature (*see* A1099). The Panel also sought additional information from DOE regarding the nature and extent of the burden an accommodation would present to its operations.

Shortly after deciding plaintiffs' renewed requests, and still within the two-week period for completing its review, the Citywide Panel prepared written summaries of its reasoning. Although plaintiffs repeatedly claim these summaries were generated by defendants' litigation counsel (App. Br. 17, 30, 45), as stated in the transmittal email they were simply *conveyed* through counsel—a step taken because plaintiffs had previously

---

[9] EEOC, *Vaccinations – Title VII and Religious Objections to COVID-19 Vaccine Mandates* (captured Feb. 18, 2022), https://perma.cc/4DPE-39SJ (permitting employers to ask employees to explain the religious nature of objection to COVID-19 vaccination and to seek additional supporting information to confirm either the religious nature or the sincerity of a particular objection).

objected to direct communication from the Panel (A1164-69; *see also* A1154 n.1). And, where relevant, the summaries describe dissenting votes among Panel members, undermining any suggestion that counsel manufactured the decisions (A1164-69). None of these summaries was submitted to the district court as part of plaintiffs' second motion for a preliminary injunction (*see* A1090-1150).

In the end, the Citywide Panel granted the request of one plaintiff, a non-school-based employee who has now been reinstated with backpay (*see* A1168). As a result, two of the original 15 plaintiffs have now obtained religious accommodations—one via the arbitration process and a second via the Citywide Panel process.[10]

B. This appeal and the ruling below

Immediately upon receipt of the Citywide Panel's decisions, but before receiving the written summaries of the Panel's reasoning, plaintiffs filed a one-and-a-half-page letter-motion requesting that the district

[10] As defendants represented would occur in the previous appeal, an opportunity for fresh consideration by the Citywide Panel has been extended to all DOE employees placed on leave without pay who previously had religious accommodation appeals denied by arbitrators under the now-defunct arbitral process. As a result, the Citywide Panel continues to review accommodation requests from non-plaintiff DOE employees. While any such request is pending, the employee's deadline to opt-in to the extended leave program is stayed.

court: (1) enjoin enforcement of the vaccine requirement against any employee asserting a religious objection; (2) provisionally certify a class of all DOE employees asserting religious objections to the vaccine requirement; and (3) order immediate reinstatement of all proposed class members to the positions they held prior to enforcement of the vaccine requirement (A1090-1150, 1834-50). The letter did not cite a single case (*id.*).

In support of this request, plaintiffs put forward the Panel's ultimate determinations (without the summaries of its reasoning), but neither their own initial submissions nor DOE's submissions to the Panel, which they had never sought to obtain (A1098-1106, 1848-50). And they annexed additional sundry exhibits without explaining their relevance to the vaccination requirement or the procedures employed by the Citywide Panel (A1107-50). Plaintiffs' cursory submissions did not argue that the Panel globally applied constitutionally impermissible criteria when evaluating accommodation requests, much less present supporting evidence (A1090-91, 1834-35). Plaintiffs simply noted that most, but not all, of their renewed requests had been denied (*id.*)

Seeing the motion for what it was—premature and wholly underdeveloped—the district court denied a preliminary injunction (Special

Appendix for Plaintiffs-Appellants ("SPA") 4-16). As the court observed, plaintiffs' "letter motion … cites no case law and makes very few arguments generally and as to irreparable harm specifically" (SPA8). And though plaintiffs asserted the Citywide Panel's process was a "sham," they presented "no facts" to support such a finding (SPA11-13).

As the district court also noted, "neither of the operative complaints … contain[ed] any factual allegations regarding the Citywide Panel" (SPA15). Indeed, even when plaintiffs had proposed to amend their complaints, they had offered little or no information about the Panel's process, and certainly not allegations sufficient to support a constitutional challenge to that process (*see* A921-82, 1601-79).

The district court reasonably found that "[w]ithout 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 on their argument that the Panel's decisions are constitutionally or otherwise suspect" (SPA13). Indeed, the court noted, the little evidence in the record suggested that the Panel was conducting a proper inquiry into whether applicants held sincere religious objections (*id.*).

The district court denied plaintiffs' request for "provisional" class certification as premature, noting the operative complaints lacked class allegations and a proposed class definition, and that plaintiffs' letter provided no authority supporting the concept of provisional certification (SPA14-16). That aspect of the district court's order is not at issue on this interlocutory appeal directed at the denial of preliminary relief.

