

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kate, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

**ORDER TO SHOW CAUSE**

Civil Action No. 1:21-cv-07863

Upon consideration of the annexed (1) Plaintiff's Memorandum of Law in Support of Motion for a Temporary Restraining Order and Preliminary Injunction; (2) Declaration of Sujata Gibson, dated October 4, 2021, along with the exhibits attached thereto; and (3) Expert Declaration of Dr. JAYANTA BHATTACHARYA, M.D., PhD; (4) Expert Declaration of DR. MARTIN MAKARY, M.D., M.P.H. ; (5) *Declaration of Michael Kane*; (6) *Declaration of William Castro*; (7) *Declaration of Margaret Chu*; (8) *Declaration of Robert Dillon, IV*; (9) *Declaration of Robert Gladding*; (10) *Declaration of Anthony Block*; (11) *Declaration of Heather Jo Clark*; (12) *Declaration of Nwakaego Nwaifejokwu*; (13) *Declaration of Trinidad Smith*; and (14) Plaintiff's Complaint, filed September 21, 2021, and good cause having been shown, it is hereby

**ORDERED** that the above-named Defendants appear before this Court, at Room \_\_\_\_\_, United States District Court for the Southern District of New York, located at \_\_\_\_\_ on \_\_\_\_\_, 2021 at \_\_\_\_\_: \_\_\_\_\_ o'clock in the [ ] forenoon [ ] afternoon thereof, or as soon thereafter as counsel may be heard, to show cause why preliminary injunctive relief not be issued pursuant to Rule 65 of the Federal Rules of Civil Procedure:

Granting a preliminary injunction staying the Order of Dave A Chokshi, M.D., Commissioner of the New York City Department of Health and Mental Hygiene entitled “Order of the Commissioner of Health and Mental Hygiene to require Covid-19 Vaccination for Department of Education Employees, Contractors, and Others” (DOE Vaccine Mandate) and reinstating anyone terminated or suspended for noncompliance with the DOE Vaccine Mandate pending resolution of these proceedings; and it is further

**ORDERED** that sufficient cause having been shown, pending a hearing of the Plaintiff’s application for preliminary injunction, but in no event more than fourteen days beyond the issuance of this order unless extended by the Court, a temporary restraining order is GRANTED, the DOE Vaccine Mandate is stayed, and any adverse employment action taken in reliance on the regulation is retroactively enjoined, such that implementing employers must reinstate suspended or terminated employees and restore any benefits or other terms of employment that were withheld on the basis of lack of compliance with the mandate; and it is further

**ORDERED** that no security should be required of the Plaintiff because Defendants would incur no additional expenses from the relief requested herein; and it is further

**ORDERED** that a copy of this order, together with the papers upon which it is granted, be personally served upon the Defendants or via email on their attorneys on or before \_\_\_\_\_, \_\_\_\_\_ at \_\_\_\_:\_\_\_\_ o'clock in the [ ] forenoon [ ] afternoon and that such service be deemed good and sufficient; and it is further

**ORDERED** that opposing papers, if any, shall be served by email on Sujata Gibson, Esq. Gibson Law Firm, PLLC, attorneys for the Plaintiff, received on or before \_\_\_\_\_, 2021 at \_\_\_\_\_ a.m./p.m.

Dated: \_\_\_\_\_, New York

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United States District Judge

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kate, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

CIVIL ACTION NO. 1:21-CV-07863

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR  
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

DATED this 4th day of October 2021.

Gibson Law Firm, PLLC

*/s/ Sujata S. Gibson*

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“It can hardly be argued that either students or teachers shed their constitutional rights ...at the schoolhouse gate.” *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969).

## **INTRODUCTION**

Plaintiffs seek a temporary restraining order (“TRO”) and preliminary injunction pursuant to Fed. R. Civ. Pro. 65(a) to enjoin Defendants from enforcing a policy requiring all New York City public school teachers and staff to be vaccinated for COVID-19 with no option for testing or reasonable accommodations for medical or religious reasons. Plaintiffs seek injunctive relief to maintain the *status quo*. Without relief, 15,000 teachers and staff will be suspended or terminated and barred from doing their jobs today, on Monday, October 4, 2021. This policy is reckless, senseless, and not only violates the fundamental rights of thousands of New Yorkers but will also put over 1 million New York City public school children at risk of imminent harm. In a similar case, the Second Circuit Court of Appeals issued preliminary injunctive relief on September 30, 2021, to protect religious exemptions for healthcare workers in New York State, indicating likelihood of success. Ex. 1. The same relief should be issued here.

## **BACKGROUND FACTS**

On July 26, 2021, Mayor Bill de Blasio (“Mayor de Blasio”) announced that New York City (“NYC”) would require all municipal workers to be vaccinated against COVID-19 by September 13, 2021, the same day the public schools would open. The order gives employees the option to test weekly in lieu of vaccination.

However, three weeks before school opened, after consulting with the incoming Governor, the mayor announced a new mandate, just for DOE employees with no testing and no religious or medical exemption option. Ex. 2 (the “DOE Vaccine Mandate”). Two days later, Governor Hochul announced that the state would also remove the religious exemption for healthcare workers statewide (“State Vaccine Mandate”).

At the time, the Mayor and the Governor had been meeting regularly to coordinate efforts. On August 24, 2021, the same day that the DOE Vaccine Mandate was issued and Governor Hochul sworn in, *Spectrum News* reported: “[b]eyond the Hochul family, there was likely no one happier about the Gov. Kathy Hochul’s rise to power than de Blasio... ‘She and I have already started speaking regularly,’ de Blasio said. ‘We’re going to keep it that way and do a lot of good work for the people of this city and this state.’” Ex. 3.

Governor Hochul defines vaccines as a religious issue and essentially declared a crusade against people who have religious beliefs against vaccination, or as she puts it people “who aren’t listening to God and what God wants.”

The *New York Times* reported on the infamous speech last week as follows:

On Sunday at the Christian Cultural Center in Brooklyn, Gov. Kathy Hochul pushed back hard against the idea of religious exemptions to vaccination, urging worshippers to be “apostles” for the vaccine in order to “keep more people alive.”

“God did answer our prayers,” she told the congregation. “He made the smartest men and women — the scientists, the doctors, the researchers — he made them come up with a vaccine. That is from God to us and we must say, ‘Thank you, God, thank you!’”

**“There are a lot of people out there who aren’t listening to God and what God wants,” she said as a gold necklace spelling “Vaxed” glinted from her chest.<sup>1</sup>**

Both mandates were immediately beset by legal challenges. One major issue was the lack of religious exemption in either. In an interview with NPR on September 15, 2021, Governor Hochul stated that religious exemptions are not a “legitimate” excuse to avoid COVID-19 vaccines and bragged that her health department “deliberately excluded religious exemptions from the mandate”:

Hochul said her health department deliberately excluded religious exemptions from the mandate, which requires all health care workers to be vaccinated by September 27. She

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<sup>1</sup> Ex. 4

said while the state’s attorneys will be arguing the case in court on September 28, her personal opinion is that a religious exemption is not a legitimate excuse. “I’m not aware of a **sanctioned** religious exemption from any organized religion, in fact they are encouraging the opposite,” Hochul said. “Everybody from the Pope on down is encouraging people to get vaccinated.”<sup>2</sup>

While Pope Francis and many Catholics take the religious view that vaccination is justified even though these vaccines all use aborted fetal cells in their production or development,<sup>3</sup> many other Catholic people do not agree. Governor Hochul’s hostility towards those with religious beliefs different from her own is open and extreme.

Mayor de Blasio, though perhaps not sermonizing as openly as the Governor, often makes similar derogatory statements to the media about the invalidity of religious beliefs against vaccination. He has frequently decreed that the City will only accept religious exemptions from those who follow one of two faiths that he has sanctioned as “legitimate” sources of objection to vaccines: Christian Science, and Jehovah’s Witnesses. *See, e.g., Ex. 6 and Ex. 7.*

After unsuccessful and reportedly insulting failed attempts to negotiate reasonable religious and other accommodations with the mayor, the unions unanimously rose against the DOE Vaccine Mandate. The New York City Municipal Labor Committee (“MLC”), a coalition of unions representing over 390,000 workers in New York City, along with the leaders of fifteen other prominent unions filed a lawsuit in state court and won a temporary restraining order (“TRO”). Ex. 8 (“MLC lawsuit”). The MLC lawsuit challenges the mandate broadly – arguing that the DOE mandate violates bodily integrity along with the collective bargaining rights of its members. Another suit in the Eastern District of New York also challenged the mandate broadly, as a violation of the fundamental right to practice one’s profession. On September 24, 2021, the Second Circuit briefly issued a stay, but it was dissolved the next day.

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<sup>2</sup> Ex. 5

<sup>3</sup> *Dr. Bhattacharya Decl.* pp 58-59.

Meanwhile, the United Federation of Teachers, Local 2, AFT, AFL-CIO (“UFT”) and several other unions representing DOE employees entered arbitration with the DOE before Martin F. Scheinman, Esq. (“Arbitrator Scheinman”). Arbitrator Scheinman has done substantial fundraising for Mayor de Blasio, leading to allegations of conflict of interest and the perception of impropriety. *See, e.g., Ex. 9 and Ex. 10.*

Though the media widely reported that the mayor was “forced” to add religious and medical accommodations to the DOE Vaccine Mandate, Arbitrator Scheinman’s award defines these exemptions so narrowly, and provides so many roadblocks to fair evaluation, that they appear to be pretextual and mainly issued for cover against the pending lawsuits.

The UFT Arbitration Award was issued September 10, 2021. Ex.11 (“UFT Award”). Several other unions also received the same or substantially the same award within the next two weeks from Scheinman Arbitration Services (collectively “Arbitration Awards”). On the unexamined assumption that adequate religious and medical exemptions were now available, the state court dissolved the TRO in the MLC lawsuit. Unfortunately, what was not before the state court was the fact that the criteria and process set forth in the Arbitration Awards is discriminatory, and wholly inadequate to meet basic constitutional standards. This suit is focused on those issues.

***The Religious Exemption Provided is Blatantly Discriminatory***

The Arbitration Award blatantly discriminates between religions and excludes personally held religious beliefs or beliefs that allegedly conflict with mainstream religious dogma. To be considered, religious exemption requests must be “documented in writing” by a religious official (i.e. clergy)” and “shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, or where the documentation is readily available (e.g., from an online source), or where the objection is personal, political or philosophical in nature.” Further,

“Exemption requests shall [only] be considered for recognized and established religious organizations (e.g., Christian Scientists).” Ex. 11.

Mayor de Blasio repeatedly bragged to the media the City would openly discriminate between religions, and that they only planned to grant exemptions to those who belong to one of two state-preferred religions: Christian Science or Jehovah’s Witnesses. *See, e.g., Ex. 7 Gothamist* article September 24, 2021: “De Blasio has said that the religious exemptions would also be limited to two well established religions, Christian Science and Jehovah’s Witnesses...the mayor warned those exemptions would be rare;” *See, also Ex. 6, New York Post* article September 23, 2021: “De Blasio said Thursday that only Christian Scientists and Jehovah’s Witnesses have any prayer for a religious exemption.”

True to form, in what only can be characterized as “heretic tribunals”, the Arbitrators and DOE employees have been aggressively questioning the validity of religious beliefs that conflict with the state’s view of what valid Catholic or other “sanctioned” beliefs require. Declarations from dozens of DOE employees are attached and incorporated into these moving papers describing a pattern and practice of unconstitutional questioning and harassment.

As one of countless examples, Plaintiff Kane appeared via zoom to defend his denied exemption on October 1, 2021. He was raised in both Catholicism and Buddhism. But his relationship with God and his religious beliefs are personal in nature. He follows the teachings of Buddha and Christ as his foundational spiritual guides, along with daily prayer, attention to scripture and reliance on guidance from the Holy Spirit. The DOE attorney stated that the City did not challenge Mr. Kane’s sincerity but asserted in closing arguments only one argument: that Mr. Kane should be denied an exemption because “the Pope” and the “the Dalai Lama” got vaccinated. What that has to do with Mr. Kane’s religious objections to vaccination is still unclear. *See, Kane*



Decl. Further, the DOE believes Mr. Kane cannot prevail without a letter from a clergy member certifying he needs an exemption. Mr. Kane noted for the record that he objects to that requirement as unconstitutional, and against his faith, which is not based on the affirmations of any particular “clergy” member. *Id.*

Similarly, when Plaintiff Chu appeared for her zoom appeal, Arbitrator Barry Peek aggressively stated that Ms. Chu would be denied because she is Catholic, and the Pope was vaccinated. Ms. Chu explained that her relationship as a Catholic is first and foremost with God, not the Pope or the Vatican. She pointed out that man is fallible, and religious leaders, even in her Catholic faith have acted against God’s will many times. Therefore, her responsibility is to follow the guidance that comes from the Holy Spirit and her own moral conscience. This is a central tenet of Catholicism. *See Ex. 12*, Catechism of the Catholic Church - PART 3 SECTION 1 CHAPTER 1 ARTICLE 6 (e.g., I. 1777): “Moral conscience, present at the heart of the person, enjoins him at the appropriate moment to do good and to avoid evil. It also judges particular choices, approving those that are good and denouncing those that are evil. It bears witness to the authority of truth in reference to the supreme Good to which the human person is drawn, and it welcomes the commandments. When he listens to his conscience, the prudent man can hear God speaking.” Arbitrator Peek refused to accept this, stating that he is not Catholic, but he will rely on the Pope over lay people’s interpretation of what God or Catholicism requires. Ms. Chu notes that she felt like a Salem witch, cross-examined nonsensically about the validity of her faith, “burned, accused and guilty before trial.” The DOE attorney affirmed Arbitrator Peek’s assertions and argued that Ms. Chu should be denied for holding beliefs that in their opinion conflict with mainstream doctrine. *See, Chu Decl.*

***The Process Afforded is Inadequate and Arbitrary***

In addition to being discriminatory, the process afforded was unreasonable and arbitrarily applied. Employees were given insufficient time to gather all the certifications, baptismal records and other onerous documented required. Unqualified staff then had to sort through over thirty thousand exemption requests within three business days (one day for some union members). Upon information and belief, everyone was summarily denied by an automated system with the same autogenerated message stating that it would be an “undue hardship” to grant any exemptions given that the Vaccine Mandate would still not allow accepted employees to enter any school building.

No specifics were provided about any other basis for denial sufficient to prepare for an appeal. Appeal letters and “additional documentation” was due within one day of denial.

Many employees then received summary denials with no explanation and no opportunity for a hearing. Robert Dillon’s attached declaration reveals that in some cases, no one even read the supplemental materials before issuing a summary denial of appeal and hearing. Mr. Dillon was denied based on “undue hardship” to be able to accommodate him working remotely. But he has been working remotely for a year and a half, and, as he works in tech, can easily continue to do so now. His principal attached a letter affirming that Mr. Dillon could easily be remote and noting the impact it would have on the school to lose Mr. Dillon. No explanation was provided for why he was not accommodated. *See, Dillon Decl*. For those that had a zoom appeal, most were sent the same summary denial with no explanation. Inexplicably though, a few people with identical religious exemptions were granted sometimes by the same arbitrators. The process was arbitrary and Plaintiffs and thousands of other DOE employees felt violated and disrespected.

Many of the Plaintiffs were scheduled for zoom appeal hearings Friday. They still have not been notified whether they will be accepted or denied ultimately, but in some ways it matters little. The mandate still will prohibit them from entering any school building in New York City whether

they are accepted, denied or pending beginning today, October 4, 2021, unless vaccinated.<sup>4</sup>

***The Medical Exemption Provided is so Narrow it Shocks the Conscience***

The medical exemption policy is simply inhuman. Rather than issue a broad exemption, as should be afforded with a vaccine that is still undergoing safety trials, or an exemption that is at least as broad as the New York State Public Health Law affords for well-tested vaccines (requiring exemption from vaccine requirements if “any state licensed physician” certifies a person is at risk of harm), the Arbitration Award only allows exemptions for certified contraindications from the CDC. These are limited, as contraindications are meant to define the known circumstances where a person could *never* get vaccinated. ACIP has clarified that they do not define medical exemptions and providers may need to consider additional information to determine if a person might be at risk of serious harm.

As applied, the DOE Mandate indicates that the City is unlikely to accept a medical exemption unless a person suffered anaphylactic shock and was intubated during the observation period after a shot. Even then, they might still need to suffer the same fate with each other available vaccine before they are exempt. For the two Plaintiffs with medical exemptions in this case, the DOE did not even bother to respond to the request or provide sufficient detail on how to submit it.

This is still an experimental vaccine program, rushed to market in eight months, rather than the normal twelve to fifteen years it takes to assess safety and efficacy properly. It has not been in existence long enough to understand the long-term consequences, and rigorous studies have not even commenced yet to try to understand the effects of the vaccine or boosters on subpopulations or persons with underlying specific conditions.

Even for well-established vaccines, hundreds of additional known risk factors, adverse

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<sup>4</sup> Original deadline of September 27, 2021, extended as a result of a state and federal court TRO

reactions, and potential reasons to need a medical exemption exist, as documented in package inserts, Institutes of Medicine Reports and table injuries routinely compensated by the Vaccine Injury Compensation Program. Complaint pp 11-17. This narrow medical policy puts vulnerable people whose doctors believe are at risk in an extremely dangerous position.

***Plaintiffs do not pose a direct threat on the basis of their vaccine status***

This is not necessary. There is no reason why these teachers, who were in the school buildings for the last month and over the course of the last year and a half, are now suddenly unsafe to those around them.

Attached and incorporated into these motion papers are declarations written by highly regarded public health experts, Dr. Jayanta Bhattacharya, M.D., PhD, and Dr. Marty Makary, M.D., M.P.H. Each is prepared to give expert testimony in a preliminary injunction hearing, and each concludes that Plaintiffs pose no significant risk to students or co-workers because of their vaccine status. Neither has received any compensation from Plaintiffs or anyone associated with Plaintiffs. Neither is anti-vaccine by any stretch of the term.

Dr. Makary is a professor of public health and surgery at John's Hopkins University, has served in leadership at the World Health Organization, is the editor-in-chief of the second largest medical trade publication in the country and has published over 250 articles. He says, "Those who choose to get vaccinated may be making a poor health decision at their own risk, however they are unlikely to pose a public health threat to those around them in a school setting." *Decl. Dr. Makary* ¶8.

Dr. Bhattacharya, Professor of Health Policy at Stanford University, who has published over 135 peer-reviewed articles in scientific and medical journals, and whose research has been cited over 1100 times in other peer-reviewed publications, concludes the same: *See, e.g., Decl. Dr.*

*Bhattacharya* ¶43 – “Can the DOE keep its employees and students safe if it does not mandate that all its employees be vaccinated? The answer is a definitive yes”.

As Dr. Bhattacharya and Dr. Makary discuss in more detail in their declarations, the non-sterilizing vaccines currently available against COVID-19 are for personal protection, and will not meaningfully mitigate the spread of COVID-19 through the population.

This is not a controversial point. On August 5<sup>th</sup>, the Director of the CDC Rochelle Walensky (“Dr. Walensky”) went on national television to clarify that emerging data has shown, beyond reasonable doubt, that although the COVID-19 vaccines are good at preventing serious symptoms in individuals who are vaccinated, they cannot prevent infection and transmission to others, especially now that the delta variant dominates. Specifically, when asked if asymptomatic vaccinated people pass on disease, Dr. Walensky said:

So, yes, they can with the delta variant. And that was the reason that we changed our guidance last Tuesday. Our vaccines are working exceptionally well. They continue to work well with delta with regard to severe illness and death. They prevent it. **But what they can't do anymore is prevent transmission.** So if you are going home to somebody who has not been vaccinated to somebody who can't get vaccinated, somebody who might be immunosuppressed or a little bit frail, somebody who has comorbidities that put them at high risk, I would suggest you wear a mask in public indoor settings.<sup>5</sup>

While there may be some differences in recorded infection rates, it is not clear that any such data are reliable or meaningful. The CDC made the surprising decision to stop tracking so called “breakthrough infections” in May. Policies were then adopted under which the unvaccinated were tested far more frequently than vaccinated, leading to unreliable statistics on the percentage of infection based on vaccine rate. Moreover, the delta variant is far more likely to infect

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<sup>5</sup> See, Ex. 9 - Transcript.

vaccinated people than previous variants, which existing data is largely based on. And vaccination doesn't generate robust immunity in those with underlying conditions, and it is shown to wane in effectiveness (particularly against mild infection) within a few weeks or months. On the other hand, those with natural immunity are well-protected from both symptomatic disease and transmission. Vaccine status is not a good predictor of infectiousness.

Both experts highly recommend vaccination as a tool to mitigate severe disease in those who but acknowledge that the facts do not justify excluding people with religious or medical need for accommodation from school buildings. This is particularly true for those who have had COVID-19 and recovered.

If schools believe that it is necessary to employ a mitigation strategy, Dr. Bhattacharya recommends daily temperature screens and testing, though he suggests that if testing is employed, that all employees get tested, as vaccinated people can also become infected and transmit covid. Reliable rapid antigen testing is now available that could simplify the process during critical times when infection rates are high and would do a far better job of safeguarding the community, especially if applied to both vaccinated and unvaccinated employees.

***If a TRO is not granted today, over a million New York City children will suffer serious harm.***

The Second Circuit's TRO in the broad challenge to the mandate pushed back the effective date of the policy. However, that option now exhausted after an unsuccessful appeal for emergency relief to the Supreme Court, the deadline is upon us.

Effective today, Plaintiffs and 15,000 other DOE employees are expected to be excluded from the school buildings where they work. The impacts of this mass termination event is unimaginable, especially on the vulnerable children in the New York City school district. Attached declarations describe the intense pain that these educators feel, knowing that their students will be deprived of desperately needed (and legally required) services, along with their essential, dedicated, and much-beloved teachers. Already, the crisis has become evidence. Schools are reporting that they will be closing down entire programs schoolwide, even core subjects like math or science. Students will be shipped around to whatever untrained and unlicensed emergency “staff” the district can get to come in. There will not be any hot lunch (for some of these children, the school lunch is their only hot meal of the day). It is an absolute crisis in the making.

The teachers are worried about their own lives too. Many have spent their entire careers teaching in the NYC public schools. It breaks their hearts to leave their students and their careers so senselessly. It will also upend their security. Underpaid and living month to month by and large, few can survive leave without pay for any length of time. They are worried about losing their homes, their ability to support their families, and their careers, as they will continue to be barred from practicing their profession unless they violate their religious beliefs.

This policy is nothing short of reckless and there is no reason to abuse students and staff in this manner. To maintain the *status quo* and avoid this preventable crisis, Plaintiffs ask for a stay pending a hearing. They have been there for the last year and a half unvaccinated, a few more

weeks to ensure a measured and fair decision will not hurt anyone. Though there haven't been any major outbreaks, save at one school, where upon information and belief all of the infected teachers were fully vaccinated, the DOE could readily implement the weekly testing option pending the hearing to alleviate any fears.

### **STANDARD OF REVIEW**

Plaintiffs seek a TRO and preliminary injunction pursuant to Fed. R. Civ. Pro. 65.

Rule 65(a) governs preliminary injunctions. “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) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction.” *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 631 (2d. Cir. 2020).

Rule 65(b) of the Federal Rules of Civil Procedure governs temporary restraining orders. “The standard for granting a temporary restraining order and a preliminary injunction pursuant to Rule 65 of the Federal Rules of Procedure are identical.” *Spencer Trask Software & Info. Servs., LLC v. R. Post Int'l Ltd.*, 190 F.Supp.2d 577, 580 (S.D.N.Y. 2002). Due to the urgent and imminent nature of the relief, Plaintiffs cannot wait for an answer from Defendants about whether they consent to a TRO but have emailed courtesy copies of these papers immediately upon filing to counsel. Plaintiffs meet the standard and should be awarded a TRO for the reasons set forth below.

