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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MICHAEL KANE, *et al.*,

4 Plaintiffs,

5 v.

21 Civ. 7863 (VEC)

6 BILL DE BLASIO, *et al.*,

7 Defendants.

Decision

8 -----x
9 New York, N.Y.
October 12, 2021
11:00 a.m.

10 Before:

11 HON. VALERIE E. CAPRONI ,

12 District Judge

13
14 APPEARANCES

15 SUJATA S. GIBSON

MARY HOLLAND

16 Attorneys for Plaintiffs

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(Case called; appearances noted)

THE COURT: Everyone please be seated.

OK. Let me start, for everyone, and this is both for the people who are present in this courtroom, people who are on the telephone and people who are in the overflow courtrooms, I want to lay out the rules of the road.

First, if you're on the telephone, you may not record or rebroadcast this proceeding. We've allowed a telephone hookup to accommodate constraints on the number of people who can be in the courtroom, but I am not permitting it to be recorded or rebroadcast. If you record it or rebroadcast it, you're in contempt of court, and it will be dealt with accordingly.

Second, let me remind everybody who is present in this courtroom or in any of the overflow courtrooms, the standing order of the Southern District is that you must wear a face covering. It must cover both your mouth and your nose. This is your warning on that front. If you let your mask fall below your nose, whether in my courtroom or any of the overflow courtrooms, the court security officers have been directed to immediately remove you. They're not going to warn you. You've been warned now. You must keep your face covering over your nose and your mouth.

Lastly, let me just say that for all the people in my courtroom as well as in all of the overflow courtrooms, you

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1 must behave in accordance with the rules of decorum that are
2 appropriate for a courtroom. That means there can be no
3 outbursts and no talking. If you're in an overflow courtroom
4 or in my courtroom and you do not think you can abide by that
5 rule, let me encourage you to leave now and to call in on the
6 phone number so that you can participate by listening.

7 I'm going to give you the call-in number again. So if
8 you're somebody who does not think that you can maintain
9 decorum if something happens during this hearing that you don't
10 like, I'm encouraging you to leave now. The call-in number is
11 844-291-5489. The access code is 9438556. And as with the
12 issue of wearing face coverings, the court security officers
13 have been directed that there is zero tolerance for misconduct
14 in the courtroom, whether you are physically in my courtroom or
15 you're in an overflow courtroom.

16 That's it for the preliminary matters. Let me turn
17 first to the issue of witnesses.

18 Ms. Gibson, you have indicated a desire to call a
19 whole bunch of witnesses. I'm not quite sure what the purpose
20 of that would be, so can you tell me; can you give me a proffer
21 for what, understanding you were going to update what has
22 happened with some of the plaintiffs via the appeal process,
23 what else did you want people to testify to?

24 MS. GIBSON: Your Honor, primarily with the witnesses,
25 if it would be acceptable to counsel and the Court, I could

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1 just put in additional declarations rather than waste time on
2 having a full hearing, but I just wanted to update. Almost all
3 of them have been denied at this point, which wasn't the case
4 when we first filed.

5 As to Amanda Ruiz, she was going to testify about the
6 conditions in one of the schools where the plaintiff teaches
7 now that the plaintiffs and others have been removed from the
8 school, which goes to the public interest element of this
9 analysis.

10 THE COURT: OK.

11 MS. GIBSON: I did submit a declaration from her in
12 lieu of testimony.

13 THE COURT: I saw it. I'm going to ask you if you can
14 stand up when you talk, because otherwise I can't see you.

15 MS. GIBSON: Oh, my goodness. I'm sorry, Judge.

16 THE COURT: It's OK.

17 MS. GIBSON: And as to the expert witness, that would
18 just be going to really the substance of their declarations,
19 but going to the issue of whether the plaintiffs constitute a
20 threat based on their vaccine status and the significance of
21 that threat.

22 THE COURT: OK. So they weren't going to add to their
23 declarations; they were just going to reiterate what they'd
24 already said in it.

25 MS. GIBSON: I would say so, your Honor, yes. It

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1 would give the other side a chance to cross-examine them and so
2 forth.

3 THE COURT: I really don't think that's necessary.
4 I've read all the affidavits, and I understand your point that
5 some of the plaintiffs who had not previously been denied have
6 now been denied, so I don't think their testimony is required.

7 MS. GIBSON: Thank you, your Honor.

8 THE COURT: All right. This is your motion. Would
9 you like to be heard?

10 MS. GIBSON: Thank you.

11 Your Honor, we're here today challenging two
12 overarching policies of the defendants. The first is a policy
13 promulgated by Mayor de Blasio, Commissioner Chokshi and
14 implemented by the Department of Education, which is the
15 overall vaccine mandate for teachers, which requires, among
16 other things, that nobody who is unvaccinated is allowed to go
17 into any school building as of October 4, 2021, and that
18 includes people who have religious or medical accommodations
19 pursuant to the other policy we're challenging.

20 On its face defendants have pointed out that there is
21 a clause that says legally required accommodations are not
22 necessarily excluded from consideration, but in practice, the
23 city has made very clear that they do not consider religious
24 accommodations to be a valid reason to have to legally excuse
25 someone from the requirement.

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1 THE COURT: That means if the religious exemption has
2 been granted.

3 MS. GIBSON: I'm still just dealing with the
4 overarching view of the Commissioner Chokshi policy. That
5 doesn't even really provide for religious or medical
6 exemptions. That was challenged then by the union and an
7 arbitration award did provide for limited religious and medical
8 exemptions, but the DOE has implemented it in a manner, and
9 facially that policy which the DOE has implemented is facially
10 discriminatory against anyone who holds beliefs that are
11 outside of certain dogmas of certain religions. And both that
12 policy and the overarching policy were promulgated amidst a
13 flurry of hostile statements by the mayor and by
14 representatives of the DOE.

15 THE COURT: I looked at your papers, and I didn't
16 see -- the mandate was issued in late August. The only thing
17 that you cited prior to that, so when you say it was announced
18 amidst a flurry of antireligious statements, the only statement
19 you quote in your papers is from August the 3rd that preceded
20 the announcement of the policy.

21 Is that what you're relying on?

22 MS. GIBSON: Well, that was the first, one of the
23 first statements, but the mayor and the governor both went on
24 record many times saying that they do not believe, and
25 afterwards saying that they do not believe that religious

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1 exemptions are legitimate to --

2 THE COURT: Well --

3 MS. GIBSON: -- that there's no legitimate religious
4 reason to opt out of the vaccine and they, many times,
5 mentioned the Pope, which later the DOE, and that's where the
6 declarations come in, each of the plaintiffs, when they were in
7 their Zoom appeals, the DOE attorneys repeatedly, over and
8 over, the representatives of the DOE would mention the Pope as
9 the reason they should be denied.

10 THE COURT: That appears to be an as-applied argument.

11 Do you want to just start on the facial validity or
12 invalidity? You mentioned that it was promulgated amidst a
13 flurry of antireligious statements, so I'm trying to nail you
14 down on that. What exactly are you referring to? Because the
15 only thing in your papers that was around the time or preceding
16 the announcement is this transcript from Mayor de Blasio when
17 he announced generally that you need a vaccine, if you're in
18 New York City, to do just about anything. But there's nowhere
19 in it that references religion.

20 MS. GIBSON: Your Honor, I do apologize. I can go
21 back and look at the record and pull out a few other examples,
22 but I do believe that there were some news articles from that
23 time, right after it was promulgated, where the mayor came
24 forward and said that there are no valid religious issues for
25 exemption and that the Pope is very much in support of

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1 vaccination, and so he takes the position that, therefore,
2 nobody's religious beliefs that are contrary to the Pope's
3 would be valid.

4 THE COURT: OK. But again, do you have anything other
5 than the August 3 transcript of Mayor de Blasio's interview,
6 which is silent on religion, that suggests hostility to
7 religion at or before the time the mandate was announced?

8 MS. GIBSON: I believe I do, your Honor. I'm just
9 looking for it. The complaint discusses it, I believe, and
10 then also, my motion papers.

11 THE COURT: What paragraph of the complaint
12 particularly?

13 MS. GIBSON: Your Honor, that's a fair question, and I
14 just wasn't prepared for it. I'm sorry. But I do have several
15 articles, one from Spectrum.

16 THE COURT: Dated what?

17 MS. GIBSON: So, in exhibit 17, 17-1 -- sorry, I mean
18 17-3, -4, -5 and -6.

19 THE COURT: 17-3 is October 3. 17-5 is September 15.
20 17-4 is September 26.

21 MS. GIBSON: Well, your Honor, my understanding of
22 this law is that it doesn't -- I mean of animus, the indicia of
23 animus is it doesn't have to be preceding the promulgation of
24 the rule. It can also come afterwards, like it did in the
25 *Masterpiece Cakeshop*, where the court held that

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1 post-deprivation statements or during the time --

2 THE COURT: That's not true. Those statements were
3 made at around the time they were considering. It was an
4 as-applied challenge.

5 MS. GIBSON: I'd be happy to have a hearing on the
6 factual issue of whether there was others.

7 THE COURT: None of the witnesses that you proposed
8 can speak to this.

9 MS. GIBSON: I do believe, your Honor, that my
10 witnesses can speak to the animus that they received from the
11 DOE.

12 THE COURT: That was after this mandate was announced.
13 Right? I mean you're making a facial challenge, and you said,
14 the first thing out of your mouth almost, was it was
15 promulgated among a flurry of antireligious comments; that's
16 almost a quote. So I'm trying to see if you actually have
17 anything to back that up, and it sounds to me like the answer
18 is you do not.

19 MS. GIBSON: Well, your Honor, I believe there's an
20 article with the mayor and the governor discussing passing this
21 together, and then another article sharing the governor's very
22 clear stance on this issue.

23 THE COURT: Well, there's no question that the
24 governor has suggested that she believes that people should get
25 vaccinated. That's clearly her statement. But that's not what

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1 you're challenging. You're challenging the city's mandate.
2 The governor didn't have anything to do with the city's
3 mandate.

4 MS. GIBSON: I would counter that, your Honor. I mean
5 the governor and the mayor, and there is an article in here, in
6 No. 17, as well, the governor and the mayor sat down right
7 before August 24, when this was promulgated, and they announced
8 that they were together passing initiatives on the state and
9 city level to ensure that there would be no exemptions for
10 vaccinations.

11 THE COURT: Whoa, whoa, whoa. Please tell me where
12 that is in the record, because I don't remember that.

13 MS. GIBSON: So, exhibit 3 of --

14 THE COURT: 17-3?

15 MS. GIBSON: 17-3 is a Spectrum article, and I'm going
16 to get to the next part. Exhibit 3 is the Spectrum article
17 from August 24, which is the date this mandate was passed, and
18 in that article the mayor and the governor announced that
19 they'd been meeting regularly and were both going to be working
20 in concert to enact regulations that would protect the public
21 health with vaccination.

22 The second --

23 THE COURT: Where? Where? Whoa, whoa, whoa. Can you
24 direct me to a paragraph?

25 This is a kumbaya article. This is saying that the

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1 mayor and the new governor have sat down, they've worked
2 together, they're happy.