Without any attempt to explain how the Citywide Panel's process violated their First Amendment rights, plaintiffs noticed an appeal and requested a "stay" pending appeal from the district court, annexing the Citywide Panel summaries of its reasoning for the first time (A1159-60, 1856-57). After denying the stay request, the district court advised plaintiffs that the way forward was for them to file a consolidated amended complaint incorporating allegations concerning the Citywide Panel and making any class allegations (A1354).

Instead of taking the necessary steps in the district court, plaintiffs focused solely on their appeal, seeking emergency relief from this Court (A1974-75). A single judge denied the bulk of the request but stayed the deadline for plaintiffs to opt-in to the extended leave program or face potential termination until consideration by a full motions panel (A1355-

56, 2161-62). After full briefing and oral argument on the motion, a motions panel of this Court issued a 4-page single-spaced order denying in full plaintiffs' request for an injunction pending appeal, thereby allowing plaintiffs' terminations to go forward (2d Cir. 21-3043 ECF 85).

In denying injunctive relief, the motions panel unanimously concluded that plaintiffs had no likelihood of success on their challenge to the vaccination requirement as a whole (2d Cir. 21-3043 ECF 85 at 4). The motions panel noted that a full merits panel had already held they were unlikely to succeed on that claim and plaintiffs "offered no new facts or arguments that would change that analysis" (*id.*). To the extent plaintiffs challenged the constitutionality of the Citywide Panel's procedure for assessing religious accommodations, the motions panel likewise concluded that plaintiffs had failed to carry their burden before the district court (*id.*). The panel noted that plaintiffs had rushed to court and filed a page-and-a-half letter motion that "offered no legal argument," and provided "almost no information about the process before the Citywide Panel … let alone pinpoint[ed the] alleged deficiencies" (*id.*).

The motions panel rejected plaintiffs' suggestion that the constitutional infirmities in the procedure established by the independent labor

arbitrator meant that the Citywide Panel process, in which different actors applied different standards, was necessarily infirm too (*id.*). As the panel noted, plaintiffs provided "almost no information" about the Citywide Panel process, including the information that plaintiffs and DOE presented to the Panel and the standards the Panel applied (*id.*). With such a scant showing, plaintiffs were unlikely to succeed on the merits (*id.*).

Plaintiffs then sought a writ of injunction from the United States Supreme Court, which Justice Sotomayor denied on February 11, 2022 (S. Ct. 21A398). Plaintiffs renewed their application to Justice Gorsuch on February 14, 2022 (a "disfavored" gambit, *see* S. Ct. Rule 22.4), and he referred the application to the full Court for consideration at their next conference on March 4, 2022. The Court has not requested that defendants file any response to plaintiffs' application.

C. The termination of the employment of unvaccinated employees

On February 7, 2022, after the motions panel had lifted any impediment to terminating plaintiffs' employment for non-compliance with the vaccination requirement, DOE notified plaintiffs that, if they chose not

to either opt-in to the extended leave without pay program or get vaccinated and return to work, their employment would be terminated as of February 18, 2022 (2d Cir. 21-3043 ECF 132).[11] The first group of terminations of non-compliant DOE employees under the vaccination mandate, involving employees who had never been subject to a stay of deadlines, was effective only seven days earlier, on February 11, 2022.[12]

Because vaccination is a condition of continued DOE employment, non-compliant employees are terminated either for "non-compliance with the vaccination requirement" or "failure to meet the qualifications of the job." Plaintiffs' contention that a "misconduct" notation is entered in personnel files is false (App. Br. 11).

---

[11] Plaintiffs' counsel has proffered the termination notice—and a related waiver—as a supplemental appendix and filed those documents on the ECF docket (2d Cir. 21-3043 ECF 132). Judicial notice may be taken of those documents for their operative legal effect. *See Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006). The documents make evident that plaintiffs misstate their own termination deadline, which is February 18, 2022, not February 14, 2022, as they contend (App. Br. 20, 50). We note, too, that the new testimonial declaration also submitted by plaintiffs is not similarly subject to judicial notice.

[12] *See* N.Y. Times, *Mayor Adams says the rush of last-minute vaccinations by New York City workers is an encouraging sign* (captured Feb. 17, 2022), https://perma.cc/SES9-48V6. The DOE employees terminated in that first group were, in essence, those who did not choose either to extend their leave without pay or get vaccinated and return to work, and who did not have a religious accommodation appeal reviewed by or pending before the Citywide Panel.