### **ARGUMENT**

#### **I. AS EVIDENCED BY THE INJUNCTIVE RELIEF GRANTED BY THE SECOND CIRCUIT IN THE HEALTHCARE WORKERS MANDATE LAST WEEK, PLAINTIFFS ARE LIKELY TO SUCCEED.**

Plaintiffs allege that the Vaccine Mandate unconstitutionally discriminates against them on the basis of their religious beliefs and medical needs. Reasonable religious and medical



accommodations are a constitutional prerequisite to any valid mandate. The DOE mandate fails facially and as applied. Facially, the Vaccine Mandate intentionally declines to offer exemptions. As applied through the UFT Arbitration, the exceptions “offered” are discriminatory and far too narrow to survive strict scrutiny review or even rational basis review.

***A. Plaintiffs Will Likely Prevail on their First Amendment Claims***

The First Amendment, applicable to states through the Fourteenth Amendment, provides that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” U.S.C.A. Const. Amend. 1. These opening words to the Bill of Rights set forth a dual guarantee of religious liberty: the Establishment Clause and the Free Exercise Clause. The challenged mandate violates both clauses (facially and as applied).

***The Supreme Court Recently Clarified that there is no “Public Health Exception” to enforcing religious rights.***

Plaintiffs have a good chance of succeeding on the merits of their free exercise claim. On September 30, 2021, the Second Circuit Court of Appeals issued a preliminary injunction to a substantially similar challenge against a New York State healthcare workers vaccine mandate. Citing the Supreme Court’s decision in *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), the Second Circuit affirmed that the Plaintiffs were likely to succeed by issuing an injunction pending resolution of appeal enjoining enforcement “against persons claiming religious exemptions.” *We the Patriots v. Hochul*, Civil Case No. 21-2179 (doc 65) (Ex. 1). There is no reason why the teachers should not get similar relief.

The Second Circuit’s injunction is well supported by recent Supreme Court decisions affirming the importance of constitutional rights, particularly religious rights, even during a pandemic.

Previously, many circuit courts applied *Jacobson v. Massachusetts*, 197 U.S.11 (1905) to

avoid strict scrutiny of public health initiatives that burden fundamental rights. In *Roman Cath. Diocese*, the Supreme Court rejected this logic, holding that the Constitution must still be upheld even during a public health emergency, and that strict scrutiny requires that public health measures be narrowly tailored to avoid unnecessary infringement on important religious and constitutional rights and must employ the least restrictive measure to achieve a permissible goal in light of the important interests at stake. 141 S. Ct. at 67.

In the months since *Roman Cath. Diocese* was decided, the Supreme Court has repeatedly emphasized the importance of this holding. *See, e.g., Tandon v. Newsom*, 141 S. Ct. 1294, 1296-97 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 889 (2020) (granting certiorari and adopting *Roman Cath. Diocese v. Cuomo* holding as its decision.)

Before *Roman Cath. Diocese*, the Second Circuit followed the deference standard in matters of public health and generally avoided strict scrutiny even when fundamental rights were infringed. But in *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 635 (2d Cir. 2020), the Second Circuit applied the new standard set forth in *Roman Cath. Diocese*, and held that reliance on *Jacobson* to avoid strict scrutiny or exercise excessive deference is “misplaced”: “[t]he district courts, the motions panel of this Court, and the Governor relied on *Jacobson* as support for the notion that courts should defer to the executive in the face of the COVID-19 pandemic. But this reliance on *Jacobson* was misplaced.” Henceforth “courts must resume applying the Free Exercise Clause” even in cases of public health emergencies. *Id.* at 635 (quoting *Roman Cath. Diocese*, 141 S. Ct. at 70 (Gorsuch, J. concurring)).

***Plaintiffs Are Likely to Succeed on their Free Exercise Claims***

Plaintiffs should prevail on their free exercise claims for the same reason the healthcare workers were granted injunctive relief. Their religious rights are directly burdened by an openly hostile mandate, and there is insufficient justification and tailoring for that burden.

A substantially similar case to this already came before the federal courts of New York with dramatic results several decades ago. In *Sherr v. Northport-E. Northport Union Free Sch. Dist.*, 672 F. Supp. 81 (E.D.N.Y. 1987), the Eastern District of New York held that the limitation of religious exemption to New York's school vaccine mandate to "bona fide members of a recognized religious organization" violated both the establishment and free exercise clauses of First Amendment and must be expanded to exempt all persons who sincerely held religious beliefs that prohibited inoculation of their children. The Court also held that certification requirements from clergy were unlawful. As a result, New York State rewrote their religious exemption statute to state that anyone "with sincerely held religious beliefs against vaccination" was exempt and no certification was required. *Sherr* firmly prohibits the discrimination as applied through administration of the Arbitration Award. But the lack of a religious exemption also renders the entire DOE Vaccine Mandate unconstitutional.

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." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620,631 (2d Cir. 2020) (citations omitted). There is an exception from strict scrutiny analysis of certain free exercise claims against indirect burdens caused by "neutral laws of general applicability." Official action "burdening religious conduct that is *not* both neutral and generally applicable, however, is subject to strict scrutiny." *Id.*

The DOE Vaccine Mandate is not a neutral law. The subject of vaccination itself is too entwined with religious beliefs to classify vaccine mandates as "indirect burdens" on religious

beliefs. Since vaccines were invented, they have existed alongside a strong and vocal portion of the public, coming from a myriad of religions, who assert that vaccination with some or all vaccines violates their sacred religious beliefs. An illustrative parallel could be imagined in the case of abortion. Abortion, like vaccination, can be a secular decision but it is also historically enmeshed with religious concerns for many. If the state were to declare, like some countries have, that for the public good women are required to have an abortion in service of a facially neutral goal of population control, it would clearly violate the free exercise rights of religious objectors not to offer a religious exemption. The same is true for vaccines. Perhaps the state can impose the requirement, but any infringement on the right to opt out for religious reasons must be necessary and narrowly tailored to inflict the least burden.

Moreover, the government's open hostility towards religious beliefs against vaccination negates any argument that this is a neutral law. In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) the Supreme Court clarified that to respect the Constitution's guarantee of free exercise, the government cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. According to the Supreme Court, the Free Exercise Clause bars even "subtle departures from neutrality" on matters of religious significance. *Id.* Under this clause, laws may not discriminate against "some or all religious beliefs." *Trinity Lutheran*, 137 S.Ct. at 2021 (quoting *Church of Lukumi Babulu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993)).

Under this standard, any hostility or disrespect for religious beliefs indicated by government actors promulgating or enforcing the law triggers strict scrutiny, even of laws or policies that appear to be neutral on their face. *Masterpiece Cakeshop, Ltd. V. Colorado C.R.*

*Comm’n*, 138 S. Ct. 1719, 1731 (2018).

“Factors relevant to the assessment of governmental neutrality include “the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body.” *Id.* Here, the context and series of events leading up to the mandate and follow its implementation are important.

From the outset, the Governor of New York State has expressed, in no uncertain language, that she views vaccines as a religious obligation, that she believes God made them, that he wants us to take them, and that she is seeking “apostles” to convert those “who are not listening to God and what God wants” by holding religious beliefs against vaccines.

The DOE Vaccine Mandate, which eliminates the right to opt out of vaccination, was promulgated by the NYC DOH the day that Governor Hochul took office after she held multiple pre-appointment public meetings with Mayor de Blasio. This was a coordinated effort between the state and the City. Two days later, Governor Hochul convinced the NYS DOH to strip the religious exemption from the healthcare workers vaccine mandate.

The Governor and the Mayor pushed these regulations through their respective unelected administrative agencies amidst a flurry of hostile speech that targets those with religious beliefs against vaccination. From the outset, both the Governor and the Mayor, repeatedly call any religious beliefs opposing vaccination “illegitimate” and repeatedly cite Pope Francis’s decision to be vaccinated as proof that people who believe differently have illegitimate faiths. Governor Hochul stated that those with religious beliefs against vaccination are “not the smart ones” and bragged about how she intentionally stripped the religious exemption from the mandate because she does not respect religious objections to vaccination as “legitimate” or “sanctioned.” Mayor de

Blasio announced he planned to explicitly discriminate between applicants for a religious accommodation and preference only state sanctioned religions for acceptance.

Given their open hostility, neither the Governor nor the mayor can assert in good faith that the removal of the option of reasonable accommodation for religious exemption from either mandate is “neutral.” Nor is it of general applicability. The mandate is not imposed on students (who make up the majority of the population of the schools), and thousands of other municipal employees who are allowed to test in lieu of getting vaccinated. There is no reason why Plaintiffs cannot do the same.

***Plaintiffs are Likely to Succeed on their Establishment Clause Claims***

The Establishment Clause claims provide a second avenue for relief. The Establishment Clause erects a “wall of separation between Church and State,” *Everson v. Board of Educ. Of Ewing*, 330 U.S. 1, 15-16 (1947), so that the free exercise of one’s religion cannot be hampered by the religious orthodoxy of any leader or majority belief system. By denying exemptions to anyone with personal beliefs or beliefs that are not identical to the religious orthodoxy of Defendants or leaders they see as “sanctioned”, Defendants violate the Establishment Clause. In determining whether beliefs are to be accorded free exercise protection, the state’s scrutiny can extend only to whether claimant sincerely holds particular belief and whether that belief is religious in nature. *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996); *see, also Sherr* 672 F. Supp. at 87.

Judgment calls about the objective validity or legitimacy of someone’s religious beliefs violates the prohibition against state entanglement protected by the Establishment Clause. Rather, “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021).

It is hard to imagine a more straightforward violation of the Establishment Clause. Far lesser transgressions routinely fail. Here, the policies go far beyond any semblance of compliance with the Establishment Clause. The mayor openly declared two state-sanctioned religions and the Governor declared a religious crusade and is recruiting “apostles” to convert and persecute people with religious beliefs that do not comport with her own about what God wants.

It is one of the fundamental principles of the Supreme Court’s Establishment Clause jurisprudence that the Constitution forbids state practices that “aid one religion...or prefer one religion over another.” *Id.* at 15. Statements or action by Government officials that deride certain religious beliefs or indicate disapproval of them violate the Establishment Clause. *See, e.g.*, “an important concern of the effects test is whether the symbolic union of church and state effected by the challenged government action is sufficiently likely to be perceived by adherents as a disapproval of their religious choices.” *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

#### **B. Plaintiffs are Likely to Succeed on their Substantive Due Process Challenge**

A sufficient medical exemption has been a constitutional prerequisite to any valid vaccine mandate since this issue was first addressed in 1905. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). Even in *Jacobson*, the Supreme Court held that it would be cruel and inhuman (as well as unconstitutional) to require compliance with a mandatory vaccination requirement if a person is at risk of harm from the vaccine. *Id.*

Subsequent Supreme Court decisions clarify the limits of allowable state interference in determining whether a medical exemption is needed. Controlling precedent expressly forbids state burdens on medical exemptions which subordinate the professional judgment of a patient’s chosen physician. *Doe v. Bolton*, 410 U.S. 179, 199-200 (1973) (striking down regulatory burdens on a

medical exemption substantially similar to the ones challenged here and holding that the patient's chosen medical provider must have discretion in decisions about what may constitute harm: "[I]f a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment"). *Doe* holds that if a state licensed physician certifies a person is at risk of harm, that person *must* be able to receive a medical exemption and the state cannot condition acceptance of the exemption on consent of the state or any third party, or impose corroboration requirements, or predefine or narrow the criteria that a doctor can consider in determining necessity. *Doe*, 410 U.S. 179, 199-200 (1973).

The Supreme Court recognizes that patients have a fundamental right to make medical decisions in accordance with their physician's independent best medical judgment. *Doe* places strict limits against state interference on that right in the medical exemption context, even where the state has articulated interests as compelling as saving the life of a viable unborn child who will surely die if the medical exemption is granted. In this case, the state's interest is nowhere near as compelling. These are nonsterilizing vaccines and Plaintiffs do not pose a direct threat to others because of their vaccine status, as discussed in the expert declarations.

The challenged state action in this case blatantly violates *Doe*. The original DOE mandate has *no* exemption for medical accommodation. The Arbitration Award does not provide much more. Rather, it requires the schools to deny medical exemptions written by licensed physicians and limit important factors a physician must consider to keep a patient safe. As a matter of law, pursuant to the Supreme Court's binding decision in *Doe*, the challenged regulation and policies must be declared unconstitutional and struck down. Even the hypothetical chance that a medical exemption is narrow enough to exclude "a very few" from its protection renders a statute unconstitutional. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006).



The right to a medical exemption also encompasses a number of other fundamental rights infringed here, including but not limited to the right to attempt to preserve one's life and health, the right to refuse unwanted medical treatment, bodily integrity, fundamental privacy rights, and the right to be free from unconstitutional conditions. Infringements on fundamental rights require strict scrutiny review.

***C. The Vaccine Mandate is not narrowly tailored to achieve a compelling government interest, nor is it even rationally related to that goal.***

It is hard to imagine, given the open hostility, that the purpose of this mandate is public health. But if it were, it cannot survive strict scrutiny. "The government has the burden to establish that the challenged law satisfies strict scrutiny. To do so in this context [of Covid-19], it must do more than assert that certain risk factors 'are always present...or always absent from the other secular activities' the government may allow. Instead, narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." *Tandom v. Newsom*, 141 S. Ct. 1294, 1926-97 (2021) (internal citations omitted).

As discussed above, there are many less restrictive measures that could suffice to mitigate risk. Dr. Bhattachary provides several strategies that would be more than sufficient. Though he and Dr. Makary agree that Plaintiffs do not pose a direct threat to others based on their vaccination status. First, exemption should be offered for anyone with natural immunity. The science is clear that they have superior and longer-lasting immunity than vaccinated people. Second, daily temperature and symptom checks could be instituted, and employees could be provided with rapid antigen tests, and could take them whenever they felt symptomatic, or daily, depending on the spread in the community at the time. Third, weekly PCR tests could be implemented. The City cannot justify why this option, which is available to all other municipal employees, cannot suffice.

Dr. Bhattacharya does suggest, however, that if the rate of spread was high enough to necessitate PCR testing, all employees (vaccinated and unvaccinated) should be tested since both can spread COVID-19.

Ultimately, given the fact that the vaccines cannot reliably stop transmission, any measure which is only imposed on those with religious objections to vaccination is likely unconstitutional. It is not within the police powers of the state to mandate vaccines that can only provide a personal benefit, particularly when a person has religious objections to the vaccine. Even if it were arguably part of the police power, people have a fundamental right to decline medications, which overrides any state interest in trying to protect people from themselves. *Cruzan v. Director, DMH*, 497 U.S. 261 (1990); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (the Due process clause protects traditional right to refuse unwanted lifesaving medical treatment).

It is not enough for the City to rely on vague assertions about the “delta variant” or to cite unsupported and generalized assertions on public health websites. When Constitutional rights are infringed, the Court is not only empowered to apply strict scrutiny to the state’s rationale but is *required* to do so. *See, e.g., Roman Cath. Diocese*, 141 S. Ct. at 67; *see, also, S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021):

In cases implicating this form of “strict scrutiny,” courts nearly always face an individual’s claim of constitutional right pitted against the government’s claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government’s assertions, and our precedents make plain that it has always been a demanding and rarely satisfied standard. *See Lukumi*, 508 U.S. at 546. Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution.

Plaintiffs do not pose a significant threat of substantial harm to others, and multiple mitigation strategies could be employed short of termination or exclusion from school buildings.

## **II. PLAINTIFFS ARE SUFFERING IRREPARABLE HARM**

It is well-settled that “the alleged violation of a constitutional right...triggers a finding of irreparable harm.” *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). Courts presume that a movant has established irreparable harm in the absence of injunctive relief when the movant’s claim involves the alleged deprivation of a constitutional right. *Am. Civil Liberties Union v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). In particular, the Supreme Court holds that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 (2020).

## **III. THE BALANCE OF EQUITIES IS IN PLAINTIFFS’ FAVOR.**

Defendants cannot in good faith claim that it is an undue hardship on them to allow these dedicated educators to continue caring for the children who desperately need them. For more than a year and a half, these unvaccinated teachers and staff have worked on the frontlines of this pandemic, making sure that New York City’s children did not fall through the cracks, without any vaccine or often even a mask to protect themselves. They have not suddenly become more dangerous, and they do not pose a direct threat to others based on vaccine status.

Herd immunity is not a possibility with this vaccine. As noted by the Director of the CDC, vaccinated people are just as capable of spreading disease. Moreover, the majority of the students in schools are unvaccinated. Even if 100% of teachers were vaccinated, and even if these vaccines could create sterilizing immunity and contribute to herd immunity, the percentage of unvaccinated

students would nullify that possibility. But in this case, where the vaccinated can spread disease as well, there is no legitimate, rational, or compelling interest that accommodations for sincerely held religious beliefs create an undue burden. Herd immunity could not be achieved even with 100% vaccination of all students and staff if the disease can still freely circulate.

To the extent that Defendants believe any of their employees pose a significant threat to the community, they bear the burden of establishing this with non-speculative and concrete evidence that there are no reasonable accommodations available short of termination.

Most importantly, the challenged policies not only fail to safeguard the public from any real harm, but as the attached declarations reveal, the mass firing of 15,000 teachers and staff tomorrow will seriously endanger and harm the one million children who attend public schools in New York City. These teachers have been in the school system buildings for the past year and a half. The balance of equities favors maintaining the *status quo* pending a hearing and avoiding a crisis in the New York City school system of unimaginable scale and scope like the crisis the Governor caused in the nursing homes and hospitals last week through the parallel state mandate.

### **CONCLUSION**

Defendants' absurd and unlawful policy discriminates against frontline heroes and endangers all New Yorkers. The Plaintiffs and the People of the State of New York deserve better.

Plaintiffs have successfully pled the required elements for injunctive relief, including a temporary restraining order and a preliminary injunction, and pray this Court stays the DOE Vaccine Mandate to maintain the *status quo* pending a hearing.

October 4, 2021,

Respectfully Submitted,

*Sujata S. Gibson*  
Sujata S. Gibson, Esq.

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**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kate, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

DECLARATION OF  
SUJATA S. GIBSON

Civil Action No. 1:21-cv-07863

STATE OF NEW YORK                     )  
   ) ss.:  
COUNTY OF TOMPKINS                 )

**SUJATA GIBSON**, an attorney admitted *pro hac vice* to practice before this Court, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am the attorney for the Plaintiffs and am fully familiar with the facts and circumstances of this case.
2. I make this declaration in support of Plaintiffs' motion for a TRO and preliminary injunction.
3. My clients elected to prepare and file this TRO over the weekend after other litigation (on broader grounds) was denied. I have not had a chance to discuss it with opposing counsel, but I will email a copy of all papers to counsel for all parties as soon as I have filed.
4. The relief sought is urgent. Upon information and belief, 15,000 teachers and staff in the New York City Public School System will be fired and suspended today

without relief. NYC DOE serves over one million children. They will be denied essential services and programming if this mass termination occurs.

5. Attached hereto as **Exhibit 1** is a true and accurate copy of the preliminary injunction issued by the Second Circuit Court of Appeals in *We the Patriots v. Hochul* on September 30, 2021.
6. Attached hereto as **Exhibit 2** is a true and accurate copy of the DOE Vaccine Mandate issued August 24, 2021.
7. Attached hereto as **Exhibit 3** is a true and accurate copy of an article from Spectrum News August 24, 2021, “For de Blasio, it’s a bright new day with Hochul in office” *available at <https://www.ny1.com/nyc/all-boroughs/politics/2021/08/24/kathy-hochul-bill-de-blasio-twitter-cuomo-antagonism-new-day>* (last visited October 4, 2021).
8. Attached hereto as **Exhibit 4** is a true and accurate copy of a New York Times article, “These Health Care Workers Would Rather Get Fired Than Get Vaccinated” *available at <https://www.nytimes.com/2021/09/26/nyregion/health-workers-vaccination.html>* (last visited October 4, 2021).
9. Attached hereto as **Exhibit 5** is an NPR article, “Hochul Says Religious Exemption Not A Legitimate Excuse To Avoid A COVID Vaccine” *<https://www.wshu.org/post/hochul-says-religious-exemption-not-legitimate-excuse-avoid-covid-vaccine#stream/0>* (last visited October 4, 2021).
10. Attached hereto as **Exhibit 6** is a true and accurate copy of a *New York Post* article, “Teachers union rips City Hall's COVID preparedness in poll”

<https://nypost.com/2021/09/23/teachers-union-rips-city-halls-covid-preparedness-in-poll/> (last visited October 4, 2021).

11. Attached hereto as **Exhibit 7** is a true and accurate copy of a *Gothamist* article, “City Grants Vaccine Mandate Exemptions For Hundreds Of Public School Employees”, available at <https://nypost.com/2021/09/23/teachers-union-rips-city-halls-covid-preparedness-in-poll/> (last visited October 4, 2021).
12. Attached hereto as **Exhibit 8** is the MLC Lawsuit.
13. Attached hereto as **Exhibit 9** is a Newsday article “Labor arbitrator to host Cuomo fundraiser Tuesday in Sands Point” <https://www.newsday.com/long-island/politics/spin-cycle/labor-arbitrator-to-host-cuomo-fundraiser-tuesday-in-sands-point-1.8103742> (last visited October 4, 2021).
14. Attached hereto as **Exhibit 10**, *New York Post* article, “Labor arbitration head is a de Blasio fundraiser” <https://nypost.com/2013/12/25/labor-arbitration-head-is-a-de-blasio-fundraiser/> (last visited October 4, 2021).
15. Attached hereto is **Exhibit 11**, the UFT Arbitration Award.

Dated: October 4, 2021

Respectfully Submitted,

*Sujata S. Gibson*

Sujata Gibson



United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30<sup>th</sup> day of September, two thousand twenty-one.

Before: Pierre N. Leval,  
Robert D. Sack,  
Michael H. Park,  
*Circuit Judges.*

---

We The Patriots USA, Inc., Diane Bono,  
Michelle Melendez, Michelle Synakowski,

*Plaintiffs-Appellants,*

21-2179

v.

Kathleen Hochul, Howard A. Zucker, M.D.,

*Defendants-Appellees.*

---

Plaintiffs-Appellants move for a temporary injunction pending resolution of this appeal, prohibiting enforcement of New York State's regulation requiring vaccination of specified healthcare workers. IT IS HEREBY ORDERED that the motion is GRANTED IN PART and DENIED IN PART. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Appellees are hereby ENJOINED, pending resolution of the appeal or further order of this Court, from enforcing the mandate against persons claiming religious exemptions, in a manner that would violate the terms stated in the temporary restraining order entered by the district court in *Dr. A v. Hochul*, No. 21-cv-1009 (N.D.N.Y. Sept. 14, 2021). The motion is otherwise DENIED.

IT IS FURTHER ORDERED that the appeal will be heard by the panel sitting on October 14, 2021 beginning at 9:00 a.m. Each party will be allotted 10 minutes of argument time. Appellants' brief is due on October 4, 2021 at 9:00 a.m. Appellees' brief is due on October 7, 2021 at 5:00 p.m. The reply brief, if any, is due on October 8, 2021 at 5:00 p.m.

FOR THE COURT:  
Catherine O'Hagan Wolfe, Clerk of Court

  
Catherine O'Hagan Wolfe




NEWS [/NEWS]


# City Grants Vaccine Mandate Exemptions For Hundreds Of Public School Employees

BY [SOPHIA CHANG](#) [/STAFF/SOPHIA-CHANG] AND [JESSICA GOULD](#), WNYC [/STAFF/JESSICA-GOULD]

SEP 24, 9: 20 PM •

 25 COMMENTS [/NEWS/CITY-GRANTS-VACCINE-MANDATE-EXEMPTIONS-HUNDREDS-PUBLIC-SCHOOL-EMPLOYEES#COMMENTS]



 Students at PS 59 in Queens in September 2021  
[NYC SCHOOLS CHANCELLOR TWITTER](#)  
([HTTPS://TWITTER.COM/DOECHANCELLOR/STATUS/1437503290787471369/PHOTO/2](https://twitter.com/DOECHANCELLOR/STATUS/1437503290787471369/PHOTO/2))

Over 500 public school employees have officially been granted medical or religious exemptions to the city's vaccination mandate (<https://gothamist.com/news/nyc-public-schools-issue-full-covid-vaccine-mandate-all-staff>). But union leaders warned that many Department of Education staffers in non-teaching positions remain unvaccinated, which could leave schools short-staffed next week.