3 MS. GIBSON: And it says they're going to work in
4 coordination to protect the public health.

5 THE COURT: OK, but that --

6 MS. GIBSON: So then --

7 THE COURT: First off, it says -- what you quoted --
8 the mayor says vaccine mandates are on his to-do list.

9 MS. GIBSON: Right. The timing --

10 THE COURT: Nothing in there suggests hostility to
11 religion.

12 MS. GIBSON: So, correct, your Honor.

13 THE COURT: OK.

14 MS. GIBSON: But then the next article, The New York
15 Times article, the NPR article and, I believe, the Post
16 article, discuss -- oh, the Post and the Gotham article then
17 discuss the mayor's open hostility towards people who have
18 religious beliefs that aren't in line with the Pope's.

19 THE COURT: The Post article, what's the number on
20 that one?

21 MS. GIBSON: No. 7, your Honor.

22 THE COURT: All right. 17-7. Here's the issue with
23 17-7. One, it's hearsay. Right?

24 Two, it doesn't actually quote the mayor. It says de
25 Blasio has said the religious exemptions would also be limited

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1 to "two well-established religions: Christian Science and
2 Jehovah's Witnesses, that have a history on this of religious
3 opposition."

4 They're not quoted. The newspaper article says the
5 mayor warned those exemptions would be rare. So I don't know
6 exactly what the mayor said, but in any event, this was after
7 the arbitration award. This was after the arbitrator had
8 determined that there would be exemptions.

9 MS. GIBSON: I believe it shows that the mayor does
10 not believe that they -- he has made other comments as well,
11 and I'm happy to gather them. But the mayor has gone on
12 record.

13 THE COURT: Tell me. This is your opportunity.

14 MS. GIBSON: The mayor has gone on many times stating
15 that, just as Governor Hochul has, that there aren't valid
16 religious objections to vaccination; that it's illegitimate.

17 THE COURT: That's an as-applied challenge, right?

18 MS. GIBSON: I don't know. I believe that that shows
19 animus and legitimacy.

20 THE COURT: Why does it show animus? Why does it show
21 animus that the mayor says, in his view, there are going to be
22 few religious exemptions because major religious leaders, which
23 would deal with a vast majority of people, have all said it's
24 OK? That's not to say that there's not any religious leader
25 anywhere or any religious person anywhere that believes, as a

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1 religious matter, they can't take the vaccine. But saying they
2 don't think this is going to be common because there is
3 widespread, from established religions, acceptance and support
4 of the vaccines does not -- I'm having difficulties getting
5 from that to hostility to religion.

6 MS. GIBSON: Your Honor, I think *Masterpiece Cakeshop*,
7 *Lukumi* and a number of other cases talk about any comments that
8 would call into question the city's neutrality on the
9 legitimacy of religious viewpoints. So it's not just
10 religions. But the mayor has gone on the record. The governor
11 who is -- I think the circumstances do lead to indicia of
12 animus and working together because not only did they announce
13 they're working together, two days after this mandate from the
14 New York City Department of Health was issued, a parallel
15 mandate was issued by the governor through the state department
16 of health.

17 THE COURT: Do you have any evidence that those were
18 coordinated?

19 MS. GIBSON: I believe that the Spectrum article
20 leads --

21 THE COURT: No.

22 MS. GIBSON: -- to the inference that they were.

23 THE COURT: OK, but remember, you're the plaintiff.
24 You're asking for extraordinary relief, so you've got to show a
25 substantial likelihood that you're going to prevail on this

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1 argument, and you're relying on a Spectrum -- I'm not quite
2 sure what Spectrum is, a Spectrum article that's hearsay.

3 MS. GIBSON: Your Honor, in terms of animus, I believe
4 that in a preliminary injunction hearing, hearsay is
5 appropriate as published by the papers.

6 THE COURT: It may be if you can tell what the context
7 is. There are certainly times that I would say that's good
8 enough, but here, they tell nothing about the context in which
9 the statement was made, and you're relying on statements that
10 are not quotes. So even assuming that the reporters are
11 reliable and responsible journalists, you don't have a full
12 quote.

13 MS. GIBSON: We do have a quote, your Honor, from the
14 mayor saying that only Christian Scientists and Jehovah's
15 Witnesses will be considered.

16 THE COURT: That's not really what he says. Again, I
17 just read that quote into the record. You're quoting the Post
18 article, which isn't a quote at all.

19 The other article, which I just quoted, has the piece
20 that says religious exemptions would be limited to Christian
21 Science and Jehovah's Witnesses. That piece of the sentence is
22 not in quotes.

23 MS. GIBSON: OK, your Honor. It was reported on by
24 multiple papers, the Gothamist paper --

25 THE COURT: I did not myself go out and hunt for

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1 statements. I relied on what the plaintiffs presented me.

2 MS. GIBSON: Understood, your Honor.

3 I would then say that additional indicia of hostility
4 and animus was those with religious beliefs against
5 vaccinations can be found in the conduct that the Department of
6 Education, both within the hearings and also in response -- so
7 one of the things that happened that the plaintiffs, many of
8 them, did report on -- and I can bring them up to testify some
9 more if you'd like -- is that in nearly every appeal, the
10 Department of Education was advocating for them to be denied on
11 the basis that the Pope does not believe in vaccination -- or
12 does -- has been vaccinated, and this was even said to
13 Buddhists. This was even said to, you know, people who are not
14 Catholic.

15 THE COURT: But then what do you make of the DOE's
16 affidavit that says they've granted more than 20 for a wide
17 variety of expressed religious beliefs?

18 MS. GIBSON: Well, I'm not sure really on what basis.
19 Facially, the arbitration award itself, which they've adopted
20 as their policy, so they can't say that it's not.

21 THE COURT: Well, let me ask you about that. Did
22 they? The city's position was no exemptions. You must be
23 vaccinated, period, end. The union objected. They hit an
24 impasse, and per requirements of the collective bargaining
25 agreement, they then ended up in arbitration. The arbitrator

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1 said this is how it's going to be implemented.

2 So what was the city supposed to do? Or what was the
3 union supposed to do?

4 MS. GIBSON: The city couldn't even avoid liability
5 for discrimination when they implemented a state standard,
6 state-required test on teachers in the famous case of, I
7 believe -- I'm sorry. I'll get the citation for your Honor,
8 but it's just been settled after 20 years, where teachers --
9 there was a discriminatory impact from the state-required
10 tests, and the Second Circuit held that it wasn't enough for
11 the city to say, Well, this is required by the state.

12 I don't see how in this instance, when they have
13 implemented a facially discriminatory policy, which really on
14 its face --

15 THE COURT: How is it facially discriminatory? How is
16 the mandate facially discriminatory?

17 MS. GIBSON: The UFT award is facially discriminatory.

18 THE COURT: OK. On that, why are you the right person
19 to sue? Why isn't that the obligation of the union, and at
20 best what your claim might be -- and it might be; I haven't
21 really agonized over it -- a claim against the union for not
22 providing appropriate representation of its represented
23 members?

24 MS. GIBSON: No, your Honor. The plaintiffs against
25 the DOE, as the employer, who has the responsibility as the

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1 state, not to enforce discriminatory laws against my clients
2 who have personally held religious beliefs and are excluded
3 from the protection of, you know, reasonable religious
4 accommodations on the basis of the type of religion that they
5 practice. So if they're not a Christian Scientist or a
6 Jehovah's Witness -- and, you know, frankly, the DOE's response
7 that they've granted these exemptions to 20 people is also
8 hearsay, and we haven't talked to those people or determined on
9 what basis they said yes to them versus our clients, who really
10 were told point-blank that they cannot get relief if they have
11 personally held beliefs or if they do not submit a letter from
12 clergy.

13 That's facially discriminatory, and so the reason that
14 the union is not the appropriate party is that this is the
15 state's responsibility, and they can't sidestep this by
16 saying -- the union didn't agree to this award either. This
17 was an arbitrator, with whom I would push back on the assertion
18 that it's a neutral arbitrator. I did include two articles
19 about Arbitrator Scheinman's relationship as a fund-raiser for
20 the mayor. But in any event, once the state implements a
21 facially discriminatory award, that facially discriminates
22 against my clients, they have a right to sue the state.

23 THE COURT: OK. You don't think they have an
24 obligation to start by filing an Article 75 to challenge the
25 award?

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1 MS. GIBSON: No, your Honor. In fact, I think the
2 case law is pretty clear on that with the -- they haven't
3 waived their right to proceed.

4 THE COURT: They haven't waived their rights. There's
5 no question they have not waived their rights.

6 MS. GIBSON: And the appropriate place to challenge
7 constitutional issues is not within an Article 75 proceeding.
8 An Article 75 proceeding can't really even deal effectively
9 with constitutional issues. It has very narrow grounds for
10 relief.

11 What we're challenging is the constitutionality of the
12 state imposing on these teachers a facially discriminatory
13 requirement that they have to belong to only certain religions,
14 which violates both the establishment clause and the free
15 exercise clause.

16 THE COURT: That sounds like you are not challenging
17 the mandate, that you've abandoned your challenge to the
18 mandate.

19 MS. GIBSON: Your Honor, we are challenging the
20 mandate.

21 THE COURT: The mandate is neutral. Do you agree that
22 the mandate, as promulgated by Mr. Chokshi, is neutral? It
23 says you must be vaccinated.

24 MS. GIBSON: No, your Honor, I wouldn't agree, but I
25 do think that the indicia of animus is there. I'm happy to

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1 supplement it and bring another motion with more materials on
2 that issue, but at the -- I am, we are challenging both. I
3 mean it also has a disparate impact on people who have
4 religious beliefs. It's burdening their rights in a way that
5 is not --

6 THE COURT: But again, if you go back to the
7 jurisprudence of how you evaluate something that has a First
8 Amendment impact, if you look at Chokshi's mandate, it is
9 neutral as to religion. It applies to everybody. It applies
10 to people regardless of why they're not vaccinated. You've got
11 to be vaccinated if you're a DOE employee, period, end. That
12 is a sort of prototypical neutral position, isn't it?

13 MS. GIBSON: I would say not in light of the comments,
14 but also, I would say not in light of the fact that people who
15 only have one dose of the vaccine are allowed to go in, even
16 though they're not fully vaccinated.

17 THE COURT: But what does that have to do with the
18 religion? How does that make the mandate not neutral from a
19 religious perspective?

20 MS. GIBSON: For example, in *Roman Catholic Diocese*,
21 the court held that it wasn't neutral because, *v. Cuomo*, that
22 they weren't neutral because there were secular activities that
23 were excused.

24 THE COURT: But that was on the statute itself or on
25 the executive order itself. It distinguished between houses of

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1 worship and secular activities, so on its face it was not
2 neutral.

3 Again, what about Chokshi's mandate, on its face, is
4 not neutral, other than your claim that there were hostile
5 statements made, which you have no evidence of in the record?

6 MS. GIBSON: I believe that the neutrality goes to if
7 you have a religious need to not be vaccinated, it is just
8 arbitrary to discriminate between --

9 THE COURT: But that's an incidental effect on the
10 religion. It's a neutral statute that has an incidental effect
11 on some people. Right? That's the definition of it.

12 Look, there are two different ways of making a First
13 Amendment analysis. One is is it a neutral statute that has
14 incidental effect on religion? If so, it has to be rational.
15 It has to pass the rational relationship test. We'll get to
16 that in a second.

17 The second is if, on its face, it discriminates or it
18 makes distinctions between religious and nonreligious. That's
19 subject to strict scrutiny. Right?

20 OK. So we agree on the basic structure of First
21 Amendment law.

22 MS. GIBSON: Well, general applicability is the second
23 thing, so this vaccine mandate is not generally applicable to
24 those who are only vaccinated with one dose of a vaccine.
25 They're not fully vaccinated, but they're allowed to be in the

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1 building.