SUMMARY OF ARGUMENT

The question before this Court is not whether plaintiffs are entitled to judicial review of their claims; they certainly are, and they already have received more than their fair share so early in litigation. The question is instead whether plaintiffs are entitled to preliminary injunctive relief while they try to prove their claims in the district court. *See* Federal Practice & Procedure § 2947 (3d ed.) (noting that the point of a preliminary injunction is to "protect plaintiff from irreparable injury and preserve the court's power to render a meaningful decision after a trial on the merits"). They are not.

The first reason is that plaintiffs have shown no likelihood of succeeding on the merits. Plaintiffs' appeal is jurisdictionally confined to the denial of preliminary relief, and the district court plainly acted within its discretion by denying plaintiffs' woefully underdeveloped motion. *See Almontaser v. N.Y.C. Dep't of Educ.*, 519 F.3d 505, 508 (2d Cir. 2008) (abuse-of-discretion standard applies to denials of preliminary injunctions). Plaintiffs' cursory letter-motion presented no legal or factual basis for the court to conclude that the denial of their religious accommodation requests pursuant to the new Citywide Panel process violated their First

Amendment rights. The letter was a page-and-half long, cited no cases, put forth essentially no legal argument, and failed to pinpoint any deficiencies in the Citywide Panel process—which, after all, had been ordered by this Court in resolving their prior appeal (A1090-91). Additionally, plaintiffs provided no information about the Citywide Panel process and incomplete information about the material that was before the Panel (*see* A1092-1150, 1836-50). The district court properly rejected their argument that it should presume that the Panel's procedures were constitutionally infirm because there were issues with the earlier arbitration process, when the standards and adjudicators were entirely distinct.

Plaintiffs also fail to make a strong showing of irreparable harm. At this point, plaintiffs no longer confront the First Amendment harm they allege; any pressure to violate their religious beliefs and get vaccinated to keep their jobs has disappeared. Each plaintiff has either (a) been terminated, (b) elected to extend their leave for around seven months while releasing all existing claims and waiving any right to challenge a future separation from employment, or (c) received a religious accommodation. And, as plaintiffs now acknowledge, the economic harms

they allege with scant record support—loss of employment and health insurance—are reparable through monetary damages.

Finally, the balance of the equities favors denying an injunction. Plaintiffs do not face any imminent or irreparable harm where they are no longer subject to any pressure to get vaccinated and can pursue all the usual post-termination remedies available to any discharged employee. The public's interest in safely continuing school operations with minimal disruptions to students' education and caregivers' planning far outweighs plaintiffs' individual objections to vaccination.

ARGUMENT

PLAINTIFFS' CURSORY MOTION BELOW DID NOT COME CLOSE TO SATISFYING THEIR HEAVY BURDEN IN JUSTIFYING EXTRAORDINARY PRELIMINARY RELIEF

A. Plaintiffs relied on a wildly underdeveloped record and essentially no legal argumentation in seeking preliminary injunctive relief for a second time.

Plaintiffs' cursory letter-motion in the district court failed to do the bare minimum in the way of argumentation and evidentiary support, much less meet the high standard for injunctive relief. Though plaintiffs now purport to challenge the constitutionality of the Citywide Panel's accommodation review process, they failed to provide the district court with

a record showing what information was presented to the Panel or why the Panel reached particular determinations, much less evidence that the Panel's determinations were guided by constitutionally impermissible criteria or motivated by religious animus.

In addition, their curt letter cited no cases and presented no meaningful legal argument, merely invoking "all of the arguments and reasons" they had presented in conjunction with their earlier requests for a preliminary injunction and ensuing appeals (A1090-91, 1834-35). The letter did not confront the fact that a published 46-page opinion of this Court had already addressed all those points in the just concluded appeals, rejecting nearly all of them and, with respect to the one contention found to have likely merit, ordering the very Citywide Panel review process that plaintiffs now sought to challenge.

There is no basis for plaintiffs' contention that they did not have time to engage in discovery—or, evidently, put forth any legal argument or collect and collate appropriate materials already in their possession—because they had only three business days to submit proof of vaccination or be subject to termination (App. Br. 17, 41). Here, too, their factual premise is false. Plaintiffs had instead been notified that they had three

days to submit proof of vaccination *or risk being placed on leave without pay* (A1101, 1105-06, 1848-50). But all the plaintiffs (with the exception of the plaintiff who had received a religious accommodation through the arbitrator process) had already been on leave without pay for months.[13]

In any case, if an imminent deadline really had been the impediment, a reasonable step might have been to seek a temporary restraining order pausing the plaintiffs' deadline, clearly setting forth the legal arguments for that relief and identifying the facts known to date that supported it. Instead, plaintiffs offered no legal argument, identified no specific facts of relevance, and sought a preliminary injunction "enjoining enforcement of the vaccine mandate" as to a broad swath of employees and "immediately reinstat[ing]" all of them "to their original positions prior to the enforcement of the vaccine mandate" (A1091, 1835).