Mayor Bill de Blasio has imposed a strict policy on DOE employees (<https://gothamist.com/news/de-blasio-confident-vaccine-mandate-school-staff-will-overcome-legal-challenges>) who must show proof of at least one dose of a COVID-19 vaccine by the end of Monday, September 27th. After legal challenges by unions representing DOE workers, the city was forced to carve out exemptions for medical or religious reasons (<https://gothamist.com/news/nyc-must-give-teachers-medical-and-religion-exemptions-non-classroom-work-arbitrator-finds>). De Blasio has said the religious exemptions would also be limited to "two well-established religions, Christian Science and Jehovah's Witnesses, that have a history on this, of a religious opposition." The mayor warned those exemptions would be rare.

"What we're seeing so far is a very small number of requests for medical or religious exemption. Only in the hundreds have been approved so far," de Blasio told WNYC's Brian Lehrer Friday. "And again, there's well over 100,000 teachers and staff, and we're going to work with anyone who needs to get vaccinated between now and the deadline."

anted because the DOE said they're still

28:56

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As of Friday, "81% of all DOE employees have received at least one dose of the vaccine," said Katie O'Hanlon, a spokesperson for the DOE in a statement. She noted that 87% of teachers have received at least one dose.

"The vast majority of employees have been vaccinated and the number will continue to rise over the coming days," she added. "We administered 7,000 vaccinations on school campuses across the city last week, hired thousands of new teachers and staff, and have a large reserve of qualified workers who are ready to fill in if needed."

There are about 11,000 substitute teachers available, and an unspecified number of educators working in the DOE central offices who may be deployed to schools as well, according to the DOE. The substitute teachers and central office employees will have at least one dose of the vaccine.

O'Hanlon did not immediately respond to questions about the number of applications for exemptions the DOE has received, or what guidelines the department is using for approving applications.

Staff who qualify for medical and religious exemptions can switch to assignments outside the classroom. Teachers who don't qualify for these exemptions but still refuse to get vaccinated have to either take unpaid leave and can keep their health

insurance, or they can resign and get severance.

The city's teacher and principal unions continued to push back against the Monday deadline (<https://gothamist.com/news/fearing-staff-shortage-nyc-teacher-and-principal-unions-push-delay-vaccination-mandate>), saying the short timeframe will leave many schools seriously understaffed next week if thousands of unvaccinated teachers and staff are forced to stay home.

"At this point, principals and superintendents have been reaching out consistently to tell us that they are concerned about not having enough staff come Tuesday morning, September 28th," said Mark Cannizzaro, president of the Council of School Supervisors & Administrators union in a press conference Friday. "I've heard from several schools that have anywhere between 30 and 100 people currently on a non-compliant list."

One of the biggest worries was losing critical numbers of support staff including cafeteria workers and school safety agents, Cannizzaro said.

"It's not just teachers and administrators that are needed in schools. We need to have our custodial staff, our paraprofessionals, our kitchen staff, our school aides, and of course our school safety agents," Cannizzaro said.

Most schools may face having only one school safety agent next week. "Principals were told yesterday that school safety agents would be redeployed, and schools would probably get one safety agent per school," he said.

Gregory Floyd, president of the Local 237 union, which includes school safety agents and food service managers who supervise cafeteria workers, estimated that half the union's membership might still be unvaccinated.

He's urged hesitant members to go get their shots. "Everyone is going to have to make an individual choice," Floyd told WNYC/Gothamist. "Are you going to join your colleagues who are vaccinated and working beside you? They're healthy. Look at them."

De Blasio, who has continuously argued that New York City's public schools will remain safely open this fall because of the vaccine, said DOE staff still have time to go get vaccinated. The DOE said there will be pop-up vaccination clinics at schools with students ages 12 and up next week.

"There's all of today, there's all of tomorrow. There's all of Sunday, even into Monday to get vaccinated," de Blasio said Friday. "The vast, vast majority of teachers and staff are making the decision to get vaccinated, be part of the solution, and continue with their work."

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## LONG ISLAND / POLITICS / SPIN CYCLE

By Robert Brodsky

# Labor arbitrator to host Cuomo fundraiser Tuesday in Sands Point

*Updated May 20, 2014 3:23 PM*

Labor arbitrator Martin Scheinman will host a fundraiser for Gov. Andrew M. Cuomo's re-election efforts Tuesday night at his home in Sands Point.

Scheinman said he is co-hosting the event with former State Sen. Michael Balboni, a Republican who served as deputy secretary for public safety under former Gov. Eliot Spitzer, and Bruce Raynor, the former executive vice president of the labor union SEIU.

Scheinman said he was approached by Cuomo's campaign about hosting the fundraiser but had few details about the event other than that fewer than 100 guests were expected.

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A Cuomo spokesman did not respond to a request for comment.

Scheinman has mediated several labor fights between both Nassau and Suffolk counties and its public-sector labor unions. He most recently mediated the labor contract between New York City Mayor Bill de Blasio and the United Federation of Teachers.

Cuomo will challenge Republican Westchester County Executive Rob Astorino in November.

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By Robert Brodsky



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**OPINION**

## Labor arbitration head is a de Blasio fundraiser

By Post Editorial Board

December 25, 2013 6:50pm



Martin Scheinman in 2005, de Blasio in NYC December 23rd

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United Federation of Teachers. In this capacity, he will head a three-person panel that will help determine whether nurses and teachers deserve a 4 percent raise. How that panel decides will be important not just for nurses and teachers, but for the precedent it sets at a time when many other contracts with city workers are up for negotiation.

What complicates this is that Scheinman was also a fund-raiser for Bill de Blasio. Scheinman, who has a good reputation as an arbitrator, claims there's no conflict between serving on the arbitration panel and being a financial supporter of the incoming mayor, in part because he was named to the panel long before de Blasio even ran.

Sorry, but we don't buy it.

Appearances mean something. Even in the best of circumstances, the arbitration process has shown a built-in bias toward unions: Panels often allow wage increases whether or not the state or a given municipality can afford it. How can people really be confident in Scheinman's independence when he backed a candidate who had the support of health-care workers in the primary and the teachers in the general?

At some point, as de Blasio's candidacy picked up steam, Scheinman should have recognized the coming conflict of interest for what it was. Having a fund-raiser for a labor-friendly mayor run an arbitration panel just doesn't pass the smell test.

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between		
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BOARD OF EDUCATION OF THE CITY		Re: Impact Bargaining
SCHOOL DISTRICT OF THE CITY OF	X	
NEW YORK		
	X	
"Department"		
	X	
-and-		
	X	
UNITED FEDERATION OF TEACHERS,		
LOCAL 2, AFT, AFL-CIO	X	
"Union"	X	
-----	X	

**APPEARANCES**

**For the Department**

Renee Campion, Commissioner of Labor Relations  
Steven H. Banks, Esq., First Deputy Commissioner  
and General Counsel of Labor Relations

**For the Union**

STROOCK & STROOCK & LAVAN, L.L.P.  
Alan M. Klinger, Esq.

Beth Norton, Esq., UFT General Counsel  
Michael Mulgrew, UFT President

**BEFORE:** Martin F. Scheinman, Esq., Arbitrator

**BACKGROUND**

The Union ("Union" or "UFT") protests the Department of Education's ("Department" or "DOE") failure to reach agreement on the impact of its decision mandating all employees working in Department buildings show proof they started the Covid-19 vaccination protocols by September 27, 2021. The Union contends the Department failed to adequately provide, among other things, for those instances where employees have proof of a serious medical condition making the vaccine a danger to their health, as well as for employees who have a legitimate religious objection to vaccines.

Most of the basic facts are not in dispute.

For those in the New York City ("NYC" or "City") metropolitan area, we are now in the 18<sup>th</sup> month of the Covid-19 pandemic. During that time, we have seen substantial illness and loss of life. There have been periods of significant improvement and hope, but sadly, we have seen resurgence with the Delta variant. Throughout this period, NYC and its municipal unions have worked collaboratively to provide needed services for the City's 8.8 million residents in as safe an environment as possible. Yet, municipal employees have often borne great risk. The Department and the UFT are no exception. The DOE and the UFT immediately moved to remote instruction and then later a hybrid model of both in-person and remote learning for the 2020-2021 school year. Educators at all levels strove to deliver the best experience possible under strained circumstances. For this

coming school year, both the DOE and the UFT have endeavored to return, as much as possible, to in-person learning. They have developed protocols regarding masking and distancing to effectuate a safe environment for the City's students and educators.

To this end, the Delta resurgence has complicated matters. In recognition of increased risk, there have been various policies implemented at City agencies and other municipal entities. Mayor de Blasio in July 2021 announced a "Vaccine-or-Test" mandate which essentially requires the City workforce, including the UFT's educators, either to be vaccinated or undergo weekly testing for the Covid-19 virus effective September 13, 2021.

Most relevant to this matter, on August 23, 2021, the Mayor and the NYC Commissioner of Health and Mental Hygiene, David A. Chokshi, MD, announced a new policy for those workforces in NYC DOE buildings. Those employees would be subject to a "Vaccine Only" mandate. That is, such employees would need to show by September 27, 2021, they had at least started the vaccination protocol or would not be allowed onto DOE premises, would not be paid for work and would be at risk of loss of job and benefits. This mandate was reflected in an Order of Commissioner Chokshi, dated August 24, 2021. That Order, by its terms, did not expressly provide for exceptions or accommodations for those with medical contraindications to vaccination or sincerely-held religious objections to inoculation. Nor did it address matters of due process with regard to job and benefits protection.

The UFT promptly sought to bargain the impact and implementation of the Vaccine Only mandate. A number of discussions were had by the parties but important matters remained unresolved.

On September 1, 2021, the UFT filed a Declaration of Impasse with the Public Employment Relations Board ("PERB") as to material matters. The City/DOE did not challenge the statement of impasse and PERB appointed me to mediate the matters. Given the exigencies of the imminent start of the school year and the coming of the September 27, 2021, mandate, together with the importance of the issues involved to the workforce, mediations sessions were held immediately on September 2, 3, 4 and 5, 2021, with some days having multiple sessions. Progress was made, and certain tentative understandings were reached, but significant matters remained unresolved. By agreement of the parties, the process moved to arbitration. They asked I serve as arbitrator.<sup>1</sup>

Arbitration sessions were held on September 6 and 7, 2021. During the course of the hearings, both sides were given full opportunity to introduce evidence and argument in support of their respective positions. They did so. Both parties made strenuous and impassioned arguments reflecting their viewpoints on this entire issue.

During the course of these hearings, I made various interim rulings concerning the impact of the "Vaccine Only" mandate. I then

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<sup>1</sup> My jurisdiction is limited to the issues raised during impact bargaining and not with regard to the decision to issue the underlying "Vaccine Only" order.



directed the parties to draft language reflecting those rulings. Even though I am very familiar with the language of the current Collective Bargaining Agreement, as well as the parties' relationship since I am a member of their permanent arbitration panel and have served as a fact-finder and mediator during several rounds of bargaining, I concluded the parties are more familiar with Department policy and how leave and entitlements have been administered in accordance with prior agreements. As such, my rulings reflect both the understandings reached during the negotiations prior to mediation, those reached in the mediation process and the parties' agreed upon language in response to my rulings. All are included, herein.

I commend the parties for their seriousness of purpose and diligence in addressing these complicated matters. The UFT made clear it supports vaccination efforts and has encouraged its members to be vaccinated. Nonetheless, as a Union, it owes a duty to its members to ensure their rights are protected. The City/DOE demonstrated recognition of the importance of these issues, particularly with regard to employees' legitimate medical or religious claims. I appreciate both parties' efforts in meeting the tight timeline we have faced and the professionalism they demonstrated serving the citizens of the City and what the million plus students deserved. They have invested immense effort to insure such a serious issue was litigated in such a thoughtful way.

Yet, in the end, it falls to me, as Arbitrator, to arrive at a fair resolution of the matters at hand.

This matter is one of the most urgent events I have been involved with in my forty (40) plus years as a neutral. The parties recognized the complexity of the issues before me, as well as the magnitude of the work that lies ahead to bring this conflict to completion in a timely manner. For this reason, they understood and accepted the scope and complexity of this dispute could not be handled by me alone. They agreed my colleagues at Scheinman Arbitration and Mediation Services ("SAMS") would also be involved.

I want to thank my colleagues at SAMS, especially Barry J. Peek, for their efforts and commitment to implementing the processes to resolve this matter. This undertaking could not be accomplished by any single arbitrator.

### **Opinion**

After having carefully considered the record evidence, and after having the parties respond to countless inquiries. I have requested to permit me to make a final determination, I make the rulings set forth below. While some of the language has been drafted, initially, by the parties in response to my rulings, in the end the language set forth, herein, is mine alone. I hereby issue the following Award:

#### **I. Exemption and Accommodation Requests & Appeal Process**

As an alternative to any statutory reasonable accommodation

process, the City, the Board of Education of the City School District for the City of New York (the "DOE"), and the United Federation of Teachers, Local 2, AFT, AFL-CIO (the "UFT"), (collectively the "Parties") shall be subject to the following Expedited Review Process to be implemented immediately for full-time staff, H Bank and non-pedagogical employees who work a regular schedule of twenty (20) hours per week or more inclusive of lunch, including but not limited to Occupational Therapists and Physical Therapists, and Adult Education teachers who work a regular schedule of twenty (20) or more hours per week. This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy, and (b) medical accommodation requests where an employee is unable to mount an immune response to COVID-19 due to preexisting immune conditions and the requested accommodation is that the employee not appear at school. This process shall be in place for the 2021-2022 school year and shall only be extended by mutual agreement of the Parties.

Any requests to be considered as part of this process must be submitted via the SOLAS system no later than Monday, September 20, 2021, by 5:00 p.m.

A. Full Medical Exemptions to the vaccine mandate shall only be considered where an employee has a documented contraindication such that an employee cannot receive any of the three (3) authorized vaccines (Pfizer, Moderna, J&J)—with contraindications delineated in CDC clinical

considerations for COVID-19 vaccination. Note that a prior immediate allergic reaction to one (1) type of vaccine will be a precaution for the other types of vaccines, and may require consultation with an allergist.

B. Temporary Medical Exemptions to the vaccine mandate shall only be based on the following valid reasons to defer or delay COVID-19 vaccination for some period:

- o Within the isolation period after a COVID-19 infection;
- o Within ninety (90) days of monoclonal antibody treatment of COVID-19;
- o Treatments for conditions as delineated in CDC clinical considerations, with understanding CDC guidance can be updated to include new considerations over time, and/or determined by a treating physician with a valid medical license responsible for the immunosuppressive therapy, including full and appropriate documentation that may warrant temporary medical exemption for some period of time because of active therapy or treatment (e.g., stem cell transplant, CAR T-cell therapy) that would temporarily interfere with the patient's ability to respond adequately to vaccination;
- o Pericarditis or myocarditis not associated with COVID-19 vaccination or pericarditis or myocarditis associated with COVID-19 vaccination.

Length of delay for these conditions may vary, and the employee must get vaccinated after that period unless satisfying the criteria for a Full Medical Exemption described, above.

C. 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 online source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists).

D. There are cases in which, despite an individual having sought and received the full course of the vaccination, he or she is unable to mount an immune response to COVID-19 due to preexisting immune conditions. In these circumstances, each individual case shall be reviewed for potential accommodation. Medical accommodation requests must be documented in writing by a medical doctor.

E. The initial determination of eligibility for an exemption or accommodation shall be made by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee

Relations. These determinations shall be made in writing no later than Thursday, September 23, 2021, and, if denied, shall include a reason for the denial.

F. If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE within one (1) school day of the DOE's issuance of the initial eligibility determination. The request for appeal shall include the reason for the appeal and any additional documentation. Following the filing of the appeal, any supplemental documentation may be submitted by the employee to the Scheinman Arbitration and Mediation Services ("SAMS") within forty eight (48) hours after the filing of the appeal. If the stated reason for denial of a medical exemption or accommodation request is insufficient documentation, the employee may request from the arbitrator and, upon good cause shown, the arbitrator may grant an extension beyond forty eight (48) hours and permit the use of CAR days after September 27, 2021, for the employee to gather the appropriate medical documentation before the appeal is deemed submitted for determination.

G. A panel of arbitrators identified by SAMS shall hear these appeals, and may request the employee or the DOE submit additional documentation. The assigned arbitrator may also request information from City and/or DOE Doctors as part of the review of the appeal documentation. The assigned

arbitrator, at his or her discretion, shall either issue a decision on the appeal based on the documents submitted or hold an expedited (virtual) factual hearing. If the arbitrator requests a factual hearing, the employee may elect to have a union representative present but neither party shall be required to be represented by an attorney at the hearing. The expedited hearing shall be held via Zoom telecommunication and shall consist of brief opening statements, questions from the arbitrator, and brief closing statements. Cross examination shall not be permitted. Any documentation submitted at the arbitrator's request shall be provided to the DOE at least one (1) business day before the hearing or the issuance of the written decision without hearing.

H. Appeal decisions shall be issued to the employee and the DOE no later than Saturday September 25, 2021. Appeal decisions shall be expedited without full Opinion, and final and binding.

I. While an appeal is pending, the exemption shall be assumed granted and the individual shall remain on payroll consistent with Section K below. However, if a larger number of employees than anticipated have a pending appeal as of September 27, 2021, as determined by SAMS, SAMS may award different interim relief consistent with the parties' intent. Those employees who are vaccinated and have applied for an

accommodation shall have the ability to use CAR days while their application and appeal are pending. Should the appeal be granted, these employees shall be reimbursed any CAR days used retroactive to the date of their initial application.

J. The DOE shall cover all arbitration costs from SAMS under this process. To the extent the arbitrator requests additional medical documentation or information from the DOE, or consultation with City and/or DOE Doctors, arranging and paying for such documentation and/or consultation shall be the responsibility of the DOE.

K. An employee who is granted a medical or religious exemption or a medical accommodation under this process and within the specific criteria identified above shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/or accommodation is in place. For those with underlying medical issues granted an accommodation under Section I(D), the DOE will make best efforts to ensure the alternate work setting is appropriate for the employee's medical needs. The DOE shall make best efforts to make these assignments within the same borough as



the employee's current school, to the extent a sufficient number of assignments exist in the borough. Employees so assigned shall be required to submit to COVID testing twice per week for the duration of the assignment.

L. The process set forth, herein, shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision. Should either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to SAMS for expedited resolution.

## **II. Leave**

A. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021. Such leave may be unilaterally imposed by the DOE and may be extended at the request of the employee consistent with Section III(B), below. Placement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose.

- B. Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes.
- C. During such leave without pay, employees shall continue to be eligible for health insurance. As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period.
- D. Employees who become vaccinated while on such leave without pay and provide appropriate documentation to the DOE prior to November 30, 2021, shall have a right of return to the same school as soon as is practicable but in no case more than one (1) week following notice and submission of documentation to the DOE.
- E. Pregnancy/Parental Leave
  - i. Any soon-to-be birth mother who starts the third trimester of pregnancy on or before September 27, 2021, (e.g. has a due date no later than December 27, 2021), may commence UFT Parental Leave prior to the child's birth date, but not before September 27, 2021.
  - ii. No documentation shall be necessary for the early use of Parental Leave, other than a doctor's written assertion the employee is in her third trimester as of September 27, 2021.
  - iii. Eligible employees who choose to start Parental Leave prior to the child's birth date, shall be required to first use CAR days until either: 1) they exhaust CAR/sick days,

at which point the Parental Leave shall begin, or 2) they give birth, at which point they shall be treated as an approved Parental Leave applicant for all purposes, including their prerogative to use additional CAR days prior to the commencement of Parental Leave.

- iv. Eligible employees who have a pregnancy disability or maternity disability outside of the regular maternity period may, in accordance with existing rules, borrow CAR/sick days and use a Grace Period. This eligibility to borrow CAR/sick days does not apply to employees during the regular maternity recovery period if they have opted to use Parental Leave.
- v. In the event an eligible employee exhausts CAR/sick days and parental leave prior to giving birth, the employee shall be placed on a leave without pay, but with medical benefits at least until the birth of the child. As applicable, unvaccinated employees may be placed in the leave as delineated in Section II(A).
- vi. If not otherwise covered by existing Family Medical Leave Act ("FMLA") or leave eligibility, an employee who takes Parental Leave before the birth of the child shall be eligible to be on an unpaid leave with medical benefits for the duration of the maternity recovery period (i.e., six weeks after birth or eight weeks after a birth via C-Section)

vii. All other eligibility and use rules regarding UFT Parental Leave as well as FMLA remain in place.

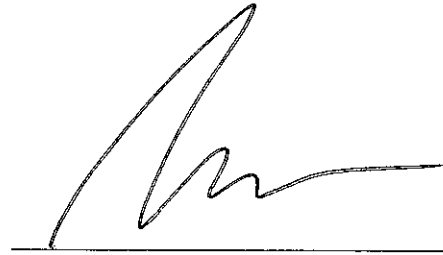
### **III. Separation**

A. During the period of September, 28, 2021, through October 29, 2021, any employee who is on leave without pay due to vaccination status may opt to separate from the DOE. In order to separate under this Section and receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. If an employee opts to separate consistent with this Section, the employee shall be eligible to be reimbursed for unused CAR days on a one (1) for one (1) basis at the rate of 1/200th of the employee's salary at departure per day, up to 100 days, to be paid following the employee's separation with documentation including the general waiver and release. Employees who elect this option shall be deemed to have resigned involuntarily effective on the date contained in the general waiver as determined by the DOE, for non-disciplinary reasons. An employee who separates under this Section shall continue to be eligible for health insurance through September 5, 2022, unless they are eligible for health insurance from another source (e.g., a spouse's coverage or another job).

- B. During the period of November 1, 2021, through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternately opt to extend the leave through September 5, 2022. In order to extend this leave pursuant to this Section, and continue to receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. Employees who select this option shall continue to be eligible for health insurance through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the DOE before September 5, 2022, shall have a right to return to the same school as soon as is practicable but in no case more than two (2) weeks following notice to the DOE. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned.
- C. Beginning December 1, 2021, the DOE shall seek to unilaterally separate employees who have not opted into separation under Sections III(A) and III(B). Except for the express provisions

contained, herein, all parties retain all legal rights at all times relevant, herein.

September 10, 2021.

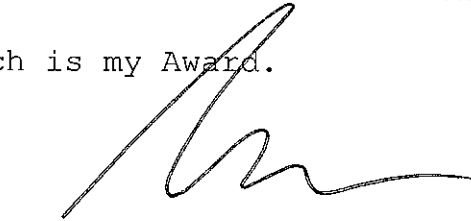


Martin F. Scheinman, Esq.  
Arbitrator

STATE OF NEW YORK            )  
  )     ss.:  
COUNTY OF NASSAU            )

I, MARTIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

September 10, 2021.



Martin F. Scheinman, Esq.  
Arbitrator

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kate, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

DECLARATION OF  
DR. JAYANTA BHATTACHARYA

Civil Action No. 1:21-cv-07863

STATE OF CALIFORNIA                     )  
   ) ss.:  
COUNTY OF SANTA CLARA             )

**DECLARATION OF DR. JAYANTA BHATTACHARYA SUPPORTING PLAINTIFFS**

I, Dr. Jayanta Bhattacharya, declare as follows:

1. I am an adult of sound mind and make this statement voluntarily, based upon my own personal knowledge, education, and experience.
2. Based on my training and experience, I have formed an opinion on the reasonableness of the requested accommodations and on the possibility of other accommodations not listed to a reasonable degree of scientific certainty.

