UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-2678, 21-3047

Caption

Kane et al., v. de Blasio, et al.

Motion for:

Emergency motion for preliminary injunction pending appeal

Set forth below precise, complete statement of relief sought:

To enjoin enforcement of the vaccine mandate imposed through emergency administrative action on all New York City Department of Education employees and contractors ("DOE Employees") pending resolution of appeal insofar as it is applied to DOE Employees who assert religious objection to the COVID-19 vaccines and to order temporary reinstatement of any DOE Employee suspended or terminated for noncompliance if they have religious objections to the COVID-19 vaccines.

MOVING PARTY:	Kane et al	**OPPOSING PARTY:**	de Blasio, et al.
Plaintiff X			Defendant
Appellant/Petitioner X			Appellee/respondent

MOVING ATTORNEY:

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Court- Judge/ Agency appealed from: Southern District of New York, Hon. Valerie E. Caproni, U.S. District Judge

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Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
X Yes ___No (explain):

Opposing counsel's position on motion:
___Unopposed **X Opposed** ___Don't Know

Does opposing counsel intend to file a response:
X Yes ___No ___Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? **X Yes** ___No
Has this relief been previously sought in this court? **X Yes** ___No

Requested return date and explanation of emergency:

Decision requested on or before 5:00 p.m. December 20, 2021 to avoid imminent termination for Appellants and proposed class members.

Is oral argument on motion requested? **X Yes** ___No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ___ Yes **X No** If yes, enter date:_____

Signature of Moving Attorney:

/s/ Sujata S. Gibson Date: 12/16/2021 Service by: **X** CM/ECF **X** Other [Attach proof of service]

Form T-1080 (rev.12-13)

21-3047

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Appellants,

– v. –

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE VALERIE E. CAPRONI
Case No. 21-CV-7863 (VEC)

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK and SARAH BUZAGLO,

Plaintiffs-Appellants,

– v. –

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, in his Official

Capacity of Health Commissioner of the City of New York, and MEISHA PORTER, in her official capacity as Chancellor of the New York City Department of Education,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE VALERIE E. CAPRONI
Case No. 21-CV-8773 (VEC)

KANE PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL – RELIEF REQUESTED BY TUESDAY, DECEMBER 21, 2021

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PRELIMINARY STATEMENT

Appellants move for preliminary injunctive relief staying a new vaccine mandate ("Mandate") for New York City Department of Education ("DOE") employees and contractors ("DOE employees") insofar as it requires DOE employees who object to the vaccine requirement on religious grounds either to violate their religious beliefs by submitting to COVID-19 vaccination or sacrifice their careers.

In the last month, this Court twice held that the Mandate, as applied through a facially unconstitutional policy requiring discrimination against religious minorities ("Exemption Policy"), was not neutral, generally applicable nor likely to survive strict scrutiny. Because this Court held that Appellants are likely to succeed on the merits, a motions panel and then a separate merits panel of this Court issued injunctive relief, vacating the district court's initial denial, and remanding the case back to the district court for further proceedings. *Kane v. de Blasio*, No. 21-2678 (2d. Cir. Nov. 28, 2021).

Unfortunately, the relief failed to offer any real protection. All but one of the original Appellants and thousands of other DOE employees who were also subjected to the unconstitutional Exemption Policy remain suspended without pay, even

though this Court acknowledged that the policy they were suspended under two months ago was unlawfully discriminatory, and even though Appellees concede that their religious beliefs are sincere.

Yesterday, the bulk of the Appellants were informed that, just in time for Christmas, they will be terminated (and lose their benefits, health insurance and seniority) if they do not waive their rights to continue this litigation or get vaccinated against their religious beliefs on or before December 28, 2021. Other similarly situated DOE employees have even less time. Appellants appeal to this Court for emergency injunctive relief for themselves and all other DOE employees whose religious beliefs prevent them from following the DOE Mandate.

Appellants respectfully pray that this Court issue an emergency order on or **before 5:00 p.m. December 21, 2021,** reinstating named Appellants and all other Proposed Class members, and prohibiting further enforcement of the DOE Mandate against any employee who asserts sincere religious opposition pending resolution of this appeal. Oral argument is requested.

STATEMENT OF THE CASE

This case arises because, in implementing a new vaccine mandate for DOE employees, Appellees adopted a facially unconstitutional religious Exemption Policy requiring discrimination against employees whose religious beliefs are personal in nature out of step with popular religious leaders and official church

orthodoxy. In implementing this policy, the DOE resurrected the unlawful practice of holding heresy inquisitions,[1] and intentionally discriminated against thousands of employees with minority religious views on vaccination.

These discriminatory policies were no accident, but rather reflect Mayor de Blasio's repeated assertions that religious objections to vaccination are invalid because they conflict with the Pope's interpretation of what scriptures require. Mayor de Blasio, who exercises control over the NYC DOE and was behind the promulgation of the Mandate, spoke to the press on the eve of the first religious exemption inquisitions. (Transcript at ECF 85-9). [2] In response to the question of what criteria the City would employ to decide who was accommodated under the DOE Mandate, he said:

> **Mayor:** Yeah, it's a great question. Thank you. Yes. **And very powerfully Pope Francis has been abundantly clear that there's nothing in scripture that suggests people shouldn't get vaccinated**. Obviously, so many people of all faiths have been getting vaccinated for years and decades. **There are, I believe it's two well-established religions, Christian Science and Jehovah's Witnesses that have a history on this, of a religious opposition. But overwhelmingly the faiths all around the world have been supportive of vaccination. So, we are saying very clearly, it's not something someone can make up individually. It has to be, you're a standing member of a faith that has a very, very specific long-standing objection**.