---

[13] Given that plaintiffs had been on leave without pay for some time, the three-day notification was provided in error. It occurred because the Citywide Panel was originally constituted to resolve accommodation appeals pertinent to the broader vaccination requirement for all city employees, and employees subject to that requirement were only being placed on leave without pay after the conclusion of the Citywide Panel process. The inadvertent failure to tailor the notifications to plaintiffs' circumstance is regrettable, but in no way justifies plaintiffs' litigation approach. And DOE sent notices clarifying the instructions applicable to plaintiffs, who were given 14 days to opt into the special leave package extending their leave without pay into September 2022.

The reason plaintiffs made no record below was not a three-day deadline (App. Br. 17, 41), but rather their own misconceived choices. Plaintiffs' repeat motion did not even include their applications to the Citywide Panel; most plaintiffs neglected to include their responses to the Panel's requests for additional information; and all plaintiffs failed to submit the Panel's written summaries of its reasoning, because they were so hasty in running back to the district court that the Panel had not even distributed them (A1090-1150, 1834-50). And plaintiffs never inquired if DOE had submitted materials to the panel as well; it had, and those materials weren't before the district court either. As this Court's motions panel confirmed, the district court rightly concluded that it simply did not have enough facts before it to evaluate plaintiffs' unpleaded arguments about the Panel's process and the determinations arising from that process (SPA4-16).

What's worse, after the district court meticulously pointed out the numerous shortcomings in plaintiffs' papers (SPA11-13; A1354), they made no effort to correct them, but instead chose to again appeal to this Court and to again seek preliminary relief pending appeal (A1159-60, 1856-57). They filed their motion for an injunction pending appeal three

days after the district court ruled, and in that motion noted that the first deadline they faced—concerning whether to opt into the extended leave package or be subject to termination—was another 11 days into the future. Accordingly, by that point it was unquestionably clear to plaintiffs that they were not operating on any three-day timeline. Yet they simply barreled forward.

Nor do plaintiffs' repeated references to their "ten-volume appendix" establish anything of relevance (App. Br. 3, 40). The overwhelming bulk of the record material dates from before the Citywide Panel process even commenced and is thus largely irrelevant. And, as noted above, the slim remainder that post-dates the commencement of the Citywide Panel's process is fatally incomplete. More significantly, as the motions panel pointed out, plaintiffs made no attempt in the district court—or, really, in this Court—to correlate the record material with grounds for obtaining the preliminary injunction they seek. Nor did they meaningfully identify any grounds for such an injunction. The volume of submitted materials alone is not the measure of responsible litigation. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1999) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Perhaps recognizing they failed to make an adequate showing below, plaintiffs contend that it was defendants' burden to demonstrate that the Citywide Panel process was constitutional (App. Br. 38-46). But plaintiffs did not make that argument in their papers below, so it is unpreserved. The argument is also meritless: in seeking a preliminary injunction, plaintiffs bear the burden on all points, and defendants have no burden to rebut their claims. *See Ashcroft v. ACLU*, 542 U.S. 656, 669 (2004).

In any case, plaintiffs did not even make a prima facie showing that the Panel process, or any individual determination, was infected by impermissible criteria or religious animus. Plaintiffs argue that the problems with the earlier arbitration process should shift the burden to the defendants to show that the Panel's procedures are not discriminatory (App. Br. 44-45). But the two processes are entirely distinct, with different decisionmakers applying different standards, and no fact-finder could reasonably *presume* that the rebooted process was constitutionally suspect on the basis that the now-defunct arbitration process was.

And plaintiffs' repeated assertions that defendants' litigation counsel somehow controlled either review process are, once again, false (*see* App. Br. 1, 9, 13, 14, 29, 39, 44). Defendants' litigation counsel did not

appear or advocate in the arbitration process (*see* App. Br. at 9). Nor have they participated in the Citywide Panel process (*id.* at 1, 13, 14, 29, 39, 44), other than simply transmitting communications to and from plaintiffs—in light of the prior objections of plaintiffs' counsel to direct communication with the Panel. And this Court already squarely rejected plaintiffs' claim that there is anything improper about a representative from the nearly thousand-attorney Office of the Corporation Counsel, who is not involved in this litigation, serving as one member of the three-member Citywide Panel (A1081).