2 THE COURT: What does that have to do with religion?

3 MS. GIBSON: Well, religious people are not allowed to
4 be in the building although they also aren't fully vaccinated.

5 THE COURT: Again, saying someone who has a political
6 objection isn't allowed in the building either if they're not
7 vaccinated.

8 MS. GIBSON: I don't believe the standard is that
9 everybody, only religion has to be excluded. I believe if
10 there's anybody excluded for a secular purpose, that that could
11 go towards general applicability. But again, going back to the
12 indicia of animus, I think that the fact that unvaccinated
13 people who have only had one dose are allowed in the building
14 but people with religious exemptions are not --

15 THE COURT: On the one dose, aren't they required to
16 get the second dose; there's like a time frame and by X point
17 you have to get the second dose too?

18 MS. GIBSON: Yes, your Honor, but October 4 that
19 wasn't in effect. It doesn't make any sense why starting
20 October 4 they wouldn't be allowed in.

21 Also, just so I can clarify my argument for the Court
22 and I don't waste your time, is the Court's taking the position
23 that Governor Hochul's quite blatant statements about the
24 illegitimacy of people who hold opinions different from hers
25 about what God wants according to vaccines not relevant here?

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1 THE COURT: What she had to say had nothing to do with
2 Chokshi's mandate. Chokshi's mandate preceded that by a month
3 and a half, and it's a city mandate, not a state mandate.

4 MS. GIBSON: Well, it was on the eve of -- both
5 mandates were passed through the DOE after Governor Hochul and
6 de Blasio announced that they were working in partnership,
7 within two days of each other. Both mandates were supposed to
8 take effect on September 27. Both mandates were highly
9 controversial in that they negated any religious exemption, and
10 Governor Hochul actually went forward and said she did that on
11 purpose, which is recorded in the NPR article, Dkt. 17.

12 THE COURT: That's the healthcare mandate. You're
13 representing the teachers.

14 MS. GIBSON: And my position, or plaintiffs' position,
15 is that these were promulgated in concert.

16 THE COURT: You might be able to prove that at some
17 point, but you certainly haven't proved it for purposes of
18 preliminary relief.

19 MS. GIBSON: Understood, your Honor.

20 And then we would take the position that later
21 statements and just open hostility towards those who get
22 religious exemptions or who are denied because the Pope, you
23 know, does not agree with them, they do indicate hostility
24 towards those with religious beliefs. The mayor, whether or
25 not he said it openly on August 24, he certainly said it later,

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1 that he doesn't believe that there are legitimate reasons for
2 vaccination.

3 THE COURT: He doesn't believe there are legitimate
4 reasons for vaccination?

5 MS. GIBSON: Sorry. Religious exemptions for
6 vaccination, religious objections to vaccination.

7 THE COURT: Or he says he doesn't believe there are
8 going to be many.

9 MS. GIBSON: I believe the Gothamist and the Post
10 article both also reference the Pope. Am I mistaken, your
11 Honor?

12 THE COURT: I don't know whether it does or not, but
13 saying that he doesn't anticipate a lot of objections because
14 there is widespread acceptance within many religious
15 communities is not saying he's hostile to other religions.
16 It's just a statement in the context of what impact is this
17 going to have? I don't think it's going to have a big impact
18 because most religions say there's nothing wrong with the
19 vaccine. That doesn't suggest hostility to religion.

20 I'm struggling, again, to get from what you've quoted,
21 the limited quotes that you have, that are quotes to hostility.
22 What I read the Pope -- not the Pope. What the governor and
23 the mayor, but the governor's statements that are not all that
24 significant. What the mayor is saying I don't anticipate a lot
25 of it, because there was a lot of discussion at the time about

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1 what kind of impact is this going to have on DOE.

2 MS. GIBSON: Your Honor, I think read in connection
3 with the UFT award and how it was implemented by the DOE, you
4 know, reading statements like only Jehovah's Witnesses and
5 Christian Scientists have a prayer for relief, and sure, it's
6 not in quotation marks, but it was reported on by both the
7 Gothamist article and the Post article does clarify that the
8 intention is to deny -- when you look at the UFT arbitration
9 award, which also says the same thing, that people will be
10 denied if any religious leader within their proposed religious
11 belief system, as applied by the DOE, if they think any
12 religious leader has ever come out in favor of vaccination,
13 they're going to be denied, if they have personally held
14 beliefs that conflict with the Pope's, they're going to be
15 denied.

16 THE COURT: You do agree that DOE has a right to
17 separate out people who have genuinely, sincerely held beliefs
18 from people who are just politically objecting?

19 MS. GIBSON: Yes, your Honor.

20 (Indiscernible overlap)

21 MS. GIBSON: And I would point to Mr. Kane's
22 declaration in which he describes how when the arbitrator asked
23 whether the DOE objects to his, the sincerity of his beliefs,
24 they didn't even know that that was part of the inquiry. They
25 said again, No, we just think that -- you know, we would like

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1 him to be denied because the Pope is in favor of vaccination,
2 and he doesn't have a clergy letter. So this isn't about
3 sincerity. I'll also point out --

4 THE COURT: Again, that's your as-applied argument.

5 MS. GIBSON: Yes.

6 THE COURT: It would help the record if you could keep
7 these two separate, because they are truly separate arguments.

8 MS. GIBSON: Sure. I understand, your Honor. I'll
9 try to do that.

10 So, I would, as applied, as a general policy, not even
11 just to these individual plaintiffs, I would say that the
12 department -- it's quite clear that the department adopted a
13 policy of denying, in conjunction with the facially
14 discriminatory UFT award, of attempting to deny anyone
15 protection who has religious beliefs that would be, would meet
16 the dictionary definition of a heretic, or heretical, somebody
17 whose beliefs conflict with established religious dogma, which
18 violates the establishment clause.

19 THE COURT: OK.

20 MS. GIBSON: So I do think that that's been
21 established in this motion, but also, they denied everybody at
22 the outset. That's another part of this motion.

23 The DOE issued blanket denials to every person that
24 applied, stating that it would be an undue burden to accept any
25 religious exemption given that the commissioner's mandate

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1 doesn't allow them to be in the building. And so on that
2 basis, they categorically said religious exemptions shouldn't
3 be granted to anybody. Then the appeals process unfolded.

4 None of my plaintiffs were given the impression that
5 the process could really challenge the constitutionality of it,
6 and indeed, it can't, because the arbitrators are bound really
7 to that agreement. But the DOE then aggressively advocated to
8 have them denied based on discriminatory reasons.

9 Then after that, they implemented a policy where
10 anybody that they had denied as having personally held
11 religious beliefs -- and nobody was told that they were being
12 denied because they were insincere, by the way. But everybody
13 whose religious beliefs were deemed invalid by the DOE or the
14 arbitrator, for whatever reason, because they weren't actually
15 given a reason, was then subjected to very harsh treatment,
16 some of them -- all of them policies adopted by the DOE.
17 They're not allowed to be paid. They're not allowed to get
18 unemployment insurance. They're not allowed to even use their
19 accrued vacation and sick time. They really -- it's really
20 openly hostile in terms of the effect on these plaintiffs'
21 rights.

22 THE COURT: Isn't it the same effect that applies to
23 someone who had a political objection and therefore is out of
24 compliance with the policy? There's not a separate set of
25 penalties for people who assert a religious exemption and are

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1 denied, is there?

2 MS. GIBSON: No, your Honor, there's not.

3 THE COURT: OK.

4 MS. GIBSON: So, I would just submit that implementing
5 the openly discriminatory policy is state action, is openly
6 discriminatory. It does violate *Sherr v. Northport* schools,
7 which I know isn't binding but is an important case in this
8 arena. That's the Eastern District case. The entire state of
9 New York changed their religious exemption policy because of
10 that case, and this case is really just the same, the same
11 thing that was challenged there. Can you say you have to
12 belong to a bona fide religion? Can you require a
13 certification of a clergy member? And the court held that you
14 cannot and that that is discrimination against personally held
15 religious beliefs and the state of New York changed their
16 statute as a result. So they knew or should have known that
17 they couldn't implement this policy in that way and that it is
18 facially unconstitutional, and yet they proceeded to do it.
19 And I would say that the mayor's statements to the media
20 indicated that they intended to do that.

21 I would ask the Court, if the Court's position is that
22 we have not put in enough information about animus, whether the
23 Court would give us leave for that portion of the motion, to
24 hold that in abeyance and supplement the record with additional
25 indicia of animus and evidence that would meet the Court's

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1 standard, that has direct quotes and so forth, instead of just
2 being newspaper articles that report on what was said.

3 THE COURT: I'll take that request under advisement.

4 MS. GIBSON: Thank you, your Honor.

5 THE COURT: Anything further?

6 MS. GIBSON: Implementation of the discriminatory
7 policy is something that we need to -- we feel that, the
8 plaintiffs feel that needs to be addressed now, because they
9 haven't raised their right to challenge being subjected to that
10 unlawful discriminatory policy, and they have been impacted
11 quite egregiously by it.

12 And that is all for the motion. Thank you, your
13 Honor.

14 THE COURT: So you're abandoning your medical
15 exemption issue.

16 MS. GIBSON: We're focusing on the religious exemption
17 now. If anyone is denied their medical exemption, we will
18 bring that as a separate motion.

19 THE COURT: OK.

20 Ms. Minicucci.

21 MS. MINICUCCI: Your Honor, do you have any specific
22 questions about our papers?

23 THE COURT: I have a question about the DOE's
24 blanketly denying requests for religious exemptions. And
25 what's the current status of the appeal? If you can also help

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1 me, walk me through it procedurally. Anyone who wants a
2 religious exemption makes the request to the Department of
3 Education. If the Department of Education denies it, they get
4 an appeal pursuant to the collective bargaining agreement to an
5 arbitrator. Right?

6 MS. MINICUCCI: They get an appeal pursuant to the UFT
7 award.

8 THE COURT: Which is?

9 MS. MINICUCCI: Pursuant to the collective bargaining
10 agreement.

11 THE COURT: Collective bargaining agreement.

12 MS. MINICUCCI: Correct.

13 So that's essentially the process.

14 THE COURT: And if they don't like the answer of the
15 arbitrator, then they can file an Article 75.

16 MS. MINICUCCI: Correct, or bring a plenary challenge,
17 as plaintiffs have in this case.

18 THE COURT: Right.

19 MS. MINICUCCI: So that is essentially the whole
20 process.

21 THE COURT: Have any Article 75s been filed?

22 MS. MINICUCCI: Not to my knowledge. Not to my
23 knowledge.

24 THE COURT: OK.

25 What about the plaintiffs' argument that the UFT award

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1 facially is drawing distinctions between types of religious
2 practices that are unconstitutional?

3 MS. MINICUCCI: Your Honor, the UFT award obviously
4 was not, is not a policy of the Department of Education,
5 although the Department of Education is a party to this
6 arbitration.

7 On page 5, it sets forth some requirements, some of
8 the procedural requirements for the religious exemptions, and
9 it names as an example Christian Scientists, and I think the --
10 I mean I can't speak for what the arbitrator was thinking when
11 he put it in the decision, but I think that's just an example
12 of a well-known religion that generally opposes medical
13 treatment.