**EXPERIENCE & CREDENTIALS**

3. I am a former Professor of Medicine and current Professor of Health Policy at Stanford University School of Medicine and a research associate at the National Bureau of Economic Research. I am also Director of Stanford's Center for Demography and Economics of Health and Aging. I hold an M.D. and Ph.D. from Stanford University. I have published 154 scholarly articles in peer-reviewed journals in the fields of medicine, economics, health policy, epidemiology, statistics, law, and public health, among others. My research has been cited in the peer-reviewed scientific literature more than 11,600 times.

4. I have dedicated my professional career to the analysis of health policy, including infectious disease epidemiology and policy, and the safety and efficacy of medical interventions. I have both studied extensively and commented publicly on the necessity and safety of vaccine requirements for those who have contracted and recovered from COVID-19 (individuals who have “natural immunity”). I am intimately familiar with the emergent scientific and medical literature on this topic and pertinent government policy responses to the issue both in the United States and abroad.

5. My assessment of vaccine immunity is based on studies related to the efficacy and safety of the one vaccine to receive full approval from the Food and Drug Administration (FDA) and two vaccines that the FDA has granted Emergency Use Authorization (EUA) for use in the United States. These include two mRNA-technology vaccines (manufactured by Pfizer-BioNTech and Moderna) and an adenovirus-vector vaccine technology (manufactured by Johnson & Johnson). Of those, the Pfizer vaccine, also known as Comirnaty, has full FDA approval.

6. I have not and will not receive any financial or other compensation to prepare this Declaration or to testify in this case. Nor have I received compensation for preparing declarations or reports or for testifying in *any* other case related to the Covid-19 pandemic. Nor have I ever received any personal or research funding from any pharmaceutical company. My participation here, just as my participation in other cases, has been motivated solely by my commitment to public health.

7. I have no prior relationship with any of the plaintiffs.

8. I have been asked to provide my opinion on matters related to the mandatory vaccination policy for its New York City teachers and staff, including the following:

- Whether people with religious or medical exemptions to vaccination pose a significant threat of substantial harm to their vaccinated co-workers and a largely unvaccinated student body



because of their vaccine status.

- Whether, based on the current medical and scientific knowledge, natural immunity is categorically inferior to vaccine immunity to prevent reinfection and transmission of the SARS-CoV-2 virus;
- Whether, based on the existing medical and scientific understanding of SARS- CoV-2 transmission and recovery, there is any categorical distinction between natural immunity and vaccine immunity;
- An assessment of the comparative safety to recipients of administering vaccines to those who have natural immunity relative to immunologically naïve recipients with no prior history of COVID infection;
- Whether vaccines pose any risks to individuals with certain medical conditions;
- The safety of providing accommodations to (1) those who have recovered from Covid and (2) those who have religious or medical reasons for declining to be vaccinated; and
- What those accommodations could look like in practice.

9. As a threshold matter, the protection provided by an individual being vaccinated to other people after the COVID-19 vaccination wanes within months after full vaccination. While the vaccines are each highly effective at mitigating severe disease, several studies show that vaccinated people are as infectious as unvaccinated people. Therefore, COVID-19 vaccination is primarily a matter of concern for the private health of an individual, rather than a matter of public health of concern to the public at large.

10. Vaccination remains a vital tool for personal protection, especially in higher risk groups. It has saved many lives during this pandemic. However, it is not necessary to require that everyone receive a vaccination given the lack of effectiveness in meaningfully mitigating transmission of disease. I provide the extensive scientific evidence on this point in Section I below.

11. My opinions are partly summarized in a recent article I published and which I reaffirm here: “the idea that everyone must be vaccinated against COVID-19 is as misguided as the anti-vax idea that no

one should. The former is more dangerous for public health.”<sup>1</sup> This is particularly true for those who have recovered from natural infection. “[R]ecovered COVID patients have strong, long-lasting protection against severe disease if reinfected, and evidence about protective immunity after natural infection is at least as good as from the vaccines. Hence, it makes no sense to require vaccines for recovered patients. For them, it simply adds a risk, however small, without any benefit.”

12. I also offer my opinion that certain individuals may face heightened risk of vaccine side effects. Though the vaccines are safe for most patients, the FDA has identified a heightened risk of myocarditis and pericarditis after vaccination with the mRNA vaccines – especially for young men. It has also identified a heightened risk of clotting abnormalities in young women taking the adenovirus vector vaccine. Even more importantly, the vaccine has not been thoroughly tested for safety and efficacy in patients with certain chronic conditions such as Multiple Sclerosis, so there is still considerable uncertainty about these heightened risks for some patients.

13. I also conclude that the New York City Department of Education (“DOE”) can safely accommodate COVID-recovered workers by exempting them from vaccine requirements since they possess better immunity versus reinfection than a vaccinated worker who never had COVID. The DOE could also safely accommodate those employees who have not recovered from Covid-19 but have religious or medical reasons for not wanting the vaccine by requiring daily symptom checking paired with rapid antigen tests to confirm if a worker is infectious. To reduce the risk from asymptotically infected workers, the DOE can require workers to conduct weekly PCR tests, though if it adopts this accommodation, it should require it of both vaccinated and unvaccinated workers since both groups can spread the virus asymptotically.

## OPINIONS

### **I. Natural Immunity Provides Durable Protection Against Reinfection and Against Severe Outcomes If Reinfected; COVID-19 Vaccines Provide Limited Protection Against Infection but Durable Protection Against Severe Outcomes if Infected.**

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<sup>1</sup> Martin Kuldorff and Jay Bhattacharya, *The ill-advised push to vaccinate the young*, THEHILL.COM (June 17, 2021), <https://thehill.com/opinion/healthcare/558757-the-ill-advised-push-to-vaccinate-the-young?rl=1>.

14. Both vaccine-mediated immunity and natural immunity after recovery from COVID infection provide extensive protection against severe disease from subsequent SARS-CoV-2 infection. There is no reason to presume that vaccine immunity provides a higher level of protection than natural immunity. Since vaccines arrived one year after the disease, there is stronger evidence for long lasting immunity from natural infection than from the vaccines.

15. Both types are based on the same basic immunological mechanism—stimulating the immune system to generate an antibody response. In clinical trials, the efficacy of those vaccines was initially tested by comparing the antibodies level in the blood of vaccinated individuals to those who had natural immunity. Later Phase III studies of the vaccines established 94%+ clinical efficacy of the mRNA vaccines against severe COVID illness.<sup>2,3</sup> A Phase III trial showed 85% efficacy for the Johnson and Johnson adenovirus-based vaccine against severe disease.<sup>4</sup>

16. Immunologists have identified many immunological mechanisms of immune protection after recovery from infections. Studies have demonstrated prolonged immunity with respect to memory T and B

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<sup>2</sup> Baden LR, El Sahly HM, Essink B, Kotloff K, Frey S, Novak R, Diemert D, Spector SA, Rouphael N, Creech CB, McGettigan J, Khetan S, Segall N, Solis J, Brosz A, Fierro C, Schwartz H, Neuzil K, Corey L, Gilbert P, Janes H, Follmann D, Marovich M, Mascola J, Polakowski L, Ledgerwood J, Graham BS, Bennett H, Pajon R, Knightly C, Leav B, Deng W, Zhou H, Han S, Ivarsson M, Miller J, Zaks T., *COVE Study Group. Efficacy and Safety of the mRNA-1273 SARS-CoV-2 Vaccine*, N ENGL J MED. (Feb. 4, 2021).

<sup>3</sup> Polack FP, Thomas SJ, Kitchin N, Absalon J, Gurtman A, Lockhart S, Perez JL, Pérez Marc G, Moreira ED, Zerbini C, Bailey R, Swanson KA, Roychoudhury S, Koury K, Li P, Kalina WV, Cooper D, Frenck RW Jr, Hammitt LL, Türeci Ö, Nell H, Schaefer A, Ünal S, Tresnan DB, Mather S, Dormitzer PR, Şahin U, Jansen KU, Gruber WC, *Safety and Efficacy of the BNT162b2 mRNA Covid-19 Vaccine*, N ENGL J MED. (Dec. 31, 2020).

<sup>4</sup> Sadoff J, Gray G, Vandebosch A, Cárdenas V, Shukarev G, Grinsztejn B, Goepfert PA, Truyers C, Fennema H, Spiessens B, Offergeld K, Scheper G, Taylor KL, Robb ML, Treanor J, Barouch DH, Stoddard J, Ryser MF, Marovich MA, Neuzil KM, Corey L, Cauwenberghs N, Tanner T, Hardt K, Ruiz-Guiñazú J, Le Gars M, Schuitemaker H, Van Hoof J, Struyf F, Douguilh M, *Safety and Efficacy of Single-Dose Ad26.COV2.S Vaccine against Covid-19*, N ENGL J MED (June 10, 2021), 2187-2201.

cells<sup>5</sup>, bone marrow plasma cells<sup>6</sup>, spike-specific neutralizing antibodies<sup>7</sup>, and IgG+ memory B cells<sup>8</sup> following naturally acquired immunity.

17. Multiple extensive, peer-reviewed studies comparing natural and vaccine immunity have now been published. These studies overwhelmingly conclude that natural immunity provides equivalent or greater protection against severe infection than immunity generated by mRNA vaccines (Pfizer and Moderna).

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<sup>5</sup> Jennifer M. Dan, et al., *Immunological memory to SARS-CoV-2 assessed for up to 8 months after infection*, SCIENCE (Feb. 5, 2021) (finding that memory T and B and B cells were present up to eight months after infection, noting that “durable immunity against secondary COVID-19 disease is a possibility for most individuals”).

<sup>6</sup> Jackson S. Turner, et al., *SARS-CoV-2 infection induces long-lived bone marrow plasma cells in humans*, NATURE (May 24, 2021) (study analyzing bone marrow plasma cells of recovered COVID-19 patients reported durable evidence of antibodies for at least 11 months after infection, describing “robust antigen-specific, long-lived humoral immune response in humans”); Ewen Callaway, *Had COVID? You’ll probably make antibodies for a lifetime*, NATURE (May 26, 2021), <https://www.nature.com/articles/d41586-021-01442-9#:~:text=Many%20people%20who%20have%20been,recovered%20from%20COVID%2D191> (“The study provides evidence that immunity triggered by SARS-CoV-2 infection will be extraordinarily long-lasting” and “people who recover from mild COVID-19 have bone-marrow cells that can churn out antibodies for decades”).

<sup>7</sup> Tyler J. Ripberger, et al., *Orthogonal SARS-Cov-2 Serological Assays Enable Surveillance of Low-Prevalence Communities and Reveal Durable Humor Immunity*, 53 IMMUNITY, Issue 5, pp. 925-933 E4 (Nov. 17, 2020) (study finding that spike and neutralizing antibodies remained detectable 5-7 months after recovering from infection).

<sup>8</sup> Kristen W. Cohen, et al., *Longitudinal analysis shows durable and broad immune memory after SARS-CoV-2 infection with persisting antibody responses and memory B and T cells*, MEDRXIV (Apr. 27, 2021), <https://www.medrxiv.org/content/10.1101/2021.04.19.21255739v1> (study of 254 recovered COVID patients over 8 months “found a predominant broad-based immune memory response” and “sustained IgG+ memory B cell response, which bodes well for rapid antibody response upon virus re-exposure.” “Taken together, these results suggest that broad and effective immunity may persist long-term in recovered COVID-19 patients”).

18. Specifically, studies confirm the efficacy of natural immunity against reinfection of COVID-19<sup>9</sup> and show that the vast majority of reinfections are less severe than first-time infections.<sup>10</sup> For example, an Israeli study of approximately 6.4 million individuals demonstrated that natural immunity provided equivalent if not better protection than vaccine immunity in preventing COVID-19 infection, morbidity, and mortality.<sup>11</sup> Of the 187,549 unvaccinated persons with natural immunity in the study, only 894 (0.48%) were reinfected; 38 (0.02%) were hospitalized, 16 (0.008%) were hospitalized with severe disease, and only one died, an individual over 80 years of age. Another study, analyzing data from Italy that only 0.31% of

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<sup>9</sup> Nabin K. Shrestha, et al., *Necessity of COVID-19 vaccination in previously infected individuals*, MEDRXIV (preprint), <https://www.medrxiv.org/content/10.1101/2021.06.01.21258176v3> (“not one of the 1359 previously infected subjects who remained unvaccinated had a SARS-CoV-2 infection over the duration of the study “and concluded that those with natural immunity are “unlikely to benefit from covid-19 vaccination”); Galit Perez, et al., *A 1 to 1000 SARS-CoV-2 reinfection proportion in members of a large healthcare provider in Israel: a preliminary report*, MEDRXIV (Mar. 8, 2021), <https://www.medrxiv.org/content/10.1101/2021.03.06.21253051v1> (Israeli study finding that approximately 1/1000 of participants were reinfected); Roberto Bertollini, et al., *Associations of Vaccination and of Prior Infection With Positive PCR Test Results for SARS-CoV-2 in Airline Passengers Arriving in Qatar*, JAMA (June 9, 2021), <https://jamanetwork.com/journals/jama/fullarticle/2781112?resultClick=1> (study of international airline passengers arriving in Qatar found no statistically significant difference in risk of reinfection between those who had been vaccinated and those who had previously been infected); Stefan Pilz, et al., *SARS-CoV-2 re-infection risk in Austria*, EUR. J. CLIN. INVEST. (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7988582/> (previous SARS-CoV-2 infection reduced the odds of re-infection by 91% compared to first infection in the remaining general population); Aodhan Sean Breathnach, et al., *Prior COVID-19 protects against reinfection, even in the absence of detectable antibodies*, 82 J. OF INFECTION e11-e12 (2021) <https://doi.org/10.1016/j.jinf.2021.05.024> (.086% of previously infected population in London became reinfected); Alison Tarke, *Negligible impact of SARS-CoV-2 variants on CD4 and CD8 T cell reactivity in COVID-19 exposed donors and vaccines*, BIORXIV (Mar. 1, 2021), <https://www.biorxiv.org/content/10.1101/2021.02.27.433180v1> (an examination of the comparative efficacy of T cell responses to existing variants from patients with natural immunity compared to those who received an mRNA vaccine found that the T cell responses of both recovered Covid patients and vaccines were effective at neutralizing mutations found in SARS-CoV-2 variants).

<sup>10</sup> Laith J. Abu-Raddad, et al., *SARS-CoV-2 reinfection in a cohort of 43,000 antibody-positive individuals followed for up to 35 weeks*, MEDRXIV (Feb. 8, 2021), <https://www.medrxiv.org/content/10.1101/2021.01.15.21249731v2> (finding that of 129 reinfections from a cohort of 43,044, only one reinfection was severe, two were moderate, and none were critical or fatal); Victoria Jane Hall, et al., *SARS-CoV-2 infection rates of antibody-positive compared with antibody-negative health-care workers in England: a large, multicentre, prospective cohort study*, 397 LANCET: 1459-69 (Apr. 9, 2021), <https://pubmed.ncbi.nlm.nih.gov/33844963/> (finding “a 93% lower risk of COVID-19 symptomatic infection... [which] show[s] equal or higher protection from natural infection, both for symptomatic and asymptomatic infection”); Aidan T. Hanrahan, et al., *Prior SARS-CoV-2 infection is associated with protection against symptomatic reinfection*, 82 JOURNAL OF INFECTION, Issue 4, E29-E30 (Apr. 1, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7832116/> (Apr. 1, 2021) (examined reinfection rates in a cohort of healthcare workers and found “no symptomatic reinfections” among those examined and that protection lasted for at least 6 months).

<sup>11</sup> Yair Goldberg, et al., *Protection of previous SARS-CoV-2 infection is similar to that of BNT162b2 vaccine protection: A three-month nationwide experience from Israel*, MEDRXIV (pre-print), <https://www.medrxiv.org/content/10.1101/2021.04.20.21255670v1>.

COVID-recovered patients experienced a reinfection within a year after the initial infection, despite the circulation of the delta variant.<sup>12</sup> In summary, the overwhelming conclusion of the pertinent scientific literature is that natural immunity is at least as effective against subsequent reinfection as even the most effective vaccines.

19. Based on such evidence, many scientists have concluded that natural protection against severe disease after COVID recovery is likely to be long-lasting. A survey article published on June 30, 2021, in the *British Medical Journal* concluded, “[t]here is reason to think that immunity could last for several months or a couple of years, at least, given what we know about other viruses and what we have seen so far in terms of antibodies in patients with COVID-19 and in people who have been vaccinated.”<sup>13</sup>

20. These findings of highly durable natural immunity should not be surprising, as they hold for SARS-CoV-1 and other respiratory viruses. According to a paper published in *Nature* in August 2020, 23 patients who had recovered from SARS-CoV-1 still possess CD4 and CD8 T cells, 17 years after infection during the 2003 epidemic.<sup>14</sup> A *Nature* paper from 2008 found that 32 people born in 1915 or earlier still retained some level of immunity against the 1918 flu strain— some 90 years later.<sup>15</sup>

21. In contrast to the concrete findings regarding the robust durability of natural immunity, it is yet unclear in the scientific literature how long-lasting vaccine-induced immunity will be. Notably, the researchers argue that they can best surmise the predicted durability of vaccine immunity by looking at the expected durability of natural immunity.<sup>16</sup>

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<sup>12</sup> Vitale J, Mumoli N, Clerici P, et al. Assessment of SARS-CoV-2 Reinfection 1 Year After Primary Infection in a Population in Lombardy, Italy. *JAMA Intern Med*. Published online May 28, 2021. doi:10.1001/jamainternmed.2021.2959

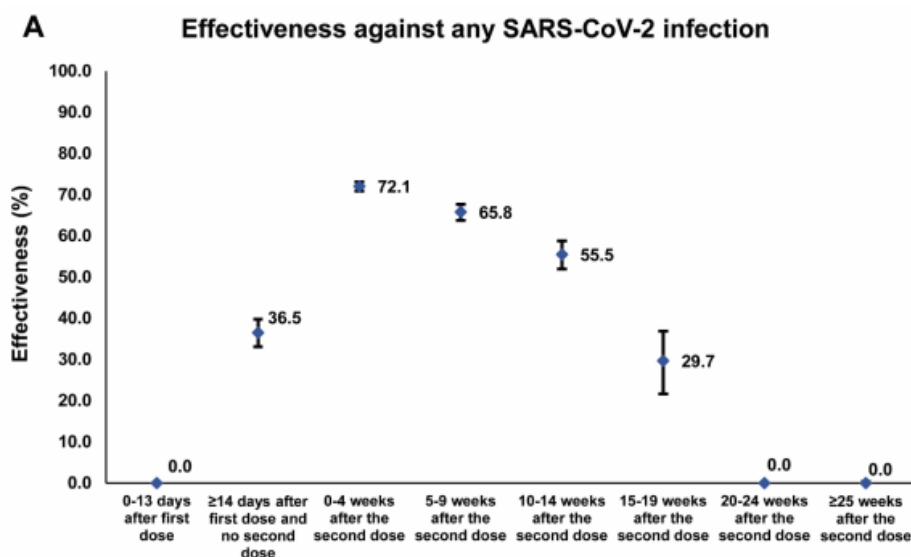
<sup>13</sup> Chris Baranjkuk, *How long does covid-19 immunity last?* 373 BMJ (2021) (emphasis added).

<sup>14</sup> Nina Le Bert, *SARS-CoV-2-specific T cell immunity in cases of COVID-19 and SARS, and uninfected control*, NATURE (Aug. 2020).

<sup>15</sup> Xiacong Yu, et al., *Neutralizing antibodies derived from the B cells of 1918 influenza pandemic survivors*, NATURE (2008).

<sup>16</sup> Heidi Ledford, *Six months of COVID vaccines: what 1.7 billion doses have taught scientists*, 594 NATURE 164 (June 10, 2021), <https://www.nature.com/articles/d41586-021-01505-x> (study notes that “Six months is not much time to collect data on how durable vaccine responses will be.... In the meantime some researchers are looking to natural immunity as a guide.”).

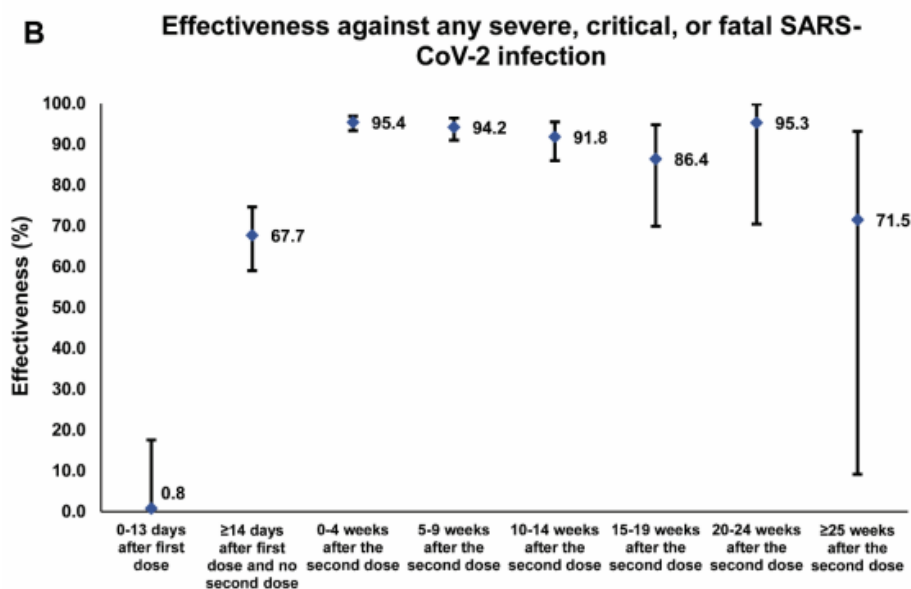
23. The key figures from the Qatari study are reproduced immediately below. Panel A shows that vaccine mediated protection against infection peaks at 72.1% zero to four weeks after the second dose, and then declines to 0%, 20 weeks after the second dose. According to this result, vaccines only protect against infection (and therefore disease spread) for a short period of time after the second dose of the mRNA vaccines.



24. On the other hand, Panel B shows that protection versus severe disease is long lasting after vaccination—even though the person will no longer be fully protected against infection and, presumably, disease spread. At 20-24 weeks after the second dose, the vaccine remains 95.3% efficacious versus severe disease. While it appears to dip after 25 weeks to 71.5% efficacy, the confidence interval is so wide that it

<sup>17</sup> Hiam Chemaitelly et al., Waning of BNT162b2 vaccine protection against SARS-CoV-2 infection in Qatar, <https://www.medrxiv.org/content/10.1101/2021.08.25.21262584v1.full.pdf>.

is consistent with no decrease whatsoever even after 25 weeks. The Qtari study is no outlier. Another recent study documented declining vaccine efficacy in the first three months after vaccination against disease



transmission in the era of the delta variant.<sup>18</sup>

25. In July, the CDC conducted a study of an outbreak of COVID-19 in Barnstable, Massachusetts.<sup>19</sup> 74% of the cases occurred in fully vaccinated individuals. Analysis of asymptomatic cases showed no significant difference in infectiousness between vaccinated and unvaccinated subjects, leading the CDC to update guidance to reflect that both vaccinated and unvaccinated people can infect others.

26. Yet another study, conducted in Wisconsin, confirmed that vaccinated individuals can shed infectious SARS-CoV-2 virus.<sup>20</sup> The authors analyzed nasopharyngeal samples to check whether patients showed evidence of infectious viral particles. They found that vaccinated individuals were at least as likely as unvaccinated individuals to be shedding live virus. They concluded:

Combined with other studies these data indicate that vaccinated and unvaccinated

<sup>18</sup> David W Eyre, Donald Taylor, Mark Purver, et al. The impact of SARS-CoV-2 vaccination on Alpha & Delta variant transmission. medRxiv Sept. 29, 2021. medRxiv 2021.09.28.21264260; doi: <https://doi.org/10.1101/2021.09.28.21264260>

<sup>19</sup> Brown CM, Vostok J, Johnson H, et al. Outbreak of SARS-CoV-2 infections, including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings – Barnstable County, Massachusetts, July 2021. MMWR Morb Mortal Wkly Rep 2021;70:1059-1062;

<sup>20</sup> Kasen K. Riemersma, Brittany E. Grogan, Amanda Kita-Yarbro, et al. Shedding of Infectious SARS-CoV-2 Despite Vaccination medRxiv 2021.07.31.21261387; August 24, 2021, doi: <https://doi.org/10.1101/2021.07.31.21261387>



individuals infected with the Delta variant might transmit infection. Importantly, we show that infectious SARS-CoV-2 is frequently found even in vaccinated persons...Vaccinated and unvaccinated persons should get tested when symptomatic or after close contact with someone with suspected or confirmed COVID-19.