Although plaintiffs prefer to live in the past, operating on a record speaking at best to the arbitration process, the fact remains that their accommodation requests have now been decided under a distinct process conducted by distinct actors. The motions panel rightly recognized that plaintiffs cannot simply rest on a record that says nothing of significance about the propriety of the Citywide Panel process or any individual outcomes arising out of that process (2d Cir. 3043 ECF 85 at 4). In the end, the record includes no meaningful information about the Citywide Panel process, much less supplies an evidentiary basis for concluding the process violated plaintiffs' rights.

Ultimately, "an undeveloped record not only makes it hard for a plaintiff to meet his burden of proof, it also cautions against an appellate court setting aside the district court's exercise of its discretion." *Siegel v. Le-Pore*, 234 F.3d 1163, 1175 (11th Cir. 2000); *see also Charette v. Town of Oyster Bay*, 159 F.3d 749, 757 (2d Cir. 1998) (remanding where record was inadequate to decide preliminary injunction motion). As the district court determined, and the motions panel confirmed, it was plaintiffs' burden to demonstrate that the Citywide Panel decided their requests in a manner that demands preliminary injunctive relief. They did not even approach such a showing.

B. Plaintiffs have not demonstrated a substantial likelihood of success on the merits.

Having no record to stand on, plaintiffs argue that once an accommodation process is provided, strict scrutiny applies—though it is not entirely clear in what way plaintiffs believe this is so, and they provide no authority for the claim (App. Br. 25-28). And to the extent that plaintiffs vaguely suggested below that strict scrutiny applies, they provided neither any explanation nor any support for this claim.

Moreover, their argument now advanced in their appellate brief is foreclosed by this Court's precedent. Plaintiffs appear to posit that the mere use of the standards imposed by Title VII and its state and local counterparts compel strict scrutiny analysis (App. Br. 25-28). They made the same argument in the prior appeal too (*see* Brief for Plaintiffs-Appellants (2d Cir. 21-2711 ECF 83) at 44), and this Court did not agree (*see* A1005-08). Elsewhere, the Court has been yet more explicit: "The mere existence of an exemption procedure, absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny." *We the Patriots USA, Inc.*, 2021 U.S. App. LEXIS 32880, at *43 (cleaned up). Plaintiffs' argument goes nowhere.

They cite *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (App. Br. 25-26), but misunderstand that case. As *Fulton* explains, where the government "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." 141 S. Ct. 1878 (cleaned up). But "individual exemptions" are those that are either wholly discretionary by their express terms, as in *Fulton*, or provided under an equivalently generalized and

contentless standard such as "good cause." *See id*. at 1877-88. Nothing like that exists under the DOE vaccination requirement. Despite plaintiffs' claim to the contrary (App. Br. 29-34), the Citywide Panel process is guided by defined standards—those established by Title VII and its state and local counterparts—and those standards are obviously calibrated to accommodate sincere religious beliefs, not to disregard them.

Where a defined category of exemption or accommodation is provided, as here, the relevant question is whether the law "prohibits religious conduct while permitting *secular* conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (emphasis added and otherwise cleaned up). Thus, strict scrutiny applies where secular conduct or beliefs are treated more favorably than religious ones. The only case other than *Fulton* that plaintiffs cite, a Texas district court decision, confirms that point (App. Br. 26). That decision found strict scrutiny to apply because the challenged law afforded "secular" exemptions but not any religious one. *See Bear Creek Bible Church v. EEOC*, 2021 U.S. Dist. LEXIS 210139, *70-71 (N. Dist. Tex. Oct. 31, 2021). It makes no sense for plaintiffs to assert that affording a *religious* accommodation somehow triggers strict scrutiny under the Free Exercise

Clause. After all, affording an opportunity for religious accommodation has never been thought to render a law suspect from a Free Exercise standpoint. Plaintiffs cite no case embracing that bizarre paradox.

Plaintiffs' suggestion that individual accommodation determinations are also subject to strict scrutiny is even harder to follow (App. Br. 26-27). To be sure, an accommodation process must apply standards that comport with the First Amendment, as the Court has already fully recognized (A1028). But a strict scrutiny framework would be an odd way to assess individual accommodation decisions. If the governing process comports with the First Amendment, so long as a decision has been made consistent with that process, the only questions are whether the decision rests on a factual error. Strict scrutiny has nothing to say about such one-off, fact-bound determinations made by employers every day.