14 Obviously, as our supplemented declaration shows, that
15 over 20 religions, both established and personal religious
16 beliefs have been granted and this is over -- you know, more
17 than 20 people have had religious exemptions granted. This is
18 just a listing of the different religions within the DOE
19 (inaudible). So -- right. So, the DOE --

20 THE COURT: So in the first sentence, the
21 documentation in writing, e.g. clergy, it doesn't have to be a
22 clergy member; it could be the person himself or herself.

23 MS. MINICUCCI: Well, it has to be a religious
24 official, so unless plaintiffs are religious officials
25 themselves, that would not necessarily work. But I think

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1 ultimately it's not just one document that's going to make the
2 difference, and in any event, each of these applications are
3 individual. Each of them are evaluated by the arbitrator based
4 on the individual's belief, which are personal, so it makes it
5 very difficult to find a blanket challenge to this policy,
6 because each person's personal religious belief would require
7 different kinds of evidence and different kinds of statements.
8 And it's up to the arbitrator, in the first instance, to
9 determine whether that belief is sincerely held and it relates
10 to the vaccination generally and is not a political --

11 THE COURT: And it's religious.

12 MS. MINICUCCI: Correct.

13 THE COURT: All right.

14 MS. MINICUCCI: Any other questions, your Honor?

15 THE COURT: I've discussed with your adversary the
16 issue of the mayor's statements, but what was the mayor trying
17 to say?

18 MS. MINICUCCI: I could not speak for what the mayor
19 was trying to say, because I don't know. I will say that the
20 mayor is not responsible for making these determinations, nor
21 was he a party to the arbitration agreement. DOE and the
22 arbitrators, who are not DOE employees, not part of the city of
23 New York's employees, came to this determination ultimately for
24 a framework and then make the individual decisions. So I
25 submit that the mayor's comments are irrelevant to this

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1 specific process.

2 THE COURT: The plaintiffs' argument is that the city
3 can't escape liability by saying, Hey, we're complying with the
4 UFT award if the UFT award itself is being applied in a
5 discriminatory way. Do you agree with that?

6 MS. MINICUCCI: Certainly in -- if we're evaluating
7 questions of liability, those are questions that are ultimately
8 questions of fact for a case to be litigated at the end.
9 Certainly if the DOE is liable, then they're liable. I don't
10 think that's the position that our papers take, that we would
11 escape all liability because an arbitrator made the decision.

12 THE COURT: Well, what is your position?

13 MS. MINICUCCI: About liability?

14 THE COURT: No. About whether they've sued the right
15 people. I understood your argument to be, until you said they
16 can bring a plenary claim, I understood your position to say if
17 they're complaining about what happens in the arbitration, they
18 need to either fight that out by bringing a claim that the
19 union is violating its duty of fair representation to them or
20 they take an Article 75. But just five minutes ago, you said,
21 Or they can file a plenary lawsuit like this.

22 MS. MINICUCCI: Correct. I meant that they can bring
23 a lawsuit as individuals if they believe their individual
24 rights were violated.

25 THE COURT: So why would you argue in your papers

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1 about duty of fair representation?

2 MS. MINICUCCI: Because in that case, your Honor, they
3 were talking about the arbitration awards.

4 THE COURT: They're still talking about the
5 arbitration awards.

6 MS. MINICUCCI: Correct. I'm sorry. I'm getting
7 mixed up between plaintiffs' claims as applied, and that's what
8 I mean. They can bring a plenary challenge to the arbitration
9 award, or not even the arbitration award, to the way that DOE
10 is applying the challenge to them, the award to them.

11 THE COURT: Like an as-applied challenge.

12 MS. MINICUCCI: Correct.

13 THE COURT: Like what this lawsuit is.

14 MS. MINICUCCI: Correct. However, this injunction is
15 saying that this award and the law is facially
16 unconstitutional, which it is not.

17 THE COURT: Well, they're also saying that as applied
18 it's unconstitutional.

19 MS. MINICUCCI: It may be ultimately found to be
20 unconstitutional. At this juncture, there's no evidence to
21 support that.

22 THE COURT: Why don't you articulate your argument on
23 why there's no evidence, on an as-applied basis, that the
24 mandate, as applied via the UFT decision -- as applied -- is
25 unconstitutional.

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1 MS. MINICUCCI: The mandate is not unconstitutional
2 because it doesn't favor one religion over another.

3 THE COURT: Not the mandate.

4 MS. MINICUCCI: I'm sorry.

5 THE COURT: As applied by the UFT decision.

6 MS. MINICUCCI: Correct. The mandate, as applied by
7 the UFT decision, is not unconstitutional because it doesn't
8 favor one religion over another and it doesn't give any
9 religion an advantage. It just sets forth a framework by which
10 to apply for an exemption.

11 THE COURT: So all of the plaintiffs' argument that
12 the DOE lawyers are quoting the Pope and the exemptions are
13 being granted almost not at all and they've been summarily
14 denied their requested exemption even though there's no
15 question that they have -- they didn't question the good faith
16 belief on the plaintiffs' part, according to your affidavits,
17 what do I make of that?

18 MS. MINICUCCI: Those are individual as-applied
19 challenges. They're not challenging the law itself or the
20 award. They're just saying what happened between, you know --

21 THE COURT: Are you saying that the Court should grant
22 these ten plaintiffs' as-applied challenges?

23 MS. MINICUCCI: No, your Honor. I submit that they
24 haven't met that requirement either.

25 THE COURT: So talk about that.

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1 MS. MINICUCCI: OK. So, in order to bring a case for
2 a violation of constitutional right or to qualify for -- excuse
3 me.

4 To qualify for religious exemption, plaintiffs would
5 have to show that their religious beliefs prevent them from
6 getting a vaccine, and it's the DOE's position that they have
7 not shown that. And that's what the DOE argued in the
8 arbitration, and that's why they don't qualify for a
9 constitutional -- for an injunction in this case either.

10 THE COURT: OK, but the plaintiffs have put in
11 affidavits that say they have an honestly held religious belief
12 and they, at least some of them, were denied the exemption.
13 They appealed it to the arbitrator. The denial of the
14 exemption was upheld. What does the city put in to controvert
15 that?

16 MS. MINICUCCI: It depends on the specific case. I'm
17 not sure what the DOE put in specifically to controvert --

18 THE COURT: What do you put in to me?

19 MS. MINICUCCI: The updated and supplemented
20 declaration.

21 THE COURT: Which says that over 20 people have been
22 granted exemptions.

23 MS. MINICUCCI: It says that people from over 20
24 religions have been granted.

25 THE COURT: Sorry. OK. Because you didn't give me a

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1 number, I can only assume it's one per religion.

2 MS. MINICUCCI: Your Honor, it's more than that. Last
3 time I checked, it was over a hundred people.

4 THE COURT: OK. And therefore, the Court should infer
5 that the problem is not how the rule is being enforced; it is
6 that there was something about the plaintiff's particular
7 claims that the arbitrator didn't buy.

8 MS. MINICUCCI: That's correct, your Honor.

9 THE COURT: OK.

10 MS. MINICUCCI: Just in conclusion, we submit that the
11 plaintiffs have not met their burden for a preliminary
12 injunction, let alone a mandatory injunction, and that they
13 don't have success of likelihood of the merits and that the
14 balance of equities is really in the favor of upholding the
15 mandate and keeping unvaccinated teachers outside of schools.

16 THE COURT: What's DOE going to do with people who are
17 granted a religious exemption? They're not letting them on the
18 school grounds, correct?

19 MS. MINICUCCI: That's correct.

20 THE COURT: What are they going to do with them?

21 MS. MINICUCCI: I believe the arbitration awards set
22 forth that they are to stay on payroll and that to the extent
23 there are --

24 THE COURT: If they can find jobs for them that won't
25 require them being on premises, they'll get them, if possible.

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1 Otherwise, they're out. Otherwise they're going to be
2 discharged as well, correct?

3 MS. MINICUCCI: I don't believe that that's been set
4 forth in the awards.

5 THE COURT: Oh.

6 MS. MINICUCCI: That there would be a termination for
7 anybody who meets the burden of religious exemption.

8 THE COURT: Well, but if you can't accommodate them,
9 then what?

10 OK. Never mind.

11 Does any of the rest of you know what the DOE is going
12 to do for people who cannot be accommodated? Normally, if you
13 can't accommodate a religious exemption, the employee's not
14 kept on.

15 Not you. You do not represent DOE.

16 MS. GIAMBRONE: I think that the DOE's attempting to
17 accommodate everybody as best they can, and I don't think that
18 that has presented itself yet.

19 THE COURT: It's not a live issue. OK. Fine.

20 Anything further?

21 MS. MINICUCCI: No, your Honor.

22 THE COURT: All right.

23 Ms. Gibson, I'll give you the last word.

24 MS. GIBSON: Your Honor, just to reiterate, this UFT
25 arbitration award, which has been implemented by the DOE is

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1 facially discriminatory. It says right in the award that
2 people with personally held religious beliefs or who have
3 religious beliefs that are not the same as the Pope or --

4 THE COURT: Where does it say that? Where does it say
5 that if you don't agree with the Pope you're out?

6 MS. GIBSON: Pardon me. Let me rephrase.

7 People who have religious beliefs that have been
8 contradicted by any religious leader.

9 THE COURT: Where does it say that?

10 MS. GIBSON: It says it in the UFT arbitration award.

11 THE COURT: What page?

12 MS. GIBSON: If there's any religious leader of
13 your --

14 THE COURT: What page?

15 MS. GIBSON: Your Honor, just give me a moment,
16 please. Your Honor, I just have to pull the award. I believe
17 I quoted it in the motion papers, but I -- one moment.

18 I'm happy to supplement that record with a written
19 page citation, but it does say in the UFT award and the CSA
20 award if any religious leader of your religion has come forward
21 and made statements in favor of vaccination, you will not be
22 granted an exemption.

23 THE COURT: Right, but it's clear that they're
24 granting exemptions notwithstanding that. So whatever the
25 gloss is on that, which presumably would be some employee who

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1 is saying, I'm X, therefore I can't be vaccinated, except that
2 the leader of X says that's not right, that's not what our
3 religion believes, and the employee doesn't say, Well, OK, so
4 it's not because of the specific doctrine of my church, but I
5 have a specific religious belief of something else. It's clear
6 that whatever he meant by that, it hasn't precluded DOE of
7 granting exemptions to people even though the head of their
8 faith organization has made statements supporting vaccines.

9 MS. GIBSON: Well, your Honor, this is news to us,
10 these 20 people who have gotten --

11 THE COURT: You got it.

12 MS. GIBSON: -- exemptions that don't --

13 THE COURT: You got it last week.

14 MS. GIBSON: -- comply with the UFT awards.

15 THE COURT: You got it last week.

16 MS. GIBSON: Yes, but we don't know the names. We
17 haven't had --

18 THE COURT: You didn't ask to adjourn this hearing so
19 that you could take expedited discovery. You didn't do any of
20 that. If you had asked for that, to take discovery of DOE on
21 this issue, I may have granted it, but you didn't.

22 MS. GIBSON: So, your Honor, just to point out that to
23 the extent that they've deviated from the facially
24 discriminatory policy in 20 cases or even a hundred cases out
25 of thousands doesn't mean that these plaintiffs got any such

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1 deviation. In fact, these plaintiffs were told very precisely
2 that they would not get a deviation from the award, that this
3 award is binding, it's discriminatory and that they just have
4 to live with that if they don't meet the criteria, which is not
5 about sincerity but, rather, about whether you belong to one of
6 these established religions and whether your religious leaders
7 have ever said anything contrary to what you believe.