27. In summary, the evidence to date strongly suggests that, while vaccines—like natural immunity—provide protection versus severe disease, they, unlike natural immunity, provide only short-lasting protection against subsequent infection and disease spread. In short, there is no medical or scientific reason to believe that vaccine immunity will prove longer lasting than natural immunity, much less that all currently approved vaccines will be expected to prove more durable than natural immunity despite their different technological foundations and dosing protocols.

## **II. Vaccine Side Effects, Though Rare, Do Occur and Can Be Deadly.**

28. Though the COVID vaccines are safe by the standards of many other vaccines approved for use in the population, like all medical interventions, they have side effects. In summarizing the evidence on vaccine side effects, the CDC lists both common side effects, at least one of which occurs in over half of all people who receive the vaccines, as well as deadly side effects that occur rarely in demographic subsets of the vaccinated population.

29. The common side effects include pain and swelling at the vaccination site and fatigue, headache, muscle pain, fever, and nausea for a limited time after vaccination.<sup>21</sup> Less common but severe side effects also include severe and non-severe allergic (anaphylactic) reactions that can occur immediately after vaccination, which can typically be treated with an epinephrine injection if it occurs.<sup>22</sup> Finally, the CDC's vaccine safety committee has identified rare but deadly side effects, including a heightened risk of clotting abnormalities<sup>23</sup> in young women after the Johnson & Johnson (J&J) vaccination, elevated risks of

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<sup>21</sup> Centers for Disease Control, *Possible Side Effects After Getting a COVID-19 Vaccine* (June 24, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html>.

<sup>22</sup> Centers for Disease Control, *What to Do If You Have an Allergic Reaction after Getting a COVID-19 Vaccine* (June 24, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/allergic-reaction.html>.

<sup>23</sup> Martin Kulldorff, *The Dangers of Pausing the J&J Vaccine*, THE HILL (April 17, 2021), <https://thehill.com/opinion/healthcare/548817-the-dangers-of-pausing-the-jj-vaccine>.

myocarditis and pericarditis<sup>24</sup> in young people—but especially young men—after mRNA vaccination, and higher risk of Guillane-Barre Syndrome<sup>25</sup> after the J&J vaccine. There is still the possibility of severe side effects that have yet to be identified as the vaccines have been in use in human populations for less than a year. Active investigation to check for safety problems is still ongoing.

30. Though the CDC<sup>26</sup> still recommends the vaccines for children 12 years old and up despite the evidence of elevated risk of myocarditis, other analysts<sup>27</sup> have objected to overly rosy assumptions made in the CDC analysis about vaccine side effects. They suggest that the recommendation is fragile to minor perturbation in their assumptions. The critical point for our analysis—undisputed in the scientific literature—is that the vaccines do have side effects, some of which are severe and not all of which are necessarily known now.

### **III. The Risk Of Those Side Effects Is Heightened In Certain Groups & Clinical Data on Vaccine Safety and Efficacy are Not Available for Patients with Certain Chronic Diseases.**

31. The CDC lists two primary contraindications to COVID vaccination: (1) “severe allergic reaction (e.g., anaphylaxis) after a previous dose or to a component of the Covid-19 vaccine”; and (2) “immediate allergic reaction of any severity to a previous dose or known (diagnosed) allergy to a component of the COVID-19 vaccine.”<sup>28</sup> Among the inactive ingredients of the COVID vaccines, polyethylene glycol (PEG)—which is used in other drugs and vaccines—is most likely to induce an allergic reaction. In addition to contraindications, the CDC lists several precautions to vaccination, including known allergic reactions

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<sup>24</sup> Centers for Disease Control, *Myocarditis and Pericarditis after Receipt of mRNA COVID-19 Vaccines Among Adolescents and Young Adults* (May 28, 2021), <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/myocarditis.html>.

<sup>25</sup> LaFranier and Weiland, *FDA Attaches Warning of Rare Nerve Syndrome to Johnson & Johnson Vaccine*, NEW YORK TIMES (July 12, 2021), <https://www.nytimes.com/2021/07/12/us/politics/fda-warning-johnson-johnson-vaccine-nerve-syndrome.html>.

<sup>26</sup> Walensky, *CDC Director Statement on Pfizer’s Use of COVID-19 Vaccine in Adolescents Age 12 and Older* (May 12, 2021), <https://www.cdc.gov/media/releases/2021/s0512-advisory-committee-signing.html>.

<sup>27</sup> Pegden, *Weighing myocarditis cases, ACIP failed to balance the harms vs benefits of 2nd doses* (June 24, 2021), <https://medium.com/@wpegden?p=d7d6b3df7cfb>.

<sup>28</sup> CDC, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States*, <https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html>.

to polysorbate or to other non-COVID vaccines and injectable therapies. Patients with precautions are encouraged to consult with an allergist or immunologist before getting the vaccine.<sup>29</sup>

32. Some clinical evidence indicates that those who have recovered from COVID-19 could have a *heightened* risk of adverse effects compared with those who have never had the virus.<sup>30,31</sup> This may be because vaccine reactogenicity after the first dose is higher among those with prior immunity.<sup>32</sup> Despite this evidence, the CDC does not list prior immunity as a contraindication to vaccination, though it does recommend waiting 90 days after recovering before vaccination.

33. Though the CDC recommends the COVID vaccines for all adults, because they are novel—available for use in the population for only 9-10 months—there remain open questions about their use in special populations because they have not been tested in subgroups of patients with clinical conditions. For instance, in a comprehensive discussion of the biology of immune responses to vaccination (including COVID-19 vaccination) for patients with Multiple Sclerosis published in June 2021, Coyle et al. emphasize the lack of high-quality evidence available to guide recommendations for MS patients. They point out that three of six medical societies that focus on MS patients have failed to make a recommendation on whether

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<sup>29</sup> CDC, *Interim Clinical Considerations for Use of COVID-19 Vaccines Currently Approved or Authorized in the United States. Contraindications and Precautions*, Accessed Oct. 1, 2021, [https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fvaccines%2Fcovid-19%2Finfo-by-product%2Fclinical-considerations.html#Contraindications](https://www.cdc.gov/vaccines/covid-19/clinical-considerations/covid-19-vaccines-us.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fvaccines%2Fcovid-19%2Finfo-by-product%2Fclinical-considerations.html#Contraindications)

<sup>30</sup> Alexander G. Mathioudakis, et al., *Self-Reported Real-World Safety and Reactogenicity of COVID-19 Vaccines: A Vaccine Recipient Survey*, 11 LIFE 249 (Mar. 2021).

<sup>31</sup> Cristina Menni, *Vaccine side-effects and SARS-CoV-2 infection after vaccination in users of the COVID symptom study app in the UK: a prospective observational study*, 21 LANCET INFECTIOUS DISEASES 939-49 (July 2021) (finding that “Systemic side-effects were more common (1.6 times after the first dose of ChAdOx1 nCoV-19 [i.e., AstraZeneca vaccine] and 2.9 times after the first dose of BNT162b2 [i.e., Pfizer/BioNTech vaccine]) among individuals with previous SARS-CoV-2 infection than among those without known past infection. Local effects were similarly higher in individuals previously infected than in those without known past infection (1.4 times after the first dose of ChAdOx1 nCoV-19 and 1.2 times after the first dose of BNT162b2).”).

<sup>32</sup> Florian Krammer, et al., *Robust spike antibody responses and increased reactogenicity in seropositive individuals after a single dose of SARS-CoV-2 mRNA vaccine*, MEDRXIV (Feb. 1, 2021), <https://www.medrxiv.org/content/10.1101/2021.01.29.21250653v1> (concluding that “vaccine reactogenicity after the first dose is substantially more pronounced in individuals with pre-existing immunity.” The authors note that “quantitative serological assays that measure antibodies to the spike protein could be used to screen individuals prior to vaccination,” which would “limit the reactogenicity experienced by COVID-19 survivors.”).

MS patients should receive the COVID-19 vaccines. They and other authorities<sup>33</sup> emphasize the need for personalized decision making based on the clinical condition of the MS patient:<sup>34</sup>

Currently, three COVID-19 vaccines have been granted emergency use authorization in the USA on the basis of promising interim findings of ongoing trials. Because analyses of these vaccines in people with MS are not available, decisions regarding COVID-19 vaccination and DMT choice should be informed by data and expert consensus, and personalized with considerations for disease burden, risk of infection, and other factors.

34. The paucity of data on the proper use of the COVID-19 vaccine on patients with particular conditions is not limited to Multiple Sclerosis. For instance, for patients with alpha-1 antitrypsin deficiency (AATD), an inherited disorder that predisposes a patient to enzymatic tissue injuries and inflammation—especially in the lungs—there is no clinical data whatsoever regarding the safety and efficacy of the COVID-19 vaccines. Writing in *Lancet Respiratory Medicine*, Yang and Zhao hypothesize “individuals with AATD might derive limited benefit from the current COVID-19 vaccines.” They note that “even though vaccination has been prioritized to more vulnerable populations (such as people with AATD), individuals with AATD are usually not included in clinical trials (as reported in ClinicalTrials.gov), and thus the effectiveness and adverse event profile of vaccination in this population are unknown.”<sup>35</sup> The same can be said for many other patients with chronic diseases, for whom the decision whether to vaccinate should be an individual decision made in consultation with their physicians, rather than coerced by a firm or the government.

#### **IV. Asymptomatic Disease Spread is Rare.**

35. In this section, I discuss the evidence regarding the asymptomatic transmission of disease. This is important because if asymptomatic disease spread is rare, the DOE can keep its employees and students safe from COVID disease spread by the simple expedient of requiring workers who have not been

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<sup>33</sup> Ciotti JR, Valtcheva MV, Cross AH. Effects of MS disease-modifying therapies on responses to vaccinations: A review. *Mult Scler Relat Disord*. 2020 Oct;45:102439. doi: 10.1016/j.msard.2020.102439. Epub 2020 Aug 1. PMID: 32769063; PMCID: PMC7395588.

<sup>34</sup> Coyle PK, Gocke A, Vignos M, Newsome SD. Vaccine Considerations for Multiple Sclerosis in the COVID-19 Era. *Adv Ther*. 2021;38(7):3550-3588. doi:10.1007/s12325-021-01761-3

<sup>35</sup> Yang C, Zhao H. COVID-19 vaccination in patients with  $\alpha$ 1-antitrypsin deficiency. *Lancet Respir Med*. 2021;9(8):818-820. doi:10.1016/S2213-2600(21)00271-X

vaccinated (and even those who have been) to report daily through an online app whether they are experiencing symptoms consistent with COVID-19. Those who are experiencing symptoms would be asked to stay at home from work and get tested; returning to work only if the test is negative.

36. The best evidence on how frequently asymptomatic disease spread occurs comes from a large meta-analysis of 54 studies from around the world of within-household spread of the virus—that is, from an infected person to someone else living in the same home (Madewell et al. 2020). This study represents the most comprehensive survey of the vast empirical literature on asymptomatic spread. At home, *of course*, none of the safeguards often recommended in public spaces outside of home (such as masking and social distancing) are typically applied. Because the study focuses on a single setting (household transmission), it is not subject to the same problems of that other studies on this topic might have. In particular, by focusing on a homogenous setting where few safeguards exist, the estimate represents an upper bound on the frequency that someone positive for the virus but with no symptoms (and hence either pre-symptomatic or asymptomatic) may spread the virus to close contacts. The primary result is that symptomatic patients passed on the disease to household members in 18% of instances. In comparison, those infected but without symptoms (asymptomatic and pre-symptomatic patients) passed on the infection to household members in only 0.7% of instances.<sup>36</sup>

37. There is some additional evidence. A large study of 10 million residents of Wuhan, China, all tested for the presence of the virus, found a total of 300 cases, all asymptomatic. A comprehensive contact tracing effort identified 1,174 close contacts of these patients, none of whom tested positive for the virus.<sup>37</sup> This is consistent with a vanishingly low level of asymptomatic spread of the disease. Given the late date of the study relative to the date of the large first wave of infections in Wuhan, it is likely that none of the

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<sup>36</sup> Madewell ZJ, Yang Y, Longini IM, Halloran ME, Dean NE. Household Transmission of SARS-CoV-2: A Systematic Review and Meta-analysis. *JAMA Netw Open*. 2020;3(12):e2031756. doi:10.1001/jamanetworkopen.2020.31756

<sup>37</sup> Cao, S., Gan, Y., Wang, C. et al. Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China. *Nat Commun* 11, 5917 (2020). <https://doi.org/10.1038/s41467-020-19802-w>

300 asymptomatic cases were likely ever to develop symptoms. A separate, smaller meta-analysis similarly found that asymptomatic patients are much less likely to infect others than symptomatic patients.<sup>38</sup>

38. By contrast with asymptomatic patients, symptomatic patients are very likely to infect others with the virus during extended interactions, especially in the initial period after they develop symptoms. A careful review of 79 studies on the infectivity of COVID-19 patients found that even symptomatic patients are infectious for only the first eight days after symptom onset, with no evidence of live virus detected beyond day nine of illness.<sup>39</sup>

39. Much of the support for the idea that asymptomatic disease spread is common comes from theoretical modeling work from earlier in the epidemic (including some of my own published research<sup>40</sup>), predicting some level of asymptomatic disease spread. However, this sort of modeling work does not represent actual evidence that asymptomatic spread is common in the real world, since they rely on many modeling assumptions that are impossible to check.

40. There is at least one prominent real-world study that some have used to argue that asymptomatic disease spread is common. A meta-analytic study by Qiu et al. (2021) distinguishes the likelihood of disease spread by a pre-symptomatic individual the likelihood of spread by an asymptomatic individual who never develops symptoms.<sup>41</sup> A primary finding of this study is that, while an asymptomatic individual who never develops symptoms is exceedingly unlikely to spread the disease, individuals who are not symptomatic now but will eventually develop symptoms are efficient at infecting others during their pre-symptomatic state. One problematic interpretation of this result is that the relative efficiency of disease

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<sup>38</sup> Buitrago-Garcia D, Egli-Gany D, Counotte MJ, Hossmann S, Imeri H, Ipekci AM, Salanti G, Low N. Occurrence and transmission potential of asymptomatic and presymptomatic SARS-CoV-2 infections: A living systematic review and meta-analysis. *PLoS Med.* 2020 Sep 22;17(9):e1003346. doi: 10.1371/journal.pmed.1003346. PMID: 32960881; PMCID: PMC7508369.

<sup>39</sup> Cevik M, Tate M, Lloyd O et al. SARS-CoV-2, SARS-CoV, and MERS-CoV viral load dynamics, duration of viral shedding, and infectiousness: a systematic review and meta-analysis. *The Lancet Microbe.* Nov. 19, 2020. DOI:[https://doi.org/10.1016/S2666-5247\(20\)30172-5](https://doi.org/10.1016/S2666-5247(20)30172-5)

<sup>40</sup> Peirlinck M, Linka K, Costabal FS, Bhattacharya J, Bendavid E, Ioannidis J, Kuhl E (2020), “Visualizing the Invisible: The Effect of Asymptomatic Transmission on the Outbreak Dynamics of COVID-19” *Computer Methods in Applied Mechanics and Engineering.* 372: 1 Dec. 2020, 113410. <https://doi.org/10.1016/j.cma.2020.113410>.

<sup>41</sup> Qiu X, Nergiz AI, Maraolo AE, Bogoch II, Low N, Cevik M. The role of asymptomatic and pre-symptomatic infection in SARS-CoV-2 transmission-a living systematic review. *Clin Microbiol Infect.* 2021 Apr;27(4):511-519. doi: 10.1016/j.cmi.2021.01.011. Epub 2021 Jan 21. PMID: 33484843; PMCID: PMC7825872.

spread by pre-symptomatic individuals militates in favor of lockdown policies and mass asymptomatic testing. This interpretation is incorrect.

41. Distinguishing between an infected individual who will eventually develop symptoms and an infected individual who will never develop symptoms is difficult without the passage of time. Infected individuals who will develop symptoms tend to do so within a very short interval (two to three days) after first becoming infected. Meanwhile, infected individuals who never develop symptoms may test positive with the PCR test for the virus for an extended period. These two groups of observationally identical individuals are mixed in the population in some unknown frequency that may change over time. Given this information constraint, from a policy point of view, the relevant question is how likely it is that an infected individual without symptoms (whether pre-symptomatic or purely asymptomatic) will spread the disease to close contacts. The Madewell et al. (2020) study provides an answer (less than 0.7% secondary attack rate in household settings), while the Qiu et al. (2021) study does not. Additionally, unlike the Madewell et al. (2020) study, the Qiu et al. (2021) study does not concentrate its focus on a homogenous environment (households), which makes the results it reports harder to interpret.

42. In summary, asymptomatic individuals are an order of magnitude less likely to infect others than symptomatic individuals, even in intimate settings such as people living in the same household where people are much less likely to follow social distancing and masking practices that they follow outside the household. Spread of the disease in less intimate settings by asymptomatic individuals—including in the context of schools—is likely to be even less likely than in the household.

#### **V. There Are Multiple Safe Alternatives to Indefinite Leave That Can Be Offered to DOE teachers and staff**

43. Can the DOE keep its employees and students safe if it does not mandate that all its employees be vaccinated? The answer is a definitive yes.

44. First, and most obviously, the DOE could exempt all employees who have recovered from COVID infection from a vaccine requirement. The evidence provided in this declaration shows that such



employees pose as least as little—and likely less—risk of spreading the SARS-CoV-2 virus than fully vaccinated workers who are not among the set of COVID-recovered patients.

45. Second, the DOE could adopt a robust sick policy, requiring that workers who have not been vaccinated and who show symptoms consistent with COVID-19 infection stay at home from work, returning to work only once they have had a negative COVID-19 antigen test result. This could be implemented for instance, by requiring workers to complete an online symptom self-check each day before coming to work. The DOE would provide workers with a supply of rapid antigen tests, which are easy to self-administer at home, provide results within 30 minutes, and are highly accurate for detecting whether a patient is infectious.<sup>42, 43</sup> Alternatively, the DOE could require that any unvaccinated workers obtain those tests themselves to keep its own costs down. If the DOE's goal is to prevent the spread of Covid-19, symptom checking should be required of all employees, whether vaccinated or not, since the evidence shows that vaccination does not eliminate the probability of infection or transmission and may provide less protection versus infection than immunity induced by prior COVID infection.

46. For this symptom checking policy to be effective in reducing the risk of disease spread, it must be the case that symptomatic workers are substantially more likely to infect others than workers who are infected (that is, have evidence of the virus in the nasopharynx), but who have no symptoms. Fortunately, as we have seen in the previous section, the best empirical evidence shows that the probability that an asymptomatic individual spreading the disease is rare.

47. Third, the DOE could implement a program of weekly PCR testing of asymptomatic workers to guard against the risk (admittedly low) of a worker coming to work with an asymptomatic infection. Many other organizations have implemented a testing regimen like this, including my home institution, Stanford University. Workers could take the test in the workplace – there are versions of the test available

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<sup>42</sup> Surasi K, Cummings KJ, Hanson C, Morris MK, Salas M, Seftel D, et al. Effectiveness of Abbott BinaxNOW rapid antigen test for detection of SARS-CoV-2 infections in outbreak among horse racetrack workers, California, USA. *Emerg Infect Dis*. 2021 Nov [date cited]. <https://doi.org/10.3201/eid2711.211449>

<sup>43</sup> Homza M, Zelena H, Janosek J, et al. Covid-19 antigen testing: better than we know? A test accuracy study. *Infect Dis (Lond)*. 2021;53(9):661-668. doi:10.1080/23744235.2021.1914857



that can be self-administered. One key detail: if implemented, both vaccinated and unvaccinated workers should be required to provide a weekly test, since both can have asymptomatic SARS-CoV-2 infections.

48. In sum, as a general matter, there are multiple risk mitigation strategies short of a mandate or leave without pay that can be implemented to accommodate religious and medical exemptions safely.

#### **VI. Variants Do Not Alter the Conclusion that Accommodations Can Be Allowed Without Risk to Public Safety.**

49. Since its spread through the human population, the SARS-CoV-2 virus—an RNA virus—has been mutating, including some forms that are likely more transmissible than the original wild-type virus that emerged from Wuhan, China, in 2019. As of the date of this declaration, the delta variant is the dominant form of the SARS-CoV-2 virus worldwide. The virus will continue to mutate as it continues to spread. However, the possibility of such a mutation does not alter the conclusion that accommodations can be allowed without risk to public safety.

50. The key point is that the mutant variants do not escape the immunity provided by prior infection with the wild-type virus or vaccination.<sup>44,45,46</sup> This is true of the delta variant as well. In a study of a large population of patients in Israel, vaccinated people who had not been previously infected were 13 times more likely to experience a breakthrough infection with the delta variant than patients who had recovered from COVID.<sup>47</sup> Although reinfection can occur, people who have been previously infected by the virus are

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<sup>44</sup> Alison Tarke, A., Sidney, J., Methot, N., Zhang, Y., Dan, J. M., Goodwin, B., Rubiro, P., Sutherland, A., da Silva Antunes, R., Frazier, A., Rawlings, S. A., Smith, D. M., Peters, B., Scheuermann, R. H., Weiskopf, D., Crotty, S., Grifoni, A., & Sette, A., *Negligible impact of SARS-CoV-2 variants on CD4 + and CD8 + T cell reactivity in COVID-19 exposed donors and vaccinees*, BIORXIV, 2021.02.27.433180 (2021), <https://doi.org/10.1101/2021.02.27.433180>.

<sup>45</sup> Wu, K., Werner, A. P., Moliva, J. I., Koch, M., Choi, A., Stewart-Jones, G. B. E., Bennett, H., Boyoglu-Barnum, S., Shi, W., Graham, B. S., Carfi, A., Corbett, K. S., Seder, R. A., & Edwards, D. K., *mRNA-1273 vaccine induces neutralizing antibodies against spike mutants from global SARS-CoV-2 variants*, BIORXIV: THE PREPRINT SERVER FOR BIOLOGY, 2021.01.25.427948 (2021), <https://doi.org/10.1101/2021.01.25.427948>.

<sup>46</sup> Redd, A. D., Nardin, A., Kared, H., Bloch, E. M., Pekosz, A., Laeyendecker, O., Abel, B., Fehlings, M., Quinn, T. C., & Tobian, A. A., *CD8+ T cell responses in COVID-19 convalescent individuals target conserved epitopes from multiple prominent SARS-CoV-2 circulating variants*, MEDRXIV: THE PREPRINT SERVER FOR HEALTH SCIENCES, 2021.02.11.21251585 (2021), <https://doi.org/10.1101/2021.02.11.21251585>.

<sup>47</sup> Sivan Gazit, Roei Shlezinger, Galit Perez, et al. Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections. medRxiv. August 25, 2021. doi: <https://doi.org/10.1101/2021.08.24.21262415>

unlikely to have a severe outcome (hospitalization or death) after exposure to a variant virus (see section I above for citations). A variant circulating in the population thus poses little additional risk of hospital overcrowding or excess mortality due to viral infection.

51. The dissemination of vaccines that protect against hospitalizations and deaths upon COVID-19 infection throughout the older population in the United States has partially decoupled the growth in COVID-19 cases from COVID-19 mortality. Vaccinated people can still be infected but much less commonly have severe symptoms in response to infection. Throughout last year, a rise in cases was inevitably accompanied by an increase in deaths with a two-to-three-week lag. However, during this most recent wave, in Sweden and the U.K., where vaccines have been provided to a large portion of the vulnerable elderly population and more, there have been “relatively few hospitalisations and deaths” in those countries.<sup>48</sup> Because of the success of the American vaccination effort among the vulnerable elderly, COVID-19 cases and COVID-19 deaths are at least partially decoupled, so the public danger from the continuing spread of COVID-19 disease is less than it was last year when the vaccine was not available.