In the final analysis, plaintiffs have presented no evidence that the Citywide Panel Process or any individual determination suffers from a constitutional infirmity. The mere fact that requests were denied based on a finding that an objection was grounded in personal or philosophical, rather than religious, beliefs; or that accommodating a sincerely held religious belief would constitute an undue burden—and sometimes on both

grounds—does not make out a constitutional violation (*see* App. Br. 31-33). Employees have no constitutional right to a religious accommodation absent a sincerely held religious objection to vaccination, nor to one that an employer cannot provide without undue hardship.

And the fact that some accommodations were granted under the arbitration award appeals process does not establish that plaintiffs can be accommodated without undue hardship, as they contend (App. Br. 9, 18, 30). Because plaintiffs raised no argument about undue hardship below, there is simply no information before the Court about the circumstances of the other accommodations—or their effects on DOE's operations—that would support plaintiffs' conclusion. Plaintiffs have shown no likelihood of success on the merits of any claim that could conceivably support prospective injunctive relief.

C. The absence of irreparable injury and the balance of equities weigh heavily against an injunction.

The extraordinary relief of a stay pending appeal is also unwarranted here for the additional reason that the plaintiffs have failed to establish either irreparable injury or a balance of equities in their favor. *See Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008).

Plaintiffs assert that they will suffer irreparable injury from the coercive effect of the deadline by which they have to either elect to extend their leave without pay, get vaccinated and return to work, or be terminated (App. Br. 47-50). As plaintiffs frame it, "the source of Applicants' chilled free exercise rights is the coercive termination deadline of February 14 Applicants seek to stay" (App. Br. 50). Rather characteristically, plaintiffs misstate the deadline, which is February 18 and not February 14. But the dispositive point is that the deadline will have passed by the time that this Court hears and decides this appeal, and any pressure plaintiffs purportedly felt to violate their beliefs will have ended. And plaintiffs further concede, as they must, that the economic harms they face—the loss of employment and health insurance—are not irreparable (App. Br. 50). *See Sampson v. Murray*, 415 U.S. 61, 92 (1974) (concluding economic harms from loss of employment will not support a finding of irreparable injury). Plaintiffs' theory of irreparable harm thus now fails on its own terms.[14]

---

[14] A wrinkle is that one of the plaintiffs, Matthew Keil, recently opted into the special package affording extended leave and health benefits into September 2022 and thus will not be terminated in the near term for non-compliance with the vaccination requirement. But in exchange for receiving that special package, Keil agreed to a full

(cont'd on next page)

Meanwhile, granting an injunction would be against the public interest. Sustaining in-person public education is crucially important, yet at the same time brings an enormous number of unrelated individuals into extended daily contact in an indoor setting during this continuing pandemic. And COVID-19 continues to pose a grave danger in settings like schools where it spreads by person-to-person contact in confined indoor spaces.[15] Vaccinating employees in schools that serve hundreds of thousands of unvaccinated children is of the utmost importance.

Although vaccinating employees may not always prevent infection, it reduces the risks of getting and spreading the virus and of severe illness causing prolonged absences.[16] Enjoining the vaccination requirement would hamper efforts to maintain continuity of learning for the one million students in the largest school district in the country who deserve

---

release, dated February 11, 2022, waiving any "right or claim that may exist or arise up to and including" the date of the release. *See* 2d Cir. 21-3043 ECF 132 & n. 11, *supra.* That release, therefore, defeats Keil's claim.

[15] *See* EPA, *Indoor Air and Coronavirus (COVID-19)* (captured Feb. 17, 2022), https://perma.cc/C9UB-94JA.

[16] *See* n.5, *supra* (CDC has advised that "vaccines can reduce the risk of people spreading the virus that causes COVID-19").

a good public education. Doing so is plainly not in the public interest and the balance of equities tips decidedly in favor of the City.

CONCLUSION

This Court should affirm the district court's order denying plaintiffs' motion for a preliminary injunction.

Dated: New York, NY
February 18, 2022

Respectfully submitted,

GEORGIA M. PESTANA
Corporation Counsel
of the City of New York
Attorney for Appellees

By: _____
SUSAN PAULSON
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-0821
spaulson@law.nyc.gov

RICHARD DEARING
DEVIN SLACK
SUSAN PAULSON
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 6,365 words, not including the table of contents, table of authorities, this certificate, and the cover.

SUSAN PAULSON