8 So let's take the case of Margaret Chu, for example.
9 She details in her declaration how she repeatedly told the
10 arbitrator and the DOE attorney that she, as a practicing
11 Catholic, believes that her moral conscience is more important
12 than anything that the Pope has taken a position on and that
13 that is a part of her religion. She was told that that doesn't
14 matter and that they're going to take the word of the Pope over
15 a layperson like her.

16 THE COURT: Did you submit an arbitration award where
17 the arbitrator said, We reject your view because the Pope said
18 X?

19 MS. GIBSON: The arbitrators didn't put any reason for
20 any of the plaintiffs' denials. They simply wrote, checked the
21 box that said denied.

22 THE COURT: OK.

23 MS. GIBSON: (inaudible) arbitration they said that.

24 THE COURT: But you don't know exactly what, then, was
25 the deciding factor for the arbitrator.

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1 MS. GIBSON: Well, what they told her was that --

2 THE COURT: They who?

3 MS. GIBSON: The arbitrator told Margaret Chu that he
4 was going to take the word of the Pope over a layperson and he
5 could not consider her personally held Catholic beliefs over
6 the word of the Pope. And that was brought up in multiple
7 plaintiffs' arbitration hearings not only by the arbitrators
8 but by the DOE who advocated that the policy on its face
9 requires discrimination. To the extent individual
10 arbitrators -- 20, maybe a hundred times, and I don't know if
11 that was after the suit was filed or not. But to the extent
12 that any of them deviated from the facially discriminatory
13 standard, the standard itself is discriminatory. And so at
14 that point, strict scrutiny has to apply.

15 So in this instance, I would submit, and we have
16 submitted, evidence from two very highly regarded public health
17 officials, certainly not antivaccine. They're Stanford and
18 Johns Hopkins public health authorities who have --

19 THE COURT: The guy from Stanford is a public policy
20 guy, health policy.

21 MS. GIBSON: Well, I believe he's published over --
22 he's been cited in over 11,000 public health scientific
23 articles. He is an authority on this subject.

24 THE COURT: On vaccines in particular? That's not
25 what his affidavit says, but go ahead. Make your argument.

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1 MS. GIBSON: Dr. Makary, from Johns Hopkins, who has
2 sat on the World Health Organization advisory committee, who is
3 also an authority in this subject, they both have extensive
4 things to say about whether people pose a direct threat based
5 on their vaccination status in this instance, which it would
6 then become the obligation of the Department of Education and
7 the other defendants to prove that they cannot grant sincerely
8 held religious exemptions because of that. And in this
9 instance -- or that these people cannot be in the building at
10 all. And in this instance, you know, there's really not,
11 there's really not good science on that.

12 The CDC has admitted, and that's in exhibit 5 of my
13 most recent affidavit that went with my supplemental materials,
14 the CDC director went on national TV and stated that the
15 vaccines can't stop transmission.

16 THE COURT: OK. Let me stop you. Do you agree, do
17 the plaintiffs agree, that the vaccines make it less likely
18 that someone who has been vaccinated will contract Covid?

19 MS. GIBSON: Your Honor, that's why the expert
20 testimony is interesting. The experts both --

21 THE COURT: They don't address this. They do not
22 address the issue of whether the vaccine is effective to reduce
23 the risk of contracting the virus.

24 MS. GIBSON: They do discuss the waning vaccine
25 immunity, and they discuss the extensive science showing that

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1 you're just as infectious, if you're infected, and that even if
2 vaccinated, even if there's some slight protection against
3 infection --

4 THE COURT: Some slight protection?

5 MS. GIBSON: -- that it wanes rapidly.

6 THE COURT: Slight protection?

7 MS. GIBSON: Yes, and there's a number of --

8 THE COURT: Slight?

9 MS. GIBSON: Yes. Slight.

10 THE COURT: Come on.

11 MS. GIBSON: Your Honor, there's a number of studies
12 that are showing --

13 THE COURT: Come on. You're losing credibility.

14 MS. GIBSON: -- that it goes from pretty fairly good
15 protection for a few weeks to, and then within a couple of
16 months drops down to almost no protection against infection,
17 and we don't have --

18 THE COURT: It does not. There are not peer-reviewed
19 studies that show that.

20 MS. GIBSON: I think --

21 THE COURT: That they drop to almost no protection,
22 six weeks after vaccination.

23 MS. GIBSON: No. Six months, your Honor. There are.
24 I mean, there's just a study out of Israel that says that. But
25 we haven't even been tracking right through --

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1 THE COURT: That drop to nothing? No.

2 MS. GIBSON: They said nothing yesterday, but I would
3 be happy to bring Dr. Bhattacharyta and even Dr. Makary up to
4 talk about these studies. But even if there was some
5 protection against infection, that goes away if you've had
6 natural immunity, so anyone who was vaccinated --

7 THE COURT: What do you mean it goes away if you've
8 got natural immunity?

9 MS. GIBSON: Well, there's no -- you don't have a
10 greater -- there's no greater -- like, the natural immunity has
11 a greater protective effect against subsequent infection than
12 the vaccine immunity does, and there's a lot of studies that
13 show that, and they both speak about that extensively.

14 Your Honor, you're shaking your head, and I appreciate
15 that. But that's why it's so important to bring experts on.
16 They can discuss the studies that have been done, which have
17 been extensive and thorough.

18 THE COURT: Do you know how many studies --

19 MS. GIBSON: And there are other mitigating --

20 THE COURT: Excuse me.

21 Do you know how many of the studies that your experts
22 cite that are not peer reviewed?

23 MS. GIBSON: I'm happy to bring them up here. I don't
24 think there's any --

25 THE COURT: Do you know? You are the attorney arguing

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1 this. You are propounding these people as experts. That's my
2 question. Do you have any idea how many of the studies that
3 they cite are not peer reviewed?

4 MS. GIBSON: No, your Honor, I don't. But I do know
5 that there are no peer-reviewed studies -- the only study --
6 there are no peer-reviewed studies that say that naïve,
7 unvaccinated versus people with natural immunity have a greater
8 protection. The Kentucky study that the defendants cite, I
9 don't know if it's even peer reviewed. It's odd. It's a CDC
10 study that takes Kentucky out of the 50 states that they have
11 data on, so it's not clear why they chose that state. And it
12 doesn't test unvaccinated -- I mean vaccinated people who have
13 not had infection against people who have had infection. It
14 tests vaccinated people who have already been infected against
15 people with infection to see if vaccination can further protect
16 against immunity. But if you just take all of the studies that
17 have shown vaccinated people who have not had infection against
18 unvaccinated people who have had infection, show that natural
19 immunity is substantially more robust. And I do believe some
20 of them are peer reviewed. But I'm happy to bring them up
21 here.

22 I think the other mitigation strategies, though,
23 suggested are the -- there's no reason why these plaintiffs
24 can't do the weekly testing or the biweekly testing.

25 THE COURT: All you're saying is that there are other

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1 things that might also be a rational response, but that doesn't
2 mean that the plan that the city came up with is irrational.

3 MS. GIBSON: Well, if you have to -- we're looking at
4 strict scrutiny for the UFT arbitration awards. So if we're
5 looking at, you know, whether that's the least restrictive
6 means, it's certainly not; that there are -- every other
7 teacher in the state, people two miles away from the schools in
8 Queens, for example, do not have to get vaccinated. They're
9 getting tested, so there's no real reason why these particular
10 teachers have to be subjected to violating their religious
11 beliefs or getting fired when they have that other testing
12 option.

13 In terms of whether it's a rational reason, if we were
14 in that realm, I'm not sure that it is completely rational.
15 The unrefuted record right now --

16 THE COURT: Why isn't it rational?

17 MS. GIBSON: We don't really have facts in the record
18 to establish what you're saying about infection, your Honor,
19 and so if we want to have a hearing --

20 THE COURT: Just to be clear, you brought this on by
21 order to show cause. You sought a preliminary injunction.
22 Your obligation is to show that there's a probability of
23 success for you; that is, that you're going to win the lawsuit.
24 So that's your burden. And I asked you at the very beginning
25 what you proposed to put on in terms of testimony, and you said

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1 they would repeat what's in their affidavits. I've read their
2 affidavits.

3 MS. GIBSON: If you'd like to cross-examine them on
4 infection --

5 THE COURT: I don't want to cross-examine them. I
6 want to decide based on the evidence you've presented me.

7 MS. GIBSON: OK, your Honor. Well, I believe that our
8 burden is to show likelihood of success on the merits. In
9 terms of whether the people are a direct threat, then the
10 burden shifts. Once we've shown likelihood of success on the
11 merits because there's a facially discriminatory policy adopted
12 by the New York City Department of Education, the burden then
13 does shift to defendants to prove that they've used the least
14 likely, least burdensome -- I mean, sorry, least intrusive and
15 least burdensome methods to meet their compelling interests.
16 That is *Roman Catholic Diocese*, for example, and a number of
17 other cases.

18 THE COURT: Again, those were very different. Those
19 were facial claims where you had overtly discriminatory
20 provisions. That's not this.

21 MS. GIBSON: And I would submit that the UFT
22 arbitration award, as implemented by the DOE, is overtly
23 discriminatory --

24 THE COURT: That's an as-applied challenge.

25 MS. GIBSON: -- people. It's overtly discriminatory

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1 to all people who don't belong to certain religions or have
2 religious beliefs that are echoed by their religious leaders,
3 so anyone with personally held religious beliefs is overtly
4 discriminated against by this policy.

5 THE COURT: OK.

6 MS. GIBSON: Your Honor, the last thing I'd like to
7 say is the mandatory versus prohibitory injunction standard,
8 there's a lot of different -- discussion about different dates
9 of things being announced, but I don't believe there's any real
10 debate about when it was to go into effect, and that was
11 October 4. I'll direct the Court to exhibit 45-2.

12 THE COURT: You mean October 1.

13 MS. GIBSON: October 4 is when they were excluded from
14 school.

15 THE COURT: OK.

16 MS. GIBSON: October 1 is when they had to get
17 vaccinated, but they could still go to school and were still
18 being paid. October 4 is when they could no longer come into
19 the building.

20 THE COURT: But October 1 was the deadline.

21 MS. GIBSON: No -- but October 4 is when they stopped
22 getting paid, and the mayor said that anyone who wants to get
23 vaccinated over the weekend -- a lot of people did get
24 vaccinated after October 1 and were allowed in October 4.

25 THE COURT: OK.

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1 MS. GIBSON: So the only meaningful -- the meaningful
2 deadline, in any event, is October 4. And the case law, as
3 defendants acknowledge, discuss that the status quo is the last
4 applicable time line before the controversy arose. So we're
5 talking about a couple of days here, but not even, because as
6 exhibit 45-2 shows, the school -- the DOE clearly told people
7 that they had to be vaccinated before October 4 or they'd be
8 excluded. And we filed the morning of the 4th, so at the time
9 of filing, all of these plaintiffs, the status quo was that
10 they could teach. In fact, most of them have been teaching in
11 the schools for the last year and a half unvaccinated. There's
12 really no difference between then and allowing them to keep
13 doing so while we determine the merits of this case.

14 And then on top of that, if the Court was to
15 ultimately find that they did not deserve relief, either as
16 applied or facially, they could always then be told to leave at
17 that point.

18 In closing, I would like to state that we are looking
19 for a stay of this entire policy because it is facially
20 discriminatory. But if the Court doesn't grant that, in the
21 alternative, we would like at least the as-applied relief for
22 these plaintiffs who have not been -- who have put declarations
23 in stating that they have sincerely held religious beliefs and
24 were denied protection on the basis of a discriminatory policy
25 adopted by the DOE.