**VII. The Presence of Lingering Post-Viral Infection Symptoms in a Subset of Recovered COVID Patients (“Long COVID”) Does Not Alter the Conclusion that Accommodations Pose No Threat to Public Safety.**

52. Some analysts and politicians have used the possibility that a fraction of patients who recover from COVID infection will experience lingering symptoms to justify unyielding vaccine mandates. Long COVID, as this phenomenon is called, includes a complex set of clinical outcomes with a poorly understood link to acute COVID infection.<sup>49</sup> One cross-sectional study found that about 30% of recovered COVID patients reported at least one symptom months after recovery, with fatigue and anosmia (loss of sense of smell) by far the most common.<sup>50</sup> A separate study with a more convincing longitudinal methodology, by

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<sup>48</sup> Jay Bhattacharya, Martin Kulldorff, and Sunetra Gupta, *Sweden’s Lessons for the UK’s Third Wave*, THE SPECTATOR (July 12, 2021), <https://www.spectator.co.uk/article/sweden-shows-that-the-uk-s-third-wave-won-t-sting>.

<sup>49</sup> Nalbandian, A., Sehgal, K., Gupta, A. et al., *Post-acute COVID-19 syndrome*, NAT MED 27, 601–615 (2021), <https://doi.org/10.1038/s41591-021-01283-z>.

<sup>50</sup> Logue JK, Franko NM, McCulloch DJ, et al., *Sequelae in Adults at 6 Months After COVID-19 Infection*, JAMA NETW OPEN (2021);4(2):e210830, doi:10.1001/jamanetworkopen.2021.0830.

contrast, concluded that 2.3% of patients experienced such symptoms three months after recovery.<sup>51</sup> Patients who suffered a more severe acute course of COVID, including hospitalization, were more likely to report lingering symptoms after recovery.<sup>52</sup> A study of children who recovered from COVID found the same rate of long COVID symptoms as a control group of children who had no serological evidence of prior COVID infection.<sup>53</sup> Some analysts have noted the similarity between “long COVID” symptoms and other functional somatic syndromes that sometimes occur after other viral infections and other triggers (and sometimes with no identifiable etiology).<sup>54</sup>

53. To summarize, as with other viruses, long COVID symptoms occur in a minority of patients who recover from COVID and pose a real burden on patients who suffer from it. However, this fact does not alter the logic of my point about accommodations. On the contrary. After suffering through a COVID infection, with or without long COVID, such individuals should not be forced to also endure common, but mild, vaccine adverse reactions or risk rare—but serious—adverse reactions. Moreover, the successful vaccine rollout in the United States—where every teenager and adult has free access to the vaccines—addresses the problem of long COVID, just as it addresses COVID-associated mortality.

**VIII. The CDC’s Recommendation for Vaccination of Recovered COVID Patients Applies with Equal Force to Those Who Have Been Previously Vaccinated, Whose Protection Against Infection Wanes Within a Few Months After Vaccination.**

54. The CDC, in a FAQ section of a website encouraging vaccination, provides the following advice to previously recovered patients:<sup>55</sup>

Yes, you should be vaccinated regardless of whether you already had COVID-19. That’s because experts do not yet know how long you are protected from

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<sup>51</sup> Sudre, C.H., Murray, B., Varsavsky, T. et al., *Attributes and predictors of long COVID*, NAT MED 27, 626–631 (2021), <https://doi.org/10.1038/s41591-021-01292-y>.

<sup>52</sup> Arnold DT, Hamilton FW, Milne A, et al., *Patient outcomes after hospitalisation with COVID-19 and implications for follow-up: results from a prospective UK cohort*, THORAX, 76:399-401 (2021).

<sup>53</sup> Thomas Radtke, Agne Ulyte, Milo A Puhan, Susi Kriemler, *Long-term symptoms after SARS-CoV-2 infection in school children: population-based cohort with 6-months follow-up*, MEDRXIV (2021), <https://doi.org/10.1101/2021.05.16.21257255>.

<sup>54</sup> Ballering A, Olde Hartman T, Rosmalen J, *Long COVID-19, persistent somatic symptoms and social stigmatization*, J EPIDEMIOLOG COMMUNITY HEALTH (2021).

<sup>55</sup> US Centers for Disease Control (2021), *Frequently Asked Questions About COVID-19 Vaccination*. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>.

getting sick again after recovering from COVID-19. Even if you have already recovered from COVID-19, it is possible—although rare—that you could be infected with the virus that causes COVID-19 again. Studies have shown that vaccination provides a strong boost in protection in people who have recovered from COVID-19. Learn more about why getting vaccinated is a safer way to build protection than getting infected.

55. The text of this advice by the CDC does not address any of the scientific evidence included here about the lack of necessity for recovered COVID patients to be vaccinated. While it is true that I do not know how long-lasting natural immunity after recovery lasts, the immunological evidence to date suggests that protection against disease will last for years.<sup>56</sup> Uncertainty over the longevity of immunity after recovery is a specious reason for not exempting COVID-recovered patients from vaccination mandates, since the same can be said about vaccine mediated immunity. I do not know how long it will last either, and there is no reason to believe it provides longer lasting or more complete immunity than recovery from COVID.

56. Similarly, just as reinfections are possible though rare after COVID recovery, breakthrough infections are possible after vaccination, as the CDC's team investigating vaccine breakthrough infections itself recognizes.<sup>57</sup> On the same CDC FAQ webpage I cite above,<sup>58</sup> the CDC writes about vaccine mediated immunity, "We don't know how long protection lasts for those who are vaccinated."

57. The CDC's main concern in this FAQ seems to be to help people understand that it is safer to attain immunity against SARS-CoV-2 infection via vaccination rather than via infection. This is a point not in dispute. Rather, the question is whether someone who *already* has been infected and recovered will benefit on net from the additional protection provided by vaccination. On this point, the CDC's statement in the FAQ is non-responsive and ignores the scientific evidence. Here again, the possibility of reinfection

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<sup>56</sup> Patel N (2021) Covid-19 Immunity Likely Lasts for Years. MIT Technology Review. January 6, 2021. <https://www.technologyreview.com/2021/01/06/1015822/covid-19-immunity-likely-lasts-for-years/>.

<sup>57</sup> CDC COVID-19 Vaccine Breakthrough Case Investigations Team (2021) COVID-19 Vaccine Breakthrough Infections Reported to CDC — United States, January 1–April 30, 2021. May 28, 2021. <https://www.cdc.gov/mmwr/volumes/70/wr/mm7021e3.htm>.

<sup>58</sup> US Centers for Disease Control (2021) Frequently Asked Questions About COVID-19 Vaccination. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>.

does not alter the conclusion that, especially for those who have already recovered from COVID, accommodations can be allowed without threatening public safety.

**IX. Fetal Cell Lines Were Used to Develop the Johnson & Johnson Vaccine and Were Used to Test the Two mRNA Vaccines.**

58. Many people of religious faith have a deeply held objection to benefitting from abortion of a human fetus. At the same time, much modern biological research, development, and production employs fetal cell lines that are derived from an abortion that occurred decades ago. The fetal tissue used in biological work is not the actual tissue from the aborted baby—it is a clone of cells sampled from that tissue. Nevertheless, many religious people object to the personal use of any product that involved the use of these fetal tissue cell lines. In the context of the COVID-19 vaccines, fetal tissue lines were used in the research and testing of both the mRNA vaccines (Pfizer and Moderna) and the adenovector vaccine (Johnson & Johnson).

59. While aborted fetal tissue is not used in the production of the mRNA vaccines, they are used in the production of the Johnson & Johnson vaccine.<sup>59</sup> While some religious authorities have stated that the cell lines used in the development, production, and testing of these vaccines are remote enough from the act of abortion that it is permissible for faithful people to be vaccinated with these vaccines,<sup>60</sup> other religious authorities disagree<sup>61</sup> reflecting longstanding objections to vaccines derived using aborted tissue lines.<sup>62</sup> Ultimately, it is a matter of individual conscience for each person to decide whether the benefits derived from the vaccines in terms of protection against severe COVID disease should be eschewed in light of sincere moral qualms about deriving that benefit as the ultimate fruit of an action that the faithful person deems sinful. Science cannot resolve this question as a matter of law.

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<sup>59</sup> Zimmerman RK. Helping patients with ethical concerns about COVID-19 vaccines in light of fetal cell lines used in some COVID-19 vaccines. *Vaccine*. 2021;39(31):4242-4244. doi:10.1016/j.vaccine.2021.06.027

<sup>60</sup> Giangrave C and Jenkins J. As US Bishops Reject Exemptions, Pope Francis Dubs COVID-19 Vaccine ‘Act of Love’. Religious News Service. August 18, 2021. <https://religionnews.com/2021/08/18/pope-francis-declares-getting-a-covid-19-vaccine-an-act-of-love/>

<sup>61</sup> John Piper. Can I Take a Vaccine Made from Aborted Babies? Desiring God. January 4, 2021. <https://www.desiringgod.org/interviews/can-i-take-a-vaccine-made-from-aborted-babies>

<sup>62</sup> Pelčić G, Karačić S, Mikirtichan GL, et al. Religious exception for vaccination or religious excuses for avoiding vaccination. *Croat Med J*. 2016;57(5):516-521. doi:10.3325/cmj.2016.57.516

## **X. Conclusion**

60. A fundamental ethical principle guiding the practice of medicine is that any medical intervention, whether surgical, pharmacological, or a vaccine, should be recommended only if it is deemed medically necessary. Any medical procedure, including vaccination, involves risk. No medical procedure is 100% safe, especially those involving a new vaccine, which by definition has not been studied for long-term adverse side effects. For this reason, it is a fundamental principle of medical ethics that the risks of the procedure be balanced against the potential benefits.

61. As I established earlier, based on the scientific evidence to date, those who have recovered from a SARS-CoV-2 infection possess immunity as robust and durable as that acquired through vaccination. The existing clinical literature overwhelmingly indicates that the protection afforded to the individual and community from natural immunity is as effective and durable as the efficacy levels of the most effective vaccines to date. There is no good reason for those who have such protection to be vaccinated. At the very least, the decision should be left to them, in conjunction with their doctors, and without coercion from their employers.

62. In sum, based on my analysis of the existing medical and scientific literature, any policy mandating vaccinations that does not recognize natural immunity is irrational, arbitrary, and counterproductive to community health.<sup>63</sup>

63. In this context, additional factors counsel against a finding that the exemptions will create a significant risk of substantial harm to co-workers and students.

64. The students, who constitute the majority of the population, are largely unvaccinated. Even if herd immunity were conceivable through vaccination against SARS-CoV-2, and all staff were vaccinated against SARS-CoV-2, the majority of the school population, the students, are unvaccinated, rendering herd immunity impossible in that setting. The reservoir of unvaccinated students already constitutes too large a

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<sup>63</sup> Jay Bhattacharya, Sunetra Gupta, & Martin Kulldorff, *The Beauty of Vaccines and Natural Immunity*, SMERCONISH NEWSLETTER (June 4, 2021), <https://www.smerconish.com/exclusive-content/the-beauty-of-vaccines-and-natural-immunity>.

percent of the population to stop the spread of disease in the school community regardless of how many teachers and staff are immune.

65. But Children, luckily, are at very low risk of severe disease. If they are infected, either in the school or outside of school, they are not at substantial risk of developing severe symptoms. Similarly, an unvaccinated DOE employee poses little danger to co-workers, the overwhelming majority of whom are vaccinated and thus protected from severe symptoms if they have are infected.

66. Now that every American adult and teenager has free access to the vaccines, the case for a vaccine mandate is even weaker than it once was. There is no good public health case for DOE to require proof of vaccination for employees who have recovered from Covid-19. Since the successful vaccination campaign already protects the vulnerable adult population in schools, the unvaccinated—especially recovered COVID patients—pose a vanishingly small threat to their vaccinated coworkers. They are protected by an effective vaccine that dramatically reduces the likelihood of hospitalization or death after infections to near zero and natural immunity, which provides benefits that are at least as strong and may well be stronger.

67. In conclusion, the emerging evidence from the medical literature finds that COVID-recovered patients have robust and long lasting immunity against SARS-CoV-2 reinfection; that this immunity against infection is better than vaccinated patients who have never had COVID; that the vaccines—though safe for most people—do sometimes cause known severe side effects; that for patients with particular chronic conditions, including Multiple Sclerosis, the data on the safety and efficacy of the vaccine is still uncertain; that the development of the mRNA vaccines and the production of the adenovirus vector vaccines both involved the use of fetal tissue cell lines, to which some people have sincere religious objections; and finally that there exist inexpensive safe accommodations that the DOE can adopt which would protect both employees and customers against SARS-CoV-2 infection without terminating unvaccinated employees.

68. I declare under penalty of perjury under the laws of the United States of America that, to the best of my knowledge, the foregoing is true and correct this 3<sup>rd</sup> day of October, 2021, Stanford, California.

Respectfully submitted,

A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes, likely representing the name Jay Bhattacharya.

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Dr. Jay Bhattacharya, MD, Ph.D.  
Professor of Health Policy  
Stanford University



**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kate, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

DECLARATION OF  
DR. MARTIN MAKARY

Civil Action No. 1:21-cv-07863

STATE OF  
COUNTY OF

)  
) ss.:  
)

**Martin Makary, M.D., M.P.H.** declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I was asked to provide a declaration providing my opinion, as an expert witness, on points related to a direct threat analysis in this case.
2. Some of my background and qualifications are below.
3. I have a master's in public health from the Harvard School of Public Health and am a licensed physician.
4. I am a Professor at the Johns Hopkins University School of Medicine where I have been teaching and conducting research for nineteen years.
5. In addition, I manage patients where issues of infection control are paramount, particularly among immunosuppressed patients after surgery.
6. I have published over 250 scientific articles and served in leadership in the World Health Organization Safe Surgery Saves Lives initiative.

7. I have not and will not receive any financial or other compensation for writing this Declaration. Nor have I received compensation for preparing declarations or reports or for testifying in *any* other case related to the Covid-19 pandemic. I have no financial or other ties to the Plaintiffs or the attorneys in this suit. My participation has been motivated solely by my commitment to public health.
8. Those who choose not to get vaccinated may be making a poor health decision at their own individual risk. However, they are unlikely to pose a significant public health threat to those around them in a school setting.
9. The risk of harm to an immune person is minimal. Vaccination has been shown to be highly effective in preventing severe Covid disease and in downgrading the severity of illness.
10. Similarly, the risk to children is very low. Most children experience very mild symptoms or no symptoms. For example, the incidence of hospitalization from COVID-19 in kids ages 5 to 17 was 0.3 per million for the week ending July 24, 2021, according to the Centers for Disease Control and Prevention<sup>1</sup>.
11. The infection fatality rate of Covid illness in Covid immune people is lower than the infection fatality rate of influenza in people who have not received the influenza vaccine.
12. Requiring the vaccine in people who are already immune with natural immunity is excessive because natural immunity is at least as effective as vaccinated immunity in several studies. In the largest study conducted worldwide, natural

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<sup>1</sup> [https://gis.cdc.gov/grasp/COVIDNet/COVID19\\_3.html](https://gis.cdc.gov/grasp/COVIDNet/COVID19_3.html)

immunity was approximately 27-times more effective than vaccinated immunity in preventing symptomatic Covid infection.<sup>2</sup>

13. This affirmed a June Cleveland Clinic study of health-care workers (who are often exposed to the virus), in which none who had previously tested positive for the Covid got reinfected.<sup>3</sup> The study authors concluded that “individuals who have had SARS-CoV-2 infection are unlikely to benefit from covid-19 vaccination.”
14. Similarly in May, a Washington University study reported that even a mild covid infection resulted in long-lasting immunity.<sup>4</sup>
15. The emerging data from these and multiple other studies suggest that natural immunity is as effective or better than vaccine-induced immunity in terms of clinical outcomes in the time studied.
16. Some public health officials cite a CDC study suggesting that vaccinated immunity is more effective than natural immunity, but the study is limited because it only examined a 2-month period in one state and did not report whether people who developed covid had any symptoms. This was the only slice of data reported by the CDC to my knowledge, despite the CDC having data on many states for a much longer period of time.

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<sup>2</sup> Sivan Gazit, Roei Shlezinger, Galit Perez, Roni Lotan, Asaf Peretz, Amir BenTov, Dani Cohen, Khitam Muhsen, Gabriel Chodick, Tal Patalon. Comparing SARS-CoV-2 natural immunity to vaccine-induced immunity: reinfections versus breakthrough infections. medRxiv August 24, 2021; DOI: [10.1101/2021.08.24.21262415](https://doi.org/10.1101/2021.08.24.21262415)

<sup>3</sup> Nabin K. Shrestha, Patrick C. Burke, Amy S. Nowacki, Paul Terpeluk, Steven M. Gordon. Necessity of COVID-19 vaccination in previously infected individuals. medRxiv. June 1, 2021. DOI: [10.1101/2021.06.01.21258176](https://doi.org/10.1101/2021.06.01.21258176)

<sup>4</sup> Turner JS, Kim W, Kalaidina E, Goss CW, Rauseo AM, Schmitz AJ, Hansen L, Haile A, Klebert MK, Pusic I, O'Halloran JA, Presti RM, Ellebedy AH. SARS-CoV-2 infection induces long-lived bone marrow plasma cells in humans. Nature. May 24, 2021. DOI: [10.1038/s41586-021-03647-4](https://doi.org/10.1038/s41586-021-03647-4)



17. There is high population immunity in many parts of the U.S. This stems from a combination of natural immunity<sup>5</sup> and vaccinated immunity.
18. Roughly a third to half of Americans who are unvaccinated have natural immunity, based on an analysis of California residents<sup>6</sup>, and the estimate may be higher in people who worked throughout the pandemic. The prevalence of natural immunity increases with each passing day.
19. Medical exemptions to vaccine mandates should not be pre-defined to be overly narrow. There are multiple valid reasons why a clinician may not recommend a full 2-dose vaccine regimen to an individual, depending on their clinical situation and history.
20. Mandating vaccines for "every living, walking American" is, as of now, not well-supported by science. Moreover, an indiscriminate vaccination policy may result in unintended harm.
21. Clinical studies show, for example, that boys and men under the age of twenty three face a risk of myocarditis after the second vaccine dose that may be as high as 1 per 7000 males. Myocarditis may lead to death. The true incidence of this known vaccine-related complications is not fully understood with reliable population studies.
22. For any male employees under the age of 23, an exemption to avoid the second vaccine dose can be supported by the science.

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<sup>5</sup> <https://www.wsj.com/articles/the-power-of-natural-immunity-11623171303>

<sup>6</sup> <https://www.sfchronicle.com/health/article/More-than-a-third-of-Californians-recently-tested-16015721.php>

23. Currently, we do not have robust and highly-reliable system for actively tracking adverse reactions to the vaccine in young people. As a result, the CDC may not be accurately capturing the extent of rare adverse reactions in this population.

A handwritten signature in cursive script, reading "Martin Makary", written in black ink. The signature is positioned above a horizontal line.

DR. MARTIN MAKARY

M.D., M.P.H.

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kane, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

DECLARATION OF MICHAEL KANE

Civil Action No. 1:21-cv-07863

STATE OF NEW YORK                     )  
  ) ss.:  
COUNTY OF NASSAU                 )

**MICHAEL KANE**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

- 1) My name is Michael Kane.
- 2) I have worked in the New York City public school system for over 14 years. My current position is as an appointed Special Education Teacher in Jamaica, Queens.
- 3) I have religious objections to vaccines, and my faith does not allow me to take a covid-19 vaccine.
- 4) In addition, in February of 2020 – just 3 weeks before the “COVID lockdown” in NYC, my entire family suffered from classic covid-like symptoms. I believe my entire family has been infected by the SARS CoV-2 virus and recovered though I have not had an antibody test yet.
- 5) On or about September 18<sup>th</sup> I submitted an application for a religious exemption to vaccination through the NYC DOE SOLAS portal and was quickly denied with a form letter, boilerplate response.

- 6) I know for a fact multiple teachers and educators received the identical denial.
- 7) I know this because I am the founder of the group NY TEACHERS FOR CHOICE and receive hundreds of emails everyday from educators across NYC.
- 8) Dozens of teachers sent me their denials which were identical to mine. My denial letter, like all the others, stated I was denied because it would be an “undue hardship” to grant me an exemption.
- 9) I appealed and was eventually granted a hearing.
- 10) I appeared via zoom to defend my denied exemption on October 1, 2021. My basic religious beliefs were retold to the arbitrator as follows: I was raised in both Catholicism and Buddhism. But my relationship with God and my religious beliefs are personal in nature. I follow the teachings of Buddha and Christ as my foundational spiritual guides, along with daily prayer, attention to scripture and reliance on guidance from the Holy Spirit.
- 11) The DOE attorney stated that the City did not challenge my sincerity but asserted in closing arguments only one argument: that I should be denied an exemption because “the Pope” recommends vaccination and the Dalai Lama is himself vaccinated.
- 12) The Pope and the Dalai Lama are not a part of my daily religious practices. I do not pray to them, fellowship with them, nor do I seek their advice and counsel in regards to my religious practice and beliefs. Not all Buddhists are devotees of the Dalai Lama, and not all Christians follow the Pope.
- 13) While I was raised by pseudo-Catholic parents, I recognize the Pope as I do any person – as a human being with both positive traits and flaws. Further, the DOE believes I cannot prevail without a letter from a clergy member. I do not need any letter from any clergy

member to certify my personal religious beliefs as I obtain conscious contact with my higher power in prayer on a daily basis.

14) The NYC DOE should not play any role in telling me what religious beliefs I should or shouldn't have and what religious leaders I should and shouldn't follow.

15) I do not know if the arbitrator will accept my exemption after consideration. As of now the decision is "still pending."

16) On Friday October 1, 2021 at around 10pm I received an email saying on Monday I will NOT be placed on unpaid leave as my exemption and appeal are still under review, however I am also NOT allowed inside my school building in Jamaica Queens.

17) I must stay at home until a decision about my religious exemption is made. So even if I "win" my appeal I will not be allowed to service the students I know and love.

18) This is where the most damage is being done – to the students I work with everyday, especially special education students.

19) I am a special education teacher with over 14 years in the NYC DOE. In my school, we already have 2 content teachers on leave, and I work with both of them. My role is as an ICT teacher or "co-teacher." The content teacher is responsible for teaching the entire class and I am responsible for assisting the special education students.

20) Since both content teachers are on leave and we already have 2 subs, I am lesson planning for the entire class and teaching the entire class while my special education students are not receiving the level of services they are legally entitled to by the specialist they are entitled to.

21) If I am removed from the school, the substitutes who have little experience and no sense of obligation to serve the students will be left to run the class on their own. This will be



an educational nightmare for all the students, but especially for my special education population. After the 18-month educational disaster of remote learning in NYC it is horrible to see such a lack of care for the students continuing.

22) In other classes, where I am working with a content teacher (not substitutes) in the proper situation, when I am removed it is highly unlikely I will be replaced.

23) Councilman Mark Treyger, who is head of the City Council education committee, stated that the NYC DOE plans to send employees from their central offices to work in school buildings. I can guarantee you not one of those people is a properly licensed and experienced special education teacher with over 14 years of experience.

24) On the evening of Saturday October 2nd, an online chat group made of only UFT & NYC DOE employees exploded with information on the newly announced redeployment of central office NYC DOE staffers. In the social media group known as NYC DOE TEACHERS AND OTHER UFT MEMBERS ONLY CHAT a group post was made by "Florelly FP" stating hundreds of central staff workers were just informed on Saturday October 2<sup>nd</sup> they must report to schools on Monday to cover the coming teacher and staff shortages.

25) The MOA states the reassignment of these employees could be until June of 2022 and these employees were given no prior notice and no time to even collect their personal items in their central office.