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1 THE COURT: Thanks.

2 Why shouldn't I view the UFT decision as facially
3 discriminatory?

4 MS. MINICUCCI: Your Honor, because it's not. Like I
5 said before, it simply provides a framework.

6 THE COURT: It does say that if the leader of the
7 faith organization has said something to the contrary, then the
8 exemption will not be granted. Right?

9 MS. MINICUCCI: Correct. I mean it does say that on
10 page 5, but obviously, there have been Roman Catholic people
11 who have had exemptions granted, and the Pope has come out for
12 vaccines.

13 THE COURT: So you're saying that because there was an
14 exception, the language of this doesn't mean what it says it
15 says?

16 MS. MINICUCCI: I think that the way that the UFT
17 award is written, it's setting forth examples of reasons that
18 would lead to a denial, because the next sentence after that
19 says where the documentation is readily available, so that goes
20 to, Well, if you can just find this letter online, it's going
21 to be denied.

22 THE COURT: I understood that point. The notion that
23 because you've read about it in the papers, that there are all
24 kinds of charlatans who are just posting Religions R Us letters
25 that say we're opposed, but that was what that was addressed

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1 to. I understood that.

2 I was more focusing on the first sentence, which is --
3 the second sentence, "requests shall be denied where the leader
4 of the religious organization has spoken publicly in favor of
5 the vaccine," that clause.

6 MS. MINICUCCI: Yes, your Honor. And I guess I'm
7 using the second clause to provide context. I think it's
8 creating a shorthand, but in any event, this is sort of the
9 last step of the award. The award itself is one that's
10 facially discriminatory against any religion, even privately
11 held religious beliefs, and the mandate is the DOE's mandate.
12 The award is going beyond what plaintiffs are challenging. The
13 mandate from the department of --

14 THE COURT: No, that's not true. They are quite
15 clearly challenging the UFT awards, the UFT structure, whatever
16 you want to call this. They're saying that, as the arbitrator
17 came down with this decision, this decision discriminates on a
18 religious basis.

19 That's your claim, right, Ms. Gibson?

20 MS. GIBSON: Yes, your Honor.

21 MS. MINICUCCI: So, to sort of -- I don't know. I
22 can't speak to what the arbitrator was thinking when he wrote
23 this, but I think that it was created as a sort of shorthand.
24 And again, it's obviously not proof that people who had
25 requests for religious exemption that fall under these

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1 categories where the religious leader did speak out for
2 vaccines but they weren't granted. Obviously there's a lot of
3 personal decisions and personal documentation and personal
4 testimony with each application, and that's where the
5 arbitrator specifically needs to consider.

6 THE COURT: OK.

7 MS. MINICUCCI: Thank you.

8 THE COURT: All right. I'm going to take about a
9 ten-minute break. It's 12:15 now. I'll be back at 12:30 on
10 the dot.

11 (Recess)

12 THE COURT: Please be seated.

13 Thank you, all. I'm now ready to rule.

14 I want to start by thanking the ten plaintiffs and the
15 many other DOE employees in my courtroom, in the overflow
16 courtrooms and listening on the phone for their tireless work
17 on behalf of the students of this city in what can only be
18 described as next-to-impossible conditions this past year and a
19 half. You've all worked hard to do the best you can under very
20 difficult circumstances.

21 I also want to thank the city defendants, who have
22 been tireless in pursuing a strategy for the city to get back
23 to normal while minimizing the risk to public health and
24 safety. The city officials have plotted a course between
25 Scylla and Charybdis and have done so in the face of rapidly

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1 evolving scientific and medical knowledge. They have done so
2 in the face of massive disinformation about Covid and vaccines
3 that has been relentlessly pushed out through social media and
4 has been swallowed by some people hook, line, and sinker. It
5 is clear to me that if social media had been around at the
6 beginning of the last century, we would not have eliminated
7 smallpox, and polio would still be endemic in this country.

8 Plaintiffs have applied for a preliminary injunction
9 to enjoin the implementation of the city's Covid vaccine
10 mandate for DOE employees. For the reasons I will lay out in
11 detail, plaintiffs have not shown that they are entitled to
12 this extraordinary remedy, and their application for
13 preliminary injunction is denied.

14 Ten Department of Education employees have sued the
15 mayor, the city health commissioner, and the DOE, claiming that
16 a city order requiring DOE employees to be vaccinated against
17 COVID-19 violates their constitutional rights. The challenged
18 order, which was initially published on August 24, required all
19 DOE employees to provide proof of vaccination by September 27.
20 See Aug. 24 order, which is at Dkt. 1-1. After discussions
21 with DOE regarding the impact of the order on the employees it
22 represents were unsuccessful, on September 1, the United
23 Federation of Teachers, or UFT, filed a declaration of impasse
24 and the parties proceeded to arbitration. Compl., Dkt. 1 at ¶
25 29.

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1 On September 10, the arbitrator published an award
2 which required that DOE provide eligible UFT employees with
3 medical and religious exemptions according to criteria laid out
4 in the award. *Id.* ¶ 30; Arb. Award, Dkt. 1-2. The award also
5 established that employees who do not submit proof of
6 vaccination and who do not have a pending or granted exemption
7 would be placed on leave without pay, Resp., Dkt. 31 at 4. A
8 similar award was entered a few days later to cover DOE
9 employees represented by the Council of School supervisors &
10 Administrators, or CSA, Compl. ¶ 31. The two awards will be
11 collectively referred to as "arbitration awards."

12 On September 15, Commissioner Chokshi updated the
13 vaccine mandate order, adding a provision that "nothing in this
14 order shall be construed to prohibit any reasonable
15 accommodations otherwise required by law." Sept. 15 order,
16 Dkt. 31-2 ¶ 6. And on September 28, 2021, Commissioner Chokshi
17 extended the date by which DOE employees must submit proof of
18 vaccination to October 1. Sept. 28 order, Dkt. 31-3.

19 I will refer to the various commissioner of health
20 orders I just described as the vaccine mandate.

21 Plaintiffs filed this lawsuit on September 21, after
22 the arbitration awards had been issued and after Commissioner
23 Chokshi added to the mandate the possibility of a reasonable
24 accommodation. Almost two weeks later, after the extended date
25 for compliance had passed, on October 4, plaintiffs applied for

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1 an order to show cause why a preliminary restraining order, or
2 TRO, and a preliminary injunction should not be ordered. The
3 next day, Judge Vyskocil, sitting in part 1, denied the
4 plaintiffs' request for a TRO and scheduled this hearing on
5 plaintiffs' application for a preliminary injunction. See
6 order, Dkt. 33.

7 Plaintiffs challenge the vaccine mandate facially and
8 as applied, Compl. ¶ 2. An as-applied challenge addresses "the
9 application of an order to a particular set of plaintiffs,"
10 whereas a facial challenge addresses "the legality of the
11 [order] itself." *Congregation Rabbinical Coll. of Tartikov,*
12 *Inc. v. Vill. of Pomona*, 915 F.Supp.2d 574, 611 (S.D.N.Y. 2011)
13 *aff'd sub nom.*, 945 F.3d 83 (2d Cir. 2019) (cleaned up).

14 I will begin with the plaintiffs' as-applied
15 challenges.

16 The vaccine mandate is applied to these 10 plaintiffs
17 through the arbitration awards. Defendants report -- and
18 plaintiffs do not contest -- that all 10 plaintiffs are
19 represented by either the UFT or the CSA and are, therefore,
20 subject to the procedures and consequences outlined in the
21 arbitration awards. See first Bernstein Decl., Dkt. 31-10, ¶¶
22 2, 4. Instead of arguing that the arbitration awards do not
23 apply to them, plaintiffs argue that the contours of the
24 arbitration awards' religious exemptions are unconstitutional
25 or that, as interpreted by the arbitration panels that are

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1 handling the exemption process, are being applied
2 unconstitutionally. See generally Compl., Dkt. 1; Mem. of Law,
3 Dkt. 16.

4 On the record before me, I cannot conclude that
5 plaintiffs have standing to challenge the exemption process
6 established by the arbitration awards as applied to them. In
7 denying the TRO, Judge Vyskocil noted that neither party had
8 briefed the question of "whether, because there is the
9 collective bargaining process, the individual teachers as
10 opposed to the union have standing to even assert those
11 violations." TRO hearing Tr. at 6; see also *Id.* at 18.
12 Despite having the issue flagged for them and being given the
13 opportunity to submit supplemental briefing, inexplicably,
14 plaintiffs' counsel did not address this crucial threshold
15 issue.

16 Under New York law, it is well established that "[i]f
17 there is no claim that the union breached its duty of fair
18 representation, an individual employee represented by a union
19 generally does not have standing to challenge an arbitration
20 proceeding to which the union and the employer were the only
21 parties." *Katir v. Columbia Univ.*, 15 F.3d 23, 24-25 (2d Cir.
22 1994) (internal citation omitted); see also *Chupka v.*
23 *Lorenz-Schneider Co.*, 12 N.Y.2d 1, 6 (1962) ("[E]ach individual
24 employee in becoming a beneficiary to the [collective
25 bargaining agreement] gives up to the union, as his

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1 representative, his individual right to sue on or litigate as
2 to the contract."); *Bd. of Educ. Commack Union Free Sch. Dist.*
3 *v. Ambach*, 70 N.Y.2d 501, 508 (1987) (collecting cases).
4 Plaintiffs may have a claim of breach of the duty of fair
5 representation, but the complaint does not articulate it, and I
6 have no facts before me that even remotely suggest that the
7 unions' conduct was arbitrary, discriminatory, or in bad faith.
8 See *Hunt v. Klein*, 2011 WL 651876, at *3 (S.D.N.Y. Feb. 10,
9 2011), *aff'd*, 476 F.App'x 889 (2d Cir. 2012).

10 In this case, due to the lack of briefing, it is not
11 clear that plaintiffs have standing. Accordingly, I will order
12 supplemental briefing on that issue as well as the issue of
13 whether plaintiffs' remedy is an Article 75 proceeding.

14 Plaintiffs' facial challenges concern the legality of
15 the vaccine mandate itself. To be entitled to a preliminary
16 injunction enjoining the implementation of the mandate,
17 plaintiffs must show: (1) a likelihood of success on the
18 merits; (2) that the plaintiff is likely to suffer irreparable
19 injury in the absence of an injunction; (3) that the balance of
20 hardships tips in the plaintiff's favor; and (4) that the
21 injunction is in the public interest. *Capstone Logistics*
22 *Holdings, Inc. v. Navarette*, 736 F.App'x 25, 26 (2d Cir. 2018).
23 That burden is even higher when a party seeks "a mandatory
24 preliminary injunction that alters the status quo by commanding
25 some positive act, as opposed to a prohibitory injunction

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1 seeking only to maintain the status quo." *Cachillo v. Insmad,*
2 *Inc.*, 638 F.3d 401, 406 (2d Cir. 2011) (cleaned up). To meet
3 that higher burden, a party seeking a mandatory injunction must
4 show a "clear or substantial likelihood of success on the
5 merits." *Donninger v. Neihoff*, 527 F.3d 41, 47 (2d Cir. 2008)
6 (cleaned up).

7 Plaintiffs are clearly seeking to change the status
8 quo. The vaccine mandate went into effect on October 1, and
9 their challenge was filed on the morning of October 4. But
10 because I find that plaintiffs have not met the lower standard
11 of a likelihood of success on the merits, I need not grapple
12 with the question of whether plaintiffs are seeking a
13 prohibitive or mandatory injunction.

14 Because plaintiffs assert a violation of their
15 constitutional rights as the irreparable harm, the first two
16 prongs of the preliminary injunction standard merge into one.
17 In order to show irreparable injury, plaintiff must show a
18 likelihood of success on the merits. *Turley v. Giuliani*, 86
19 F.Supp.2d 291, 295 (S.D.N.Y. 2000).

20 Before I turn to the likelihood of success on the
21 merits, I note that preliminary injunctions are generally
22 issued when there is an urgent need for speedy action to
23 protect a plaintiff's rights. As the Second Circuit has noted,
24 "a delay in seeking enforcement of those rights...tends to
25 indicate at least a reduced need for such drastic, speedy

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1 action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d
2 Cir. 1985).

3 I am absolutely baffled by plaintiffs' delay in
4 seeking a preliminary injunction. The vaccine mandate was
5 announced on August 23 and published on August 24. Plaintiffs
6 filed this action almost a month later, on September 21.
7 Although the complaint asserted that plaintiffs were seeking a
8 preliminary injunction, see Compl. ¶ 6, there is no indication
9 that they served the complaint promptly and, even if they did,
10 they waited to seek an order to show cause why a TRO and
11 preliminary injunction should not be granted until October 4,
12 three days after the effective date of the order they were
13 challenging. Although I am not denying the request for
14 emergency relief because of plaintiffs' delay, the apparent
15 gamesmanship by plaintiffs' counsel in waiting to file this
16 case and then in seeking a preliminary injunction does nothing
17 to help her cause.

18 I now turn to the likelihood of success on the merits
19 of plaintiffs' constitutional challenge, starting with the
20 alleged violations of the free exercise clause of the First
21 Amendment.

22 The Court's assessment of the free exercise claims
23 turns on whether the challenged restriction is "neutral" and of
24 "general applicability." "[W]hen the government seeks to
25 enforce a law that is neutral and generally applicable, it need

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1 only demonstrate a rational basis for its enforcement, even if
2 enforcement of the law incidentally burdens religious
3 practices." *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*,
4 680 F.3d 194, 212 (2d Cir. 2012). If the restriction is not
5 neutral and generally applicable, then it is subject to "strict
6 scrutiny," which means that the restriction must be "narrowly
7 tailored" to serve a "compelling" state interest. See *Roman*
8 *Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020).

9 The first step in determining whether a law is neutral
10 is to look at the text of the law, because "if it refers to a
11 religious practice without a secular meaning discernible from
12 the language or context," it lacks facial neutrality. *Church*
13 *of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.
14 520, 533 (1993). In *Roman Cath. Diocese of Brooklyn v. Cuomo*,
15 for example, the Supreme Court found that New York State
16 regulations that expressly established more restrictive Covid
17 rules for houses of worship than for similar secular activities
18 could not be viewed as neutral. 141 S.Ct. at 66. Similarly,
19 in *Church of Lukumi*, the Supreme Court found that a city
20 ordinance was not facially neutral in part because it expressly
21 recited that the ordinance was passed to address the fact that
22 "certain religions may propose to engage in practices which are
23 inconsistent with public morals, peace or safety." 508 U.S. at
24 535. There is no analogous language in the vaccine mandate; it
25 does not mention religion or religious practices at all.

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1 Although the explicit text of the order begins the
2 evaluation, it is not the end of the inquiry. In addition to
3 overt discrimination against religious practices, the free
4 exercise clause also "forbids subtle departures from
5 neutrality," and "covert suppression of particular religious
6 beliefs." *Church of Lukumi*, 508 U.S. 534 (internal citations
7 omitted). To ascertain whether such "subtle departures" exist,
8 courts consider "the historical background of the decision
9 under challenge, the specific series of events leading to the
10 enactment or official policy in question, and the legislative
11 or administrative history, including contemporaneous statements
12 made by members of the decision-making body." *Id.* at 540.

13 For example, in assessing New York State's Covid
14 restrictions on houses of worship, the Supreme Court and the
15 Second Circuit found it significant that a day before issuing
16 the order, then-Governor Cuomo said that if the "ultra-Orthodox
17 community" would not agree to enforce the rules, "then we'll
18 close the institutions down." *Agudath Israel of Am. v. Cuomo*,
19 983 F.3d 620, 627 (2d Cir. 2020); see also *Roman Cath. Diocese*
20 *of Brooklyn*, 141 S.Ct. at 66 (citing *Agudath Israel of Am. v.*
21 *Cuomo*, 980 F.3d 222, 229 (2d Cir. 2020) (Park, J., dissenting).
22 And although *Masterpiece Cakeshop* was an as-applied challenge
23 that is not directly on point, in that case the Supreme Court
24 found significant the "official expressions of hostility to
25 religion," including a comment by a commissioner that freedom

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1 of religion had been used to justify slavery and the Holocaust.
2 138 S.Ct. 1719, 1729, 1732 (2018).

3 In this case, plaintiffs argue that comments by the
4 mayor indicate that there is religious animus surrounding the
5 vaccine mandate. Their rhetoric notwithstanding, plaintiffs
6 have not provided a single statement made by the mayor or the
7 governor or Dr. Chokshi preceding or contemporaneous to the
8 vaccine mandate that suggests even a whiff of antireligion
9 animus. The vaccine mandate was first announced on August 23
10 and it was published the next day. The only statement cited by
11 the mayor cited by plaintiffs that precedes those dates was
12 made on August 3. In that statement, the mayor is reported to
13 have said: "if you're unvaccinated, unfortunately, you will not
14 be able to participate in many things. That's the point we're
15 trying to get across. It's time for people to see vaccination
16 as literally necessary to living a good and full and healthy
17 life."

18 But far from targeting religious practices, the
19 mayor's messaging was clearly aimed at 100 percent of the
20 unvaccinated populace, whether their reason for being
21 unvaccinated was inertia, political objection, disinformation,
22 fear of needles, hostility to Big Pharma, or religion. In
23 short, his statement did not in any way signal that the goal of
24 the law was to infringe on or to restrict the free exercise of
25 religion.

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1 The other two statements attributed to the mayor were
2 allegedly made on September 23 and 24, a month after the
3 vaccine mandate had been announced. See Mem. of Law at 16
4 (citing the two media articles). Plaintiffs' reliance on those
5 statements is baseless. Putting aside the fact that the
6 articles are hearsay, they neither quote the mayor in full nor
7 provide the context in which the complained-of statements were
8 made. Statements in which the mayor purportedly suggested that
9 religious exemptions would be available only to Christian
10 Scientists and Jehovah's Witnesses say nothing about the
11 purpose of a vaccine mandate and, if anything, to the
12 plaintiffs' as-applied challenges. Evidence that the mayor's
13 statements may be being taken out of context can be found in
14 the fact, whomever he thought would be eligible for religious
15 exemption, religious exemptions have in fact been granted to
16 DOE employees who self-identify as adhering to at least 20
17 different religions. Second Bernstein Decl., Dkt. 52 ¶ 7. In
18 any event, the mayor's statements are of no moment to the
19 inquiry before me, which is whether the vaccine mandate itself,
20 not the arbitration awards, is neutral and generally applicable
21 to everyone, regardless of why he or she is not vaccinated.

22 Plaintiffs also contend that the vaccine mandate was a
23 "coordinated effort between the state and the city." Mem. of
24 Law at 18. Here, too, the only statements preceding or
25 contemporaneous with the vaccine mandate were purportedly made

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1 on August 24. Those statements concerned the mayor's attempt
2 to forge a productive relationship with the new governor, see
3 Mem. of Law at 2, and have nothing to do with religion or
4 vaccines. Moreover, the statements attributed to Governor
5 Hochul and allegedly made on September 15 and September 26
6 concern the state vaccine mandate for healthcare workers, see
7 Mem. of Law at 2-3, which has no bearing on whether the city's
8 mandate for DOE employees is a covert attempt to interfere with
9 the free exercise of religion by DOE employees. In short, none
10 of the statements highlighted by plaintiffs is indicative of
11 subtle or covert departures from neutrality.

12 Additionally, when determining whether restrictions
13 are neutral and generally applicable, the Supreme Court
14 requires courts to assess whether the text of the restriction
15 was crafted to proscribe religious conduct while permitting
16 similar secular activities. For example, in *Church of Lukumi*,
17 the Supreme Court found that the city ordinance at issue was
18 drafted in a way to prohibit the killing of animals as part of
19 a Santeria religious sacrifice but to permit the killing of
20 animals that is no more necessary or humane than a sacrifice
21 would be (like hunting, extermination of mice and rats, and
22 killing stray animals).

23 Here, the text of the vaccine mandate was not crafted
24 to target religious conduct for less favorable treatment than
25 the secular conduct. DOE employees with political, moral, or

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1 philosophical objections to vaccines are all required to be
2 vaccinated. In short, plaintiffs are not likely to prevail on
3 their argument that the vaccine mandate is not neutral and
4 generally applicable.

5 Because the city is likely to prevail on its argument
6 that the vaccine mandate is neutral and generally applicable,
7 for it to be unconstitutional, it must lack a rational basis.
8 Plaintiffs argue that the vaccine mandate is, in fact,
9 irrational. See, e.g., Compl. ¶ 312. In support, plaintiffs
10 rely principally on a declaration from Dr. Jayanta
11 Bhattacharya, a medical doctor on the faculty of Stanford
12 Medical School, whose review of medical literature plaintiffs
13 claim supports their conclusion that the COVID-19 vaccines "are
14 for personal protection, and will not meaningfully mitigate the
15 spread of COVID-19 through the population." Mem. of Law at 10;
16 Bhattacharya Decl., Dkt. 18.

17 Data cited by the CDC, on the other hand, indicate
18 that "fully vaccinated persons are less likely than
19 unvaccinated persons to acquire [COVID-19]" in the first place.
20 See *Science Brief: COVID-19 vaccines and vaccination*, Centers
21 for Disease Control & Prevention (last updated Sept. 15, 2021)
22 (collecting studies). I do not need to conclude whose review
23 of the data is more accurate. Given the data that exists, it
24 was not irrational for the city to conclude that vaccinations
25 reduced the probability of infection. As Judge Cogan stated in

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1 a different challenge to the DOE vaccine mandate, "even if
2 plaintiffs disagree with it, the order at issue represents a
3 rational policy decision surrounding how best to protect
4 children during a global pandemic." *Maniscalco v. New York*
5 *City Dep't of Educ.*, 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23,
6 2021).

7 Although that is enough on its own to find that
8 plaintiffs are unlikely to prevail on their argument that the
9 vaccine mandate is irrational, I do want to take the
10 opportunity to highlight some of the indefensible assertions in
11 plaintiffs' discussion of the Covid vaccines. As an initial
12 matter, it is unclear whether Dr. Bhattacharyta's opinion would
13 survive a *Daubert* challenge. Putting aside the fact that his
14 expertise is not epidemiology -- he has a Ph.D. in economics
15 and specializes in health policy -- 15 of the studies he relies
16 on come from MedRxiv or BioRxiv, websites that post preliminary
17 reports of work that have not been peer reviewed. MedRxiv
18 explicitly cautions readers not to rely on the studies on the
19 site "to guide clinical practice or health-related behavior and
20 should not be reported in news media as established
21 information." While the websites do not expressly caution
22 against citing studies on its site in court papers,
23 Dr. Bhattacharyta should have known better or at the very
24 minimum should have provided a disclaimer of some kind to
25 designate for the Court which of the studies he was relying on

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1 are not peer reviewed. Because a substantial portion of the
2 authority on which he relies has not been peer reviewed, the
3 Court is entirely unable to assess what weight, if any, should
4 be given to his opinion.