26) Some of these employees are being deployed in different boroughs than where they currently work, adding hours to their commutes. Some have no idea how they will pick up their own kids from school now that their daily schedules and routines have been turned upside down with only 1-day notice.

27) This is a huge contradiction to the recent public statements from Mayor de Blasio where he repeatedly states that there are "thousands and thousands" of qualified substitutes ready to be deployed.

28) On Saturday October 2nd in an article written by Melissa Klein and Susan Edeleman published in the NY POST, a Brooklyn principal was quoted as saying, "They're saying there's plenty of substitutes. They're smoking crack. I think (Monday) will be an all-around s-tshow."

29) Over the weekend Tracie Strahan reported on NBC that Brooklyn Tech High School normally has 20 security guards on duty, but as of Monday October 4th that may drop to only 1 security guard.

30) Veteran NY POST reporter Susan Edelman announced NYC DOE still has 15,000 employees who are unvaccinated. She tweeted the following the evening of Friday October 1st:

***NYC gives numbers: As of today, the city says, at least 90% of all DOE employees (133,00 out of 148,000) are vaccinated -- including 72,500 out of 78,000 teachers and 1,570 out of 1,600 principals. "Full and final numbers" promised on Monday***

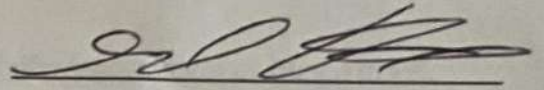
31) She later confirmed this by publishing these numbers in the NY POST the next day.

32) NYC Teacher Rachel Maniscalco who is the lead plaintiff on MANISCACLO vs NYC DOE representing over 700 NYC DOE employees told me many schools in Staten Island will lose up to 50% of their staff on Monday October 4<sup>th</sup>. One school in particular is poised to lose 100 employees.

33) Community Education Council (CEC) President for District 26 Adriana Aviles in Queens, NY told me her children's school is poised to lose their entire science department as well as all of their African American teachers.

- 34) In addition to the academic loss students at my school will face, losing me also contributes to a social emotional loss as well.
- 35) During the past 5 years, I have run a **DREAMers Alliance Club** at my school focused on helping immigrant students and their families; especially the undocumented.
- 36) We have lobbied in Albany for the passing of the DREAM ACT, held KNOW YOUR RIGHTS workshops with immigration attorneys who provided free advice to immigrant community members, volunteered at many IGINITE Young Women's Political Leadership Conferences, and maintained a "safe space" where many undocumented teenagers have shared, cried, and supported one another. I have also personally guided students and parents through various hurdles in immigration court.
- 37) On Monday, September 18th, a 15-year-old member of my DREAMers Alliance club who I've known for years came up to me and said, "Mr. Kane are you leaving?" "I don't know. Why do you ask?" I replied. "Because everyone's saying you are going to have to leave because you are unvaccinated," she said. "I'm really not sure. There are court cases about this right now," I replied. "If you leave, is there going to be a DREAMers Alliance this year?" She began to tear up.
- 38) This is a student who never told anyone about her family's status until she came to our club where we made her feel safe. I have secured a \$6,000 grant with the help of my administration for the club to help immigrant populations in our school and community this year. I've known this student and all my club members for years. What we have created together is not easily replaced or "substituted" as even the best teachers are not necessarily passionate immigrant rights activists as I am.

- 39) In regard to my personal religious exemption, even if it is accepted, the process alone felt like a violation of my constitutional rights and also my most sacred faith. It felt like a witch hunt.
- 40) In addition, the accommodation is not sufficient. If I'm allowed to continue working for NYC public schools, I cannot enter any school building and will be prohibited from helping students.
- 41) This makes no sense to me as the CDC Director has stated on CNN with Wolf Blitzer that COVID vaccines do not stop the transmission of SARS CoV-2.
- 42) In NYC Schools we also have multiple layers of protection including universal masking, social distancing, daily health screenings, etc...these measures actually do play a role in reducing the transmission of SARS CoV-2.
- 43) I do not pose any greater threat to anyone based on my vaccine status.
- 44) If I am denied, our family will suffer severe hardship. We are not rich, we do not have a lot of savings, and we would not be able to handle the loss of my salary.
- 45) More important than how this is impacting me personally is how it is going to affect all of my students as I described in this statement.
- 46) While it is not ideal, I can still serve a major role to my school community working remotely. Holding parent and IEP meetings, writing IEPs and mentoring two brand new special education teachers who have been in our building for only 1 month (and never worked in the NYC DOE before) are all contributions my principal and special education department would value greatly.
- 47) I pray that the Court hears my concerns and can intervene appropriately and swiftly.



Michael Kane



**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kane, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

DECLARATION OF WILLIAM CASTRO

Civil Action No. 1:21-cv-07863

STATE OF PENNSYLVANIA     )  
  ) ss.:  
COUNTY OF NORTHAMPTON    )

**WILLIAM CASTRO**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

- 1) My name is William Castro.
- 2) I have worked in the New York City public school system for 12 years. My current position is ELL Services Administrator.
- 3) I have religious objections to vaccines, and my faith does not allow me to take a COVID-19 vaccine. Also, I have had anaphylaxis in reaction to ingredients that have the possibility to cross react with those found in the mRNA vaccines, and my doctor wrote me a medical exemption stating that especially since I had COVID-19 already, the risks do not outweigh the benefits.
- 4) I submitted an application through the portal for Religious exemption request and was immediately denied with a form letter that I believe was automatically issued to everyone stating that I was denied because it would be an “undue hardship” to grant me an exemption.



- 5) I appealed and attended a zoom hearing on Friday, October 1st. My attorney asked why I was denied, pointing out that it is a violation of procedural due process to try to defend against the denial when we don't know why it was issued.
- 6) The NYC DOE attorney said that it was based on undue hardship, not being a part of a recognized or established religion, and the assertion that certain religious figures have spoken in support of COVID-19 vaccines.
- 7) My attorney asked how anyone would be accepted then if everyone was denied based on undue hardship. The DOE attorney said that was all she would say. She then mentioned that exemptions were denied for citing that aborted fetal cell materials as the reason for objection and that there are not present in the mRNA Pfizer or Moderna vaccines, according to Commissioner Chokshi.
- 8) I am not Catholic or subscribe to the doctrine of any particular religious figure who has gone public in support of vaccines, and do not know why any religious figures mentioned will be relevant to denying my exemption based on my sincere religious belief which was attested to and affirmed by my pastor.
- 9) Moreover, my religious objections to the vaccine do not rest solely on the fact that the three vaccines use aborted cell lines in research and development and I expressed other grounds for my religious objection, including but not limited to objections related to the use and participation in vaccines/therapeutics that utilize an mRNA platform.
- 10) I am not familiar with Commissioner Chokshi's letter, and was not shown it, but I believe it is a fact that aborted fetal cell lines were used during the research and development of all three vaccines in one way or another and object to vaccinations that have benefited in any way from abortion regardless of when and how far back or manner.



- 11) The arbitrator acknowledged it is true insofar as they are used during some of the experiments.
- 12) The DOE admitted that I fulfilled the components agreed to by the arbitrator and the process requirements to receive a religious exemption but stated a denial was originally given because I am a non-denominational born again believer, hence, it didn't matter to her that my pastor affirmed and attested to my sincere religious beliefs and outlined biblical teachings and church practices that forbid believers from receiving said COVID-19 vaccinations according to the practice of our faith.
- 13) I believe I am being persecuted for my faith and discriminated against because even though I know I am not required to support my personally held sincere religious beliefs with a letter from clergy, I provided a letter from my pastor who has not come out in favor of COVID-19 vaccines and the DOE still initially denied my religious exemption going against the arbitration agreement and ignored the fact that my pastor and I explicitly expressed in writing that the grounds for objection are not solely based on use of fetal tissue or aborted cell lines.
- 14) The NYC DOE attorney also said that the district would not accept personal religious beliefs and denied me on that basis even though my beliefs are shared by my church. My attorney told her that my church does not take a position in favor of vaccines, as indicated by the letter from my pastor, and reminded her that I meet all the requirements even for the discriminatory CSA arbitration award – I belong to a duly constituted church that has not taken a position in favor of COVID-19 vaccination, I submitted a letter from clergy that is not available online or in a printable template, none of the leaders of my church



have made statements in support of vaccination on television, and my religious beliefs are sincerely held and do not allow me to take one of these vaccines.

15) I do not know if the arbitrator will accept my exemption after consideration. Right now I am “still pending.” This is causing me a tremendous amount of stress and mental suffering as I am the provider of my household. I had to leave work early on Thursday as I began suffering from severe headaches, felt dizzy, and sharp pain in my head.

16) Even if my exemption was accepted, the process alone feels like a violation of my constitutional rights and also my most sacred faith. There was a lack of empathy and compassion throughout the entire process and I was not afforded a closing statement as per the flow of the hearing emailed to me the night prior. I was quickly rushed off the call and not given a timeframe of when a possible decision would be made.

17) Also, the accommodation is not sufficient. If I’m allowed to continue working for the NYC public schools, I cannot enter any school building and will be prohibited from helping students and supporting teachers in person, though I worked throughout the pandemic in multiple schools without vaccination or testing. I feel as if I am being treated as I am carrying disease because I am practicing my faith.

18) I’ve had COVID-19 already and am naturally immune and I test weekly, so I am not a threat to students or staff.

19) I do not pose any greater threat to others based on my vaccine status.

20) If I am denied my exemption, our family will suffer severe hardship. My family does not have a lot of money in reserve, and we would not be able to handle the loss of my salary.

21) More important than how this is impacting me, personally, though, is how it is going to affect all of the children and school communities of NYC.



- 22) I grew up in public housing, attending public schools in New York City. Education is my passion and my calling. It was the way out for me, and I believe it offers that way out for the students I care so much about. I worked my way up to become an administrator at the DOE and I know the most important factor to providing a great education is having a teacher or educator that you have a strong relationship with.
- 23) Students will be losing many highly qualified educators with this mandate that have been their social and emotional support throughout the pandemic and at the start of a school year where students are returning to in-person learning in a stressful environment.
- 24) As an administrator, I am keenly aware of what the loss of 15,000 teachers and staff will do to these vulnerable students. Many of these teachers will be replaced by subs who may not possess the certifications necessary to provide mandated special education services and English as a Second Language services according to applicable law and regulations.
- 25) The DOE has also put in place a program where temporary COVID-19 licenses will be issued to candidates who have not completed the full course of study that many of the unvaccinated and experienced teachers have.
- 26) Many of the teachers and staff that are getting terminated are people of color, who are disproportionately affected by this mandate. The NYC public school system already struggles to retain enough people of color to support the diverse student body, which really thrives from diverse role models on the teaching staff.
- 27) Not only that, but our schools are chronically understaffed as it is, and teacher retention rates are low and turnover is high.
- 28) I have conducted research that supports students learn best when they have teachers who remain, and turnover is low.



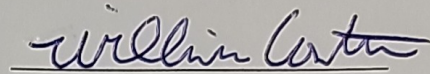
- 29) We support over a million children and are barely getting back on our feet after the pandemic. It is a struggle as it is to make sure kids are not falling through the cracks, to try to get them their necessary services and to make sure that we have enough teachers and staff in the schools to keep them safe.
- 30) I am also concerned about the physical safety of our students. Unvaccinated educators and staff have been getting tested and can demonstrate they are not transmitting the virus to students or staff.
- 31) However, according to the DOE policy vaccinated staff do not have to get tested and students who are not vaccinated but are wearing a mask and are socially distanced do not have to quarantine if there is a positive case in their classes.
- 32) Vaccinated staff members can be infected, even asymptotically, and still transmit the virus to students and staff. The policies are anti-science and do not promote the safety of students or support their socio-emotionally well-being.
- 33) I have heard directly and observed the fact that there have already been breakthrough cases in the vaccinated across the school system. I have heard reports of schools not having a certified ENL teacher to provide the required mandated minutes for ENL services.
- 34) As an administrator, you can only get a sub if they decide to show up to work. I have experienced requesting subs as an administrator, the sub accepting the assignment on the system only to never show up to work and administrators having to collapse classes so that students would be supervised.
- 35) These scenarios and conditions can create greater opportunities for community transmission and illustrate how the DOE have not put safety as a priority as much as we



are led to believe. Only those within the system can shed a light on these inconvenient truths. Our students and communities deserve better.

36) Most school districts outside of NYC permit a testing option and have avoided these disruptions. I find it appalling that our NYC students and communities of color have to suffer disruptions in their education while less diverse school districts are not putting their students through this trauma and chaos that produces more harm than good.

37) I pray that this Court can intervene and stop this injustice.

A handwritten signature in dark ink, appearing to read "William Castro", written in a cursive style.

William Castro

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kane, et al.

Plaintiffs,

vs.

De Blasio, et al.

Defendants.

DECLARATION OF  
MARGARET CHU

Civil Action No. 1:21-cv-07863

STATE OF NEW YORK                     )  
  ) ss.:  
COUNTY OF BROOKLYN                )

**Margaret Chu**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746,  
that the following is true:

1. I am Margaret Chu.
2. I have been teaching at the DOE for two years now and this last position was at a new school as an ENL teacher for K-5.
3. Prior to that I was a Special Education Itinerant Teacher (for over 11 years) working with 3, 4 and 5 year olds with learning disabilities in the New York City boroughs in private and public DOE schools.
4. This ENL position that I was recently appointed to is my "Dream Job". I have spent my life working on achieving this very position. It took many years to complete the TESOL MS. while working full time and managing to study and graduate with honors. Taking away my livelihood, my career and a job that I love is devastating to me and to my family. It is emotionally taxing, and it is creating a

lot of stress and uncertainty in my life and in the lives of my family members, my elderly parents who count on my financial support, and also my students.

5. The students in my school depend on their ENL teacher to support them through their day. These students are at different levels in their English language acquisition. The new ENL language students that do not speak a word of English need their ENL teachers to support them and to assist them through classes so that they can be successful. During such a chaotic time in everyone's lives, most certainly our students and children will suffer the most. This is most certain when there are inconsistencies in scheduling and questions on where and why their teachers are missing. My school is certainly short staffed already and with this covid mandate, my school will suffer from the missing school staff and teachers. Our students need experienced, licensed and certified teachers to ensure that they are getting the best education possible. Although substitutes are necessary, they cannot possibly know our students the way we know our students because we have had the time to create bonds with them and their families. Our schools. colleagues and coworkers need their teachers, we are a cohesive team that makes a school community successful. One spoke, one brick out of place creates weakness and instability in all school communities.
6. As a teacher, I am always looking to hone my pedagogy. I maintain a true commitment to keep myself abreast of learning different teaching strategies to assist my students in acquiring and learning the lessons that will keep them successfully engaged and motivated in and out of the classroom.

7. At the beginning of September, Mayor DeBlasio wrote an executive order stating that all DOE teachers would need to be vaccinated or be subjected to weekly testing. This quickly changed.
8. We were then ordered to submit to the covid mandate vaccination by September 20th, 2021. Lawsuits were filed and TRO's were obtained and the vaccination mandate was pushed back until September 27th, 2021. It has been pushed back again, now we have until Oct 4th, 2021, to be vaccinated.
9. As a new hire, I was asked to submit a religious accommodation and or a medical accommodation by the first weekend of September. I was able to submit a religious accommodation and had to re-submit it into the SOLAS portal. It seemed the DOE was making stuff up as they went along. There wasn't enough time to get a cardiologist appointment for my medical accommodation as it appears, there is a health care shortage all over NYC. I am still waiting for an appointment to see my cardiologist for a medical accommodation as well. I hold a sincere religious belief and believe that taking these covid 19 vaccines go against my faith. We had very little time to get our religious exemption letters written, parish letters written, and any other proof that we had a sincerely held religious belief. Jumping through DOE hoops.
10. My religious exemption documentation was submitted and was denied immediately. To add to all the confusion, I was locked out of my DOE Outlook email and proactively contacted the arbitrator's company to make my own appointment. There was no support from the DOE or the UFT. I waited for an appeal which I had on Friday, October 1, 2021.

11. I am still waiting to hear back from the Arbitrator. However, in the meantime I will not be able to go to my school on Monday.
12. The appeal: While waiting in the virtual lobby of the Appeal Appointment, I was luckier than most because I had support from my attorney. However, I still felt as if I had so much to prove. I felt that the appeal was just an appeasement of sorts, a way to say, "Well we had an appeal, and we question the validity of her religious beliefs". My arbitrator, Mr. Peek, told me that the Pope and the Vatican recommended taking the vaccine, "I asked him if I should follow all the bad examples of the Catholic Church"? I don't think there is enough time to write down all the bad examples that the Vatican has displayed during the history of the world. Besides, my relationship with GOD is between me and him. Not the Vatican or the Pope. That is the beauty about having a relationship with GOD. It is yours alone. There is a difference between God and the Pope. His progressive policies do not define my faith. (The Pope is a servant of God, and also a man who is both a political influence as well as himself influenced by politics). Man is fallible, and religious leaders, even in the Catholic faith have acted against God's will many times. Therefore, my responsibility is to follow the guidance that comes from the Holy Spirit and my own moral compass. This is a central tenet of Catholicism. Arbitrator Peek refused to accept this, stating that he is not Catholic, but he will rely on the Pope over lay people's interpretation of what God or Catholicism requires. I felt like I was at a Salem witch trial, cross-examined nonsensically about the validity of my faith, "burned, accused and guilty before trial." The DOE attorney affirmed Arbitrator Peek's assertions and argued that I should be denied for holding beliefs that in their opinion conflict with



mainstream doctrine. They ignored my documentation of all the sacraments I have received within the Catholic Church, as well as my sponsorship of my three younger cousins - two boys and one girl - whose parents entrusted me with the honor I take seriously. They also ignored the letter provided by the priest of my parish in full support of my religious objections to coerced covid-19 vaccinations.

13. Without relief from this court, I will not be able to teach on Monday and will not be able to serve the students that need their education. Some of these students do not have consistent and reliable schedules or positive home environments. This is an unfortunate reality. The only thing that is constant and reliable is going to school and seeing their teachers there every day giving them the positive encouragement they need to become functioning productive people in the future.
14. Without relief from this court, too many civil servants will be missing from their appointed positions. Our city, our communities, our students and the city will suffer and feel the blows of these decisions.

A handwritten signature in black ink, appearing to read 'MChu', written over a horizontal line.

Margaret Chu

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kate, et al.

Plaintiffs,

vs.

de Blasio, et al.

Defendants.

DECLARATION OF  
ROBERT DILLON, IV

Civil Action No. 1:21-cv-07863

STATE OF NEW YORK                    )  
  ) ss.:  
COUNTY OF NEW YORK                )

**Robert Dillon, IV**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. My name is Robert Ernest Dillon IV.
2. I am a New York City Department of Education public school teacher.
3. I work in the Morris Park section of The Bronx and teach computers, in addition to my many other duties using various systems and software essential to the operation of our school.
4. I have been teaching for the New York City Department of Education for 23 years.
5. I have sincere and firmly held religious objections to the COVID-19 vaccine.
6. On 9/15/21 I timely submitted a valid religious exemption letter and a letter from an ordained minister through the DOE's SOLAS system.

7. On 9/17/21 I received an email from [solas\\_donotreply@schools.nyc.gov](mailto:solas_donotreply@schools.nyc.gov) stating that I was denied as accommodating any religious exemptions would be an undue burden on the NYC school system. A true and accurate copy of the content of that email (cut and pasted) is attached as Exhibit A.
8. I timely appealed within one school day on Sunday, 9/19/21.
9. On 9/25/21 I received an email from [vaccineappeals@scheinmanneutrals.com](mailto:vaccineappeals@scheinmanneutrals.com) stating: "Dear Robert Dillon, Enclosed, please find your decision of the Arbitrator from Scheinman Arbitration and Mediation Services (SAMS).
10. Attached to the email was a document signed by an arbitrator on 9/24/21. A true and accurate copy of the document is attached as Exhibit B. It provided no explanation but simply denied me.
11. I was not offered a hearing at any point in the appeal process.
12. The reason given for my initial denial was that the DOE "cannot offer another worksite as an accommodation, as that would impose an undue hardship (i.e. more than a minimal burden) on the DOE and its operations."
13. As part of my appeal, I submitted a letter explaining that the reason for rejection did not apply to me, given the fact that I was working on an SBO (a modification of our contract) and was capable of performing my duties "STARS programming, Google Domain management etc) remotely.
14. I also attached documentation from my principal corroborating what I stated in my letter. He wrote:

“I am writing this letter on behalf of Robert Dillon, a pedagogue here at P.S. 83. It has come to my understanding that he is in the process of applying for an exemption to the vaccine mandate being enforced by the City of New York. As it stands now, the majority of Mr. Dillon’s work can be done remotely as he is the school’s programmer, scheduler and instructional technology specialist. A position that has been voted upon and approved by the UFT. This position requires most of his time to be spent behind a computer working with programs such as STARS, ATS, Skedula, New Visions, and the Google domain.

The work performed by Mr. Dillon is vital to the overall operations of the school. At this point in time it would be too difficult to abruptly remove him from his position without causing a disruption to the structure of our daily work. If permissible, I would gladly allow Mr. Dillon to work remotely while still being an employee at PS 83.

15. Given the obvious contradiction between the reason my religious exemption request was initially denied and the nature of my duties, it appears that the arbitrator was biased and/or did not read the documentation that I submitted.
16. At no point in the process was any reference made to the sincerity of my beliefs nor to the degree to which I hold them. The sole reason given for being unable to grant my exemption request was that it would be a burden to place me elsewhere. Yet, I submitted signed documentation from my principal stating that it would be a burden to have to replace me. Just as A cannot be B, I cannot both be a burden to accommodate and a burden to not accommodate.

17. If I am unable to continue my work it will force my principal to move someone else out of the classroom in order to perform my duties. This will place an even greater strain on the school because other teachers will have to cover the classes of the teacher replacing me.
18. Not only that, the duties I perform are oftentimes complex and require a level of knowledge and familiarity that will take my replacement time to master, if they are able to master them at all.
19. Some of my responsibilities include programming special education students correctly so that the school is in compliance with mandates.
20. My abrupt removal will make it likely that our school will not be in compliance in some areas and we may lose funding or be penalized in other ways.
21. Additionally, many teachers rely on my technical expertise and often seek my assistance for various tech related issues. I am capable of doing this remotely, as evidenced by the fact that I did it successfully for the spring of 2020 and all of last school year.
22. Therefore, removing me from my position will make the jobs of other teachers much more difficult, especially if the school must go remote at some point in the future.
23. The loss of anywhere between 7,000-15,000 teachers next week, in addition to all the other DOE employees who are essential to the operation of the NYC DOE school system, is going to severely hamper the education of the children of New York City.

24. Most of us have worked tirelessly and safely in person throughout this pandemic. Allowing us to be removed because we are not in compliance with a mandate that is not in effect nor deemed necessary anywhere else within hundreds (if not thousands) of miles, is unfair to both them and the children whom they serve.
25. I pray that the Court can help us.



---

Robert Dillon

# EXHIBIT A

(Cut and pasted from email)

Dear ROBERT DILLON,

We have reviewed your application and supporting documentation for a religious exemption from the DOE COVID-19 vaccine mandate. Your application has failed to meet the criteria for a religious based accommodation because, per the Order of the Commissioner of Health, unvaccinated employees cannot work in a school building without posing a direct threat to health and safety. Due to the configuration for the 2021 - 2022 school year, which includes no remote classwork, we cannot offer another worksite as an accommodation, as that would impose an undue hardship (i.e. more than a minimal burden) on the DOE and its operations.

This application was reviewed in accordance with applicable law as well as the Arbitration Award in the matter of the UFT and the Board of Education regarding the vaccine mandate.

Under the terms of the Arbitration Award, you may appeal this denial to an independent arbitrator. If you wish to appeal, you must do so within one school day of this notice by logging into SOLAS <https://dhrnycaps.nycenet.edu/SOLAS> and using the option "I would like to APPEAL". As part of the appeal, you may submit additional documentation and also provide a reason for the appeal.