5 Plaintiffs also emphasize that "vaccination cannot
6 stop transmission" of the virus. See, e.g., Compl. ¶ 117. But
7 you do not have to be an epidemiologist or a statistician to
8 see that plaintiffs are conflating conclusions about
9 transmissions by vaccinated persons with rates of infection
10 among vaccinated persons. There is no dispute that there have
11 been breakthrough infections and that the Covid vaccines do not
12 fully prevent transmission. But so what? The fact that a
13 vaccinated person can become infected does not mean that
14 vaccinated persons and unvaccinated persons have the same
15 likelihood of becoming infected. Put another way, concluding
16 that infected vaccinated persons transmit the virus at similar
17 rates to unvaccinated persons says nothing about how likely it
18 is for someone who is vaccinated to be infected in the first
19 place. The CDC director brought home that point in the very
20 CNN interview on which plaintiffs rely when she noted that
21 surges of Covid infections were occurring "areas that have
22 pockets of people who are unvaccinated." If *both* the
23 susceptibility to infection and the rate of transmission were
24 the same for vaccinated and unvaccinated persons, we would have
25 expected to see uniform case numbers of COVID-19 across the

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1 country after the vaccine became available. But we do not see
2 that; there is no disputing that places with higher vaccination
3 rates are seeing lower rates of Covid infections than areas
4 with lower vaccination rates.

5 Additionally, plaintiffs argue strenuously that people
6 who have recovered from COVID-19, even if they are not
7 vaccinated, have robust natural immunity that prevents
8 transmission of the disease. See, e.g., Compl. ¶ 114; Mem. of
9 Law at 11; Bhattacharya Decl. ¶¶ 14, 18; Makary Decl., Dkt. 19
10 ¶ 12. But even assuming that were true -- an assessment the
11 Court cannot make given plaintiffs' expert's heavy reliance on
12 articles that have not been peer reviewed -- it says nothing
13 about whether the city acted rationally in relying on the CDC
14 advice that even people who have had Covid should be
15 vaccinated. In addition to it being rational to follow the
16 advice of the CDC, the Court can think of other rational
17 reasons not to exclude from operation of the mandate to
18 employees who have had, or believe they have had, COVID-19.
19 Just to name one, the city may wish to avoid a policy that may
20 encourage employees to purposely infect themselves with the
21 virus, especially because -- as plaintiffs recognize --
22 unvaccinated persons are more likely to suffer a severe course
23 of infection, including hospitalization and death, than those
24 who have been vaccinated.

25 In short, I cannot conclude that plaintiffs are likely

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1 to prevail on their claim that the vaccine mandate is
2 unconstitutional because it is irrational.

3 Plaintiffs have not shown that they are likely to
4 succeed on the merits of any of their other facial challenges
5 to the mandate. Plaintiffs contend that the vaccine mandate
6 violates the establishment clause of the First Amendment, which
7 prohibits excessive government entanglement with religion.
8 Mem. of Law at 19-20. But that argument is unlikely to succeed
9 on the merits for the same reason as plaintiffs' free exercise
10 claims; most of plaintiffs' challenges regard the application
11 of the vaccine mandate through the arbitration awards, an issue
12 I cannot at this point for the reasons I've already discussed.
13 And facially, the vaccine mandate requires no entanglement with
14 religion whatsoever. In short, plaintiffs' establishment
15 clause claims are unlikely to succeed on the merits.

16 Plaintiffs also argue that the vaccine mandate
17 violates their substantive due process rights under the
18 Fourteenth Amendment. See, e.g., Compl. ¶¶ 318-319; Mem. of
19 Law at 8, 22. "To allege a violation of substantive due
20 process, plaintiff must claim (1) a valid...fundamental right;
21 and (2) that the defendant infringed on that right by conduct
22 that shocks the conscience or suggests a gross abuse of
23 governmental authority." *Dukes v. New York City Employees'*
24 *Ret. Sys.*, 361 F.Supp.3d 358 375, (S.D.N.Y. 2019). I do not
25 need to opine on whether the rights identified by plaintiffs,

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1 including the right to refuse administration of medical
2 products and the right to bodily integrity, see Compl. ¶¶
3 318-321, constitute fundamental rights under pertinent case
4 law. Instead, I find that plaintiffs' substantive due process
5 arguments are unlikely to succeed on the merits because the
6 vaccine mandate does not shock the Court's conscience. Vaccine
7 mandates are not new, see, e.g., *Jacobson v. Commonwealth of*
8 *Massachusetts*, 197 U.S. 11 (1905), and it is far from shocking
9 for the city to conclude that requiring vaccination of its DOE
10 employees is a rational way to get and keep the schools open
11 and to protect school children, many of whom are not yet
12 eligible to the vaccinated.

13 Plaintiffs also argue that the vaccine mandate
14 unlawfully discriminates against unvaccinated persons in
15 violation of the Fourteenth Amendment's equal protection
16 clause. Compl. ¶ 329. Because the unvaccinated are not a
17 "protected class," to prevail on their equal protection claim,
18 plaintiffs must demonstrate that there is no rational basis for
19 the difference in treatment between the vaccinated and the
20 unvaccinated. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S.
21 450, 457-58 (1988). Plaintiffs have not demonstrated that they
22 are likely to prevail on their argument that there is no
23 rational basis for the vaccine mandate. It follows that they
24 are also not likely to prevail on their argument that there is
25 no rational basis to distinguish, for purposes of employment in

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1 New York City public schools, between those who have been
2 vaccinated and those who have not.

3 In short, plaintiffs have not shown that they are
4 likely to succeed on the merits of any of their facial
5 constitutional challenges to the vaccine mandate.

6 Although plaintiffs' failure to show a likelihood of
7 success on the merits is enough of a reason for me to deny
8 their application for a preliminary injunction, I will also
9 consider the last two elements of the preliminary injunction
10 standard: the balance of the equities and the public interest.
11 Because the government is the opposing party, those two factors
12 merge and are considered together. *Coronel v. Decker*, 449
13 F.Supp.3d 274, 287 (S.D.N.Y. 2020). In assessing the two
14 factors, a court must "balance the competing claims of injury
15 and must consider the effect on each party of the granting or
16 withholding of the requested relief, as well as the public
17 consequences in employing the extraordinary remedy of
18 injunction." *Yang v. Kosinski*, 960 F.3d 119, 135-36 (2d Cir.
19 2020) (cleaned up).

20 Defendants contend that the vaccine mandate furthers
21 the "public interest in limiting the spread of COVID-19 in
22 schools for the safety of children, other school employees, and
23 the community at large" And that it ensures "that in-person
24 schooling may continue, uninterrupted, for as many children as
25 possible." Resp. at 18. Plaintiffs, on the other hand,

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1 emphasize that losing 15,000 teachers and staff will "endanger
2 and harm the one million children who attend public schools in
3 New York City." Mem. of Law at 25. Although defendants report
4 that the 15,000 number is likely closer to 7,000, see second
5 Bernstein Decl. ¶ 5, I have no doubt that students will suffer
6 from losing their regular teachers and support staff.

7 Reasonable minds can disagree on the right way to
8 achieve public goals. In this case, plaintiffs argue that the
9 city's way is draconian and unfair; the city's response is that
10 it is neither and that it strikes an appropriate balance
11 between the needs of its schools and their employees and public
12 health risks. Different public officials may weigh all of
13 those interests differently, but given the complex and
14 life-threatening challenges associated with the COVID-19
15 pandemic, striking that balance is left to our elected
16 officials -- not the courts. In short, the balance of the
17 equities and the public interest tip decidedly in defendants'
18 favor.

19 In sum, based on the record before me, because there
20 is a question whether plaintiffs have standing to challenge the
21 UFT awards and because plaintiffs have not shown that they are
22 likely to succeed on the merits of their facial challenges,
23 plaintiffs' application for a preliminary injunction is denied.
24 Plaintiffs' request to hold the record open for additional
25 evidence of animus is denied, because plaintiff had more than

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1 enough time to pull the evidence together before this hearing.
2 I will consider any such evidence on the merits outside of the
3 preliminary injunction context.

4 The Court had previously set a conference in this case
5 for November 12. Before I get to the briefing schedule on the
6 standing issue, is the city's plan to answer the complaint or
7 move to dismiss it?

8 MS. MINICUCCI: Move to dismiss, your Honor.

9 THE COURT: OK.

10 To the plaintiffs, if the city moves to dismiss your
11 complaint, as of right, you can amend your complaint. If you
12 think you can solve the problems that they identify in your
13 complaint, I encourage you to amend the complaint. I'll then
14 dismiss their motion at moot, and we'll start all over again.
15 If you can't fix the complaint to deal with the problems they
16 raise, then respond to it. But please do not do both. OK?

17 MS. GIBSON: Yes, your Honor.

18 THE COURT: Now, the issue of standing, I'm going to
19 give the plaintiffs the opportunity to go first.

20 How long would you like?

21 MS. GIBSON: Five minutes, your Honor.

22 THE COURT: You're going to brief it in five minutes?

23 MS. GIBSON: Oh. Oh, OK. Yes, I thought you wanted
24 me to argue.

25 THE COURT: Holy cow.

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1 MS. GIBSON: A week.

2 THE COURT: I'm going to give you two. I want you to
3 do a good job on this. This is a significant issue to your
4 clients. If they have standing to challenge the arbitration
5 awards, then I'm going to be asking you to brief, in a rational
6 way, whether they have, in fact, been discriminated against;
7 that is, as they actually were injured on an as-applied basis,
8 but the critical first point is whether they can challenge the
9 awards.

10 I'm going to give you two weeks, and I urge you to do
11 a good job, a much better job than you've done on your papers
12 that were before me. This is a critical issue.

13 How long does the city want in response?

14 MS. MINICUCCI: Two weeks, please, your Honor.

15 THE COURT: All right. Two weeks. According to my
16 little calendar, today's the 12th, so the plaintiffs' brief
17 will be due the 26th. The city's response is due the 9th, and
18 I'll give you a reply, which will be due November 16.

19 After reviewing those papers, we'll determine what the
20 next steps are.

21 Anything further from the plaintiffs?

22 MS. GIBSON: No. Thank you, your Honor.

23 THE COURT: Anything further from the defendants?

24 MS. MINICUCCI: Your Honor, defendants would just ask
25 to have more time to respond to the complaint since we've been

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1 served.

2 THE COURT: When did you all get served?

3 MS. MINICUCCI: Last week. I believe it was towards
4 the end of the week, but not all the defendants, I believe,
5 have been served.

6 THE COURT: OK. Why don't we do this. I'm going to
7 stay your time to respond to the complaint. Let's figure out
8 what the plaintiffs exactly have standing to challenge. Then
9 I'll set a date for you to answer, and we'll go forward with
10 the briefing at that point.

11 MS. MINICUCCI: Thank you, your Honor.

12 THE COURT: You're welcome.

13 Anything else from defendants?

14 MS. MINICUCCI: No.

15 THE COURT: All right.

16 MS. MINICUCCI: Thank you, your Honor.

17 THE COURT: Thanks, everybody.

18 (Adjourned)