Sincerely,

HR Connect

Medical, Leaves, and Records Administration

Please do not reply to this message via e-mail. This email address is automated.



# EXHIBIT B

SCHEINMAN ARBITRATION AND MEDIATION SERVICES

----- X  
In the Matter of the Arbitration X  
between X  
X  
NEW YORK CITY DEPARTMENT OF EDUCATION Re: UFT.255 X  
and X  
X  
ROBERT DILLON X  
X  
----- X

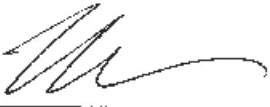
Issue: Religious Exemption

Date of Hearing: N/A

Award

APPLICATION FOR EXEMPTION: GRANTED [ ] DENIED [X] OTHER [ ]

\_\_\_\_\_  
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\_\_\_\_\_  
\_\_\_\_\_

  
\_\_\_\_\_  
Arbitrator

9/24/2024  
\_\_\_\_\_  
Date

*Martin F. Scheinman, Esq.*

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kane, et al.

Plaintiffs,

vs.

De Blasio, et al.

Defendants.

DECLARATION OF  
ROBERT GLADDING

Civil Action No. 1:21-cv-07863

STATE OF NEW YORK                    )  
  ) ss.:  
COUNTY OF NEW YORK                )

**Robert Gladding**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am Robert Gladding.
2. I am a plaintiff in this lawsuit
3. I have been teaching for 19 years in the NYC public school system. I began teaching in 2002 in response to the 9/11 tragedy in 2001. I sincerely believe I received a calling from God to do this work.
4. I have sincere religious objections to the COVID-19 vaccine
5. On Friday September 17th I timely submitted a valid religious exemption letter and letter from an ordained minister through the system.

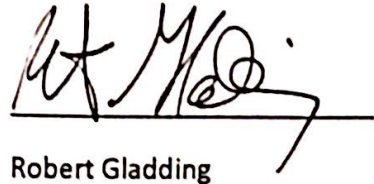
6. On Sunday September 19th I received an email stating that my application had failed to meet the criteria for a religious based accommodation, but not detailing any criteria that it failed to meet.
7. I timely appealed on Monday, September 20th.
8. I had a zoom arbitration hearing on Thursday September 23rd at 3:30 PM with a DOE representative, a UFT representative, and the arbitrator Julie Torrey. They did not say on what basis my original letter had been denied. They invited me to make a statement. I made an emotional statement about my sincerely held religious beliefs, adding to what was already stated in the letter. There were few questions, and only a short back and forth between the DOE and UFT. The UFT objected that I had not been given any criteria for my denial, and hence could not prepare for this hearing. The arbitrator noted this.
9. On Saturday September 25th, I received an email with my one page "Award" which stated only "Appellant failed to establish entitlement to a religious exemption based upon evidence submitted and the testimony presented at the hearing." There was no elaboration whatsoever on the basis of the denial, just as with the initial denial.
10. However, on Monday September 27th at 6:20 PM I received an email stating that I was still "pending". The email reads as follows: "According to our records, you have a pending appeal with the Arbitrators on your application for a COVID-19 Vaccine Mandate Related Exemption or Accommodation. Until a specific date for implementation of the vaccine mandate is announced, the current vaccine or weekly testing mandate remains in place, and **you must continue to report to your regular assignment and work location until further notice.** If you work at a school and need to be tested, you will likely be able to do so as part of the weekly testing occurring in your school building. We will continue to share information as it becomes available. If/when the vaccine mandate goes into effect, if you have a decision from the Arbitrators granting your appeal or if your appeal remains pending at that time, you will be advised on your next step for where to report."
11. Continuation of #10: On Friday October 1st at 9:51 PM I received a second similar email stating: "According to our records, you have a pending appeal on your application for a medical or religious exemption to the COVID-19 Vaccine mandate. While this appeal is pending, you are considered eligible to be treated as exempt for the purposes of the vaccine mandate which will go into effect as of Monday, October 4. However, as that status will change, you should be regularly checking your DOE email (including this weekend) for notification from the Arbitrator and be aware of the following: While your appeal is pending, and you remain unvaccinated, you will not be put on a Leave Without Pay status. However, you will not be permitted to enter a school building. If your usual

place of work is in a school, you will be expected during this time to temporarily work offsite and support your school to cover your work in your absence and perform related activities. You should be available during regular work hours and check-in with your school's payroll secretary for timekeeping purposes. If your usual place of work is not in a school building, you should continue to report to your regular location and assignment. If your appeal is granted (approved) and you remain unvaccinated, you will not be put on a Leave Without Pay status. If your usual place of work is in a school, you will receive a new assignment outside of a school building (e.g. administrative offices) to perform academic or administrative work determined by the DOE. A notification of this assignment may take a few days and in the interim you should temporarily work offsite to transition your work and support related activities. During this time, you should be available during regular work hours and check-in with your school's payroll secretary for timekeeping purposes. If your usual place of work is not in a school building, you should continue to report to your regular location and assignment unless notified otherwise. If your appeal is denied, and you remain unvaccinated, you will be put on a Leave Without Pay, with benefits. If you are vaccinated and upload your information to the Vaccination Portal then you may be restored to active pay status."

12. I cannot get this vaccine due to my sincerely held religious objections.
13. I do not believe I am a threat to anyone else as a result of my vaccination status.
14. I think that I had COVID very early on in March 2020 just before the lockdown started - I was laid up in bed, feverish, respiratory problems for several days. This predates any form of COVID testing.
15. I am a dedicated teacher and just want to be able to teach my students without violating my deeply held religious beliefs.
16. I have already made strong connections with all five classes that I teach. It is very hard to put into words the level of trust, depth and critical thinking that my classroom environment inspires. My two full sections of 11<sup>th</sup> grade AP Literature and Composition have already been deeply exploring the nuances of freedom based on their Summer reading of LeGuin's *THE DISPOSSESSED* and are ready to pair that with discussions about the systemic problem of mass incarceration in our country based on Angela Davis's *ARE PRISONS OBSOLETE?* This class has become increasingly popular and expanded to two full sections over the years that I have been teaching it, with students developing intuitive, highly personal writing voices that win them high scores on the AP Exams, particularly in the essay portion, and set them on a path to critical thinking, and trusting their voice and experiences for the rest of their lives. I have a section of freshmen

for Global Literature who are just adapting to the school and have already become able to freely express opinions and let out their personalities, even from behind the masks. I have a section of American Literature, that has inspired an honest discussion of the challenging work of Ta Nehesi Coates, as we have launched into our Examining Privilege unit. If I am taken out of the school, my long-time filmmaking and acting class will be dissolved or turned into a history through film class. It has four returning students who loved it so much last year that they wanted to take it again and keep producing their own short films. The impact of removing me from these classes will be profound to so many 11<sup>th</sup> graders – heavily compromising what is one of their most focused and exciting years of high school. Replacing a teacher who has developed a layered curriculum over many years of reflective practice is not possible. It will also damage the trust that the 9<sup>th</sup> graders feel towards our finally integrated school. I am also a freshman advisor. I volunteered to teach 9<sup>th</sup> grade again when the District 2 preference was dissolved – as a former NYC Teaching Fellow I wanted to be there for our new, more diverse population from all five boroughs.

17. The most tragic piece of how this would affect me personally if the court does not intervene is that I won't be able to continue in person with the students with whom I have developed a relationship or teach the vital courses that have evolved over years of practice and reflection. I am many students' favorite teacher – as reflected in school yearbooks where I was voted “favorite teacher” many times. Seniors come to see me in the year following taking my class to tell me how much they miss me and our intellectually open classroom space. This is because these courses and how they impact students feels personal to them, because I make room for them to trust themselves. My curricula are not transferable to another teacher; they are finely tuned vehicles for learning, fluid and structured at the same time. In my own life, I would spiritually miss the course's impact, and the students pushing these courses forward to new levels. I will miss being IN the classroom, being part of that intellectual, emotional and spiritual exchange that is the living entity that is a shared classroom space. Secondly, this would affect my family's ability to pay rent on our apartment and buy food. It would put us in a difficult and unsustainable financial situation.
18. It is in my perspective criminal that simply not complying with a medical procedure that is not part of my contract, could create this outcome. If allowed to stand, I am very concerned this mandate would prove how not free we really are as a city and country. This would break the trust of many in our systems, in authority figures who should be equanimous, not divisive and dictatorial.
19. I pray that the court will intervene to truly serve my students by allowing me to continue in my vocation as a teacher in the classroom.



Robert Gladding





support myself, but I am now taking on the responsibility of caring for a declining parent as my sister who formerly provided this support is now receiving chemotherapy and radiation treatment for cancer. I depend on this job to live – it is my livelihood -- and others depend on me to be able to provide physical support to them, which I cannot do without the income that was recently denied to me because I am unvaccinated.

4. My job is important to students of NYC schools, as teachers are chronically overworked in keeping up with the demands of teaching and especially following a year plus of remote learning when students especially need extra support emotionally and academically from qualified, experienced educators. My job at NYC DOE supports teachers in doing their work to create the most effective instruction for students to work to the best of their abilities. We want to make sure that students' physical and emotional well-being, as well as academic, does not suffer any more than it has. This weekend I learned that four Central staff member colleagues have been redeployed to schools/classrooms starting Monday, October 4<sup>th</sup>. One colleague has classroom experience and the other three have never worked in a classroom or with students at any point in their careers. While I fear that my (former?) colleagues will resign in the near future from this pressure, I certainly fear more for the students who will be subjected to these inexperienced, unqualified staff members as their "teachers," as they have no idea how to handle their multiple needs and possibly may not be able to maintain order.
5. I am also working on my data analysis skills that support tailoring instruction to meet student needs. I am constantly revising and updating the materials that I use for professional learning provided to school-based staff so that they have the best information and training to improve teaching and learning.

6. On August 23, 2021, I was informed that I must get the COVID-19 vaccine to keep my job at the NYC DOE.
7. I have sincerely held religious beliefs that prevent me from getting the Covid-19 vaccine. I also have a medical exemption for the same.
8. I attempted to submit a religious exemption through "SOLAS", the system provided for teachers and staff to upload religious or medical exemptions. I also attempted to submit a reasonable accommodation to work remotely, as medically I am unable to get the vaccine and have been working remotely for 17 months for the NYC DOE.
9. I applied for a religious exemption on September 16, 2021. I was immediately denied with a rubber-stamped letter that stated "unvaccinated employees cannot work in a school building without posing a direct threat to health and safety. Due to the configuration for the 2021 - 2022 school year, which includes no remote classwork, we cannot offer another worksite as an accommodation". However, I do not and have never worked in a school building. I immediately applied for an appeal and was given a date for the arbitration via Zoom. I also applied for reasonable accommodation on September 16, 2021 based on the note from my medical provider stating that it is not advised that I take the vaccine and recommended that I continue to work remotely to strengthen my immune system. I have suffered with post-Covid syndrome since May, 2020. This medical professional treated me since the time I was barely able to walk or function following my Covid-19 infection and advised that I not take the Covid vaccine due to my fragile health and low T-cell count and other blood test results taken over the course of 16 months of treatment. However, the DOE immediately responded to my application saying that I must submit "immunoglobulin study reports." So, with no knowledge of my medical history, the DOE told me what single blood test is acceptable

and without it they are demanding that I be injected with the vaccine in spite of the recommendation of a medical professional who basically brought me back to life following Covid. The DOE did not give me a physical, review my extensive recent bloodwork which includes my T-cell count, or medical history which includes an allergic reaction to a prior vaccine for which I was hospitalized with convulsions. I did not arrange to take the immunoglobulin study reports as they were not recommended by my medical provider and I am not ill with a disease that would impact my immunoglobulin to a significant degree. I did not submit to this test as it isn't medically necessary for my treatment or healing and my reasonable accommodation was denied.

10. During the Zoom arbitration regarding the religious exemption I had to raise my right hand to confirm that I would say the truth, although no one else in the room had to affirm that they were telling the truth. And, in fact, it seemed as though they were not, as the DOE representative said that none of the current U.S. vaccines have ever used aborted fetal cell lines, which is a false statement. They listened to my statement of my religious beliefs for approximately 3-4 minutes and then, with no questions, the DOE representative pronounced that I “do not have sincere religious beliefs because I have taken aspirin in my life.” And that was the end of the “arbitration”, and I was eventually denied the religious exemption. Strangely, I never received an email notification of the decision, I stumbled upon the denial in SOLAS by chance. Following that ruse of an arbitration, I truly understand the meaning of “kangaroo court.”

11. Without relief from this Court, I will lose my ability to teach in the NYC public school system effective on Monday, October 4<sup>th</sup>. Losing trained educators certainly has the biggest impact on students. The untrained stand-ins will not be meeting students' academic needs let alone managing attendance and understanding schedules. Quite

likely they may not be able to keep students physically safe as they do not know the emergency procedures for intruders, bomb threats, and FIRE. What happens if there is a fight between students, or if a student is ill? What policies do the stand-ins know? What happens when students don't wear masks? Are they able to log in to technology and understand how students are supposed to access it as well? Do they know how to access the curriculum and supporting documents? Do they know what an IEP is and how to access them, let alone provide the required services and support. The lack of concern on the part of the DOE that this mandate has by separating qualified teachers from their students and replacing them with warm bodies is astounding and has nothing do with safety, education, or the best interests of our students.

A handwritten signature in black ink, appearing to read "Heather Jo Clark". The signature is fluid and cursive, with the first name "Heather" being more prominent than the last name "Clark".

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Heather Jo Clark

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

Kane, et al.

Plaintiffs,

vs.

De Blasio, et al.

Defendants.

DECLARATION OF  
NWAKAEGO NWAIFEJOKWU

Civil Action No. 1:21-cv-07863

STATE OF NEW YORK                     )  
  ) ss.:  
COUNTY OF BRONX                    )

**Nwakaego Nwaifejokwu**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am Nwakaego Nwaifejokwu.
2. I have been teaching with the NYC DOE for 12 years.
3. My job as a NYC teacher is very important to me for several reasons. Firstly, I support my daughter and myself with the income I earn as a teacher. Without this income I would be in dire straits and become destitute. How would I pay my rent? How would I eat? How would I care for my daughter? Secondly, although teaching is my job; it is also my passion. I am grateful that I have been able to earn a living while doing something that I love. I would be thoroughly devastated if I were to lose my right to teach in New York.
4. It is concerning to know that I will not be there with my students as of Monday, October 4<sup>th</sup>. As a licensed special education teacher working for the NYC DOE for well over a decade, I have become aware of the existence of a perpetual shortage

of teachers in my field of special education. I worry that the students in my ICT class with IEPs will not be serviced by an experienced and licensed special educator. This is devastating, because they will not be able to meet their goals and expectations for this year. These students likely will even regress. Moreover, without a licensed special education teacher providing services to students with IEP mandates, the NYC DOE would be legally out of compliance.

5. At my school the janitors and administrators know me well for putting in late hours after the school day ends. Many times, I have been the last teacher in the building at the end of the day. Why do I stay late? I stay late because I enjoy what I am doing. I put in extra hours and spend my personal money to create an optimum learning environment for my students. Teaching might be just a job for others, but I believe it is my joy. There is something magical that happens when students are learning and thriving, while exceeding expectations.
6. On Tuesday, August 31<sup>st</sup> I was informed that I need to get the COVID-19 vaccine to continue teaching in the NYC public school system.
7. I have sincerely held religious beliefs that prevent me from taking a COVID-19 vaccine. God is telling me this is not for me.
8. I submitted a religious exemption through "SOLAS", the system provided for teachers and staff to upload religious or medical exemptions, however it was denied.
9. I applied for a religious exemption on Monday, September 20<sup>th</sup>. Initially the system of SOLAS was not allowing me to do so. I spent many hours attempting to upload my religious exemptions. There were error messages and cliches that prevented me from actually being able to successfully submit my religious

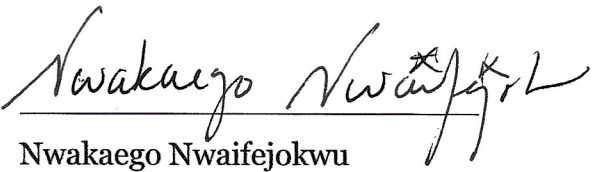


exemption until 2am the morning after September 20<sup>th</sup>. Apparently, the system was overwhelmed with applicants. An extension was given to everyone due to these issues. I received an email letter of denial on Saturday, September 25<sup>th</sup> with a form letter that stated that it would be an undue hardship to grant my exemption. In my denial no explanation was given regarding my religious beliefs. I attempted to request an appeal but instead received another denial letter. I have called the UFT and was told to keep note of the ongoing issues that arise from the DOE regarding these exemption denials. The UFT rep claimed that there were many irregularities regarding exemptions which they would be collecting as complaints from applicants and that they would look into it.

10. Without relief from this Court, I will lose my ability to teach in the NYC public school system effective on Monday, October 4<sup>th</sup>. The impending loss of 15,000 educators and staff overnight will cause an upheaval in the lives of students who already have experienced instability for the last 2 years. Many familiar friendly faces that students have come to know over the years will be missing - from the school safety officer to the cafeteria staff, to their teachers as well as countless others who make the school experience special, warm and welcoming for all students. Many students are currently experiencing academic, social and emotional losses due to these past 2 years of remote learning, school closings, and the overall overwhelming impact of the pandemic on their personal lives as well. This year was to be a year for us as educators to work diligently with students and their families to remedy these losses experienced by our children. However, with this Covid-19 mandate, students will continue to suffer and regress without access to experienced qualified educators who had spent the last

few months of the prior school year planning with administrators for the success of this school year.

11. I am praying for the Court to intervene on behalf of all who are impacted by the grave injustice we are experiencing, especially the children.

  
Nwakaego Nwaifejoku



**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kane, et al.

Plaintiffs,

vs.

De Blasio, et al.

Defendants.

DECLARATION OF  
TRINIDAD SMITH

Civil Action No. 1:21-cv-07863

STATE OF NEW JERSEY                    )  
  ) ss.:  
COUNTY OF SUSSEX                    )

**Trinidad Smith**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am Trinidad Smith.
2. I have been teaching with the NYC DOE in D75 servicing children with Autism. We are a self-contained special education school that only instructs special needs students under one administration. It has become like family to me.
3. I have a new mortgage on the home of my dreams for my teenage son. I have only been here two years and losing my career will render me unable to pay my mortgage, car payment and other bills as this is my only source of income and I

am the sole provider for my son. I was adopted from an orphanage in Bogota, Columbia at the age of six, and have been working to provide for my son what I never had.

4. I am one of the two senior educators at my site in downtown Brooklyn. I am a cluster teacher who holds the position of adaptive physical education.
5. I am confident that a sub will not be able to provide the expertise and safety I provide. I manage two classes and the adult support staff simultaneously while managing all exits to the playground.
6. Safety is a top priority for our students some who are nonverbal. My collaboration with the related services such as the physical therapist, occupational therapist and the speech pathologist at my school gives the students the best possible outcomes in our program.
7. These are relationships built over a twenty-year time span. A sub will not be able to proceed with the level of confidence and knowledge for what needs to be done! Our program is down one cluster already and will now be down one more cluster with my absence. Contrary to what is being said the DOE does not have subs to draw from. We have experienced a shortage on several occasions. The classroom teachers are then asked to work on their preps which limits their time to prepare to be the best educators possible.
8. Due to a shortage in the kitchen staff, the students will be getting cold sandwiches for lunch. At the start of the pandemic the mayor did say that he wanted to keep the schools open and one of the reasons was because this was the only hot meal that some of these students were receiving at school. Is their well-being no longer a priority?

9. When offered I attend professional development workshops as they are a crucial way for educators like myself to stay current and relevant in their classes. New techniques and methods are introduced to help students reach their highest potential.
10. I have sincerely held religious beliefs that prevent me from taking a Covid-19 vaccine.
11. On October 4th I am being asked not to come to work due to refusal of the COVID-19 vaccination! I have been loyal and hard working through the pandemic. I have been working in person with our students since the first day learning resumed at the building.
12. My personal relationship with God has guided me in the decisions I've always made and continue to make. I was baptized and raised in the church and hold the teachings very close to my heart! For this reason, I have made a personal choice to refrain from the Covid-19 vaccine. I trust my immune system that God gave me as it has protected me from succumbing to Covid-19 in spite of working with students who often unexpectedly expel bodily fluids from themselves.
13. Due to the new much harder process for obtaining a religious or medical exemption, I knew it would be impossible for me to be considered for an accommodation. This is not for lack of sincerity in my religious beliefs, but rather on the part of the ones who practically eviscerated religious exemption options. It was designed to discourage the applicants with little to no hope of being heard.
14. It is devastating to know that our school will be understaffed for my students on Monday October 4th and any days that follow if this grave injustice is allowed to

continue. Our students thrive on consistency and routines, and now we are failing them by not providing them with what they need and deserve

15. These mandates will have a huge negative effect on both students and staff and therefore I implore you to please consider granting us a TRO so we can have a fair and honest opportunity to object these mandates in a court of law!

10/4/2021

DocuSigned by:  
*Trinidad Smith*  
7A263941654E4E8...

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Trinidad Smith

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Kane, et al.

Plaintiffs,

vs.

De Blasio, et al.

Defendants.

DECLARATION OF  
ANTHONY G. BLOCH

Civil Action No. 1:21-cv-07863

STATE OF NEW YORK                    )  
  ) ss.:

COUNTY OF NEW YORK                )

**Anthony G. Bloch**, declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true:

1. I am Anthony G. Bloch.
2. I have been a substitute teacher with the NYC DOE since the spring of 2019, now for about two and a half years. As a college adjunct for 18 years, I was interested in also applying my teaching skills in the service of high-needs grade schools. The special education school that nominated me to work as a substitute teacher is the school where I have been working ever since.
3. Part time substitute teacher work has supplemented my income and allowed me to keep my financial commitment toward the support of my teenage daughter, now 19, and in college. It has also given me a new direction in my career, as I have adapted lessons for the special needs of the students whom I teach. For the full recent school year, 2020–2021, I was hired for a regular substitute job, with the same class for two days a week. Just last month, I had informed the administration of my school that I will be available for three days per week this school year, wherever I am needed.
4. NYC schools are chronically short staffed, and my own school is no exception. Although the school has four other sites where I could also work, they have needed

me too much at the main site. And in fall '21, this need is even greater because of the recent shortage of teachers. Substitute teaching for me is not just a job, but an ongoing professional opportunity, and my services are valued at my school. The children really do need experienced educators like me, to help ensure that they do not fall too far behind, and their education does not suffer any more than it already has, due to the special challenges to learning which they have faced.

5. I am also working on getting my master's degree in Education and Special Education, so that I can become a full-time teacher. Thus far, I have earned 21 of the required 36 credits, and have a 4.00 average at Touro Graduate School of Education. Substitute teaching is a vital part of my professional growth, and learning experience, as well as a necessary source of income.
6. On the 23<sup>rd</sup> of August, '21 I was informed that I need to get the COVID-19 vaccine to keep substitute teaching in the NYC public schools.
7. I have sincerely held religious beliefs that prevent me from taking a COVID-19 vaccine.
8. On September 20<sup>th</sup> of this year, I attempted to submit a religious exemption through "SOLAS", the system provided for teachers and staff to upload religious or medical exemptions. However, I was offered only Reasonable Accommodation, and the system led me to a form to fill out towards this end. There was never an option to upload my religious exemption letter that I'd completed.
9. So, I emailed the letter to the administration of the school where I am a substitute teacher. But to this day my religious exemption letter has not been accepted, filed, and processed by the Department of Education.
10. On October 1<sup>st</sup>, 2021, I received an email from the Department of Education stating, "If you do not submit proof of being vaccinated by October 1, 2021, your substitute service will be suspended, and you will be unable to work at the NYC Department of Education in any capacity."
11. Without relief from this Court, I will lose my ability to teach in the NYC public school system, effective on Monday, October 4<sup>th</sup>. I pray the Court will intervene, for the sake of all involved.

  
Anthony G. Bloch