[1] Merriam-Webster Dictionary defines heresy as "adherence to a religious opinion contrary to church dogma."
[2] References to district court docket are labeled "ECF__"

The DOE then followed this clear guidance. In implementing the Exemption Policy, DOE representatives repeatedly asserted that the Pope's stance on vaccines invalidates even Buddhist or non-denominational born-again Christian beliefs. *See, e.g.,* A-243, A-251.[3] Similarly, the DOE claimed that employees who cannot take a COVID-19 vaccine because of the known connection with abortion are "wrong" to think that such a remote connection is a sin, providing a letter from Commissioner Chokshi alleging the same thing. The DOE conceded that they did not challenge the sincerity of the Appellants, just the validity of their beliefs (*see, e.g.*, A-243).

Effective October 4, 2021, pursuant to the unconstitutional Exemption Policy, all unvaccinated NYC DOE employees, even those whose appeals were accepted or still pending, are banned from entering any school building. Denied employees were placed on leave without pay, with threats of termination if they did not waive their right to sue. This Court's injunction stayed the waiver deadline for many, but yesterday, the DOE informed Appellants they will be terminated on December 28, 2021, if they do not waive their rights or violate their deeply held religious beliefs.

Appellants filed suit just before their exclusion on October 4, 2021. The district court denied preliminary injunctive relief, but on appeal, even Appellees had to concede that they instituted a "constitutionally suspect" exemption policy.

[3] References to the Joint Appendix on interlocutory appeal are labeled A ___).

Realizing they might lose the appeal after oral arguments, Appellees proposed to give "fresh consideration" by a new "Citywide panel" they intended to create for this purpose. Appellants objected, noting that such mid-litigation offers could not be relied on in place of non-discretionary injunctive relief. This is especially important here, where the "fresh consideration" was judged by Appellees' attorneys, who are representing them in this litigation, and are thus inherently not neutral. As a temporary measure, this Court nonetheless issued an order allowing Appellees to provide the fresh consideration, subject to requirements that, in addition to other provisions:

> 1. Such consideration shall adhere to the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, and the New York City Human Rights Law. Such consideration shall not be governed by the challenged [Accommodation Standards]. Accommodations will be considered for all sincerely held religious observances, practices, and beliefs; and
>
> 2. If a plaintiff's request is granted by the citywide panel, the plaintiff will receive backpay running from the date they were placed on leave without pay.

The parties were directed to report back within two weeks to alert the Court of any further relief that might still be needed after the "Citywide panel" proceedings concluded. (ECF 97-1 at 48).

Hours after Appellants timely submitted their application materials, Appellees sent identical summary form denials to all but one Appellant, stating by way of

explanation "does not meet criteria." The one accepted Appellant received the same reason — "does not meet criteria" —as a basis for approval.

Appellants filed for emergency relief from the district court the next day but were denied. Two days later, Appellees attempted to supplement the initial summary denials with an email purporting to provide justification for why each Appellant was denied relief (ECF 92-1). The email revealed that rather than comply with Title VII and the New York State and City human rights law protections as ordered, the DOE continued to apply the Exemption Standards that they admit are unconstitutional.

For example, they denied all Appellants whose religious beliefs are derived from prayer, or guidance from the Holy Spirit. According to the Appellees, these unorthodox religious views, though acknowledged to be sincerely held, cannot be valid, because they are unique to the person who has them and thus accepting their validity allows for personal agency. *See, e.g.,* Kane decl (ECF 20) and Kane reasons for denial (ECF 92-1).

Similarly, they denied Margaret Chu, for whom the abortion tainted COVID-19 vaccines are not an option because they violate her moral conscience, which, as a lifelong Catholic, she is directed to follow above all else. ECF 22 ¶ 12; Margaret was denied by the Citywide panel on the unconstitutional assertion that following one's moral conscience is not religious in nature. ECF 92-1.

Nor is there any support for the Appellees' claim that sincere religious beliefs against COVID-19 cannot be accommodated. Appellants sincere religious beliefs can be easily and safely accommodated as evidenced by the declarations of public health experts filed in their original motions for injunctive relief (ECF No. 18 and 19) and by the great weight of the scientific evidence, which shows that COVID-19 vaccines are primarily only effective for personal protection and cannot stop spread of COVID-19 in any meaningful way. *See, e.g.,* Harvard Study at ECF 85-4, analyzing data from 68 countries and 2947 U.S. counties and concluding "there appears to be no discernable relationship between percentage of population fully vaccinated and new COVID-19 cases."

Appellees' own publicly available data confirms this. The NYC DOE publishes regular updates on the number of infected students and in-person staff working in New York City Schools. Excluding the unvaccinated DOE staff for the last two months has had no discernable impact on the numbers or percentage of teachers and staff working in the buildings that are actively infected. Infection rates have followed the same curve both in the staff and student numbers, and that was not altered after unvaccinated teachers were removed. Before exclusion, there were

about 55 staff members (most vaccinated) that were actively infected. ECF 85-6. As of December 11, 2021, there were 125. ECF 85-7.[4]

While the vaccine mandate has not impacted infection rates in the NYC schools, exclusion of these teachers created a staffing crisis that has significantly impacted the students. *See* ECF 85-8, 85-9, 17-6, 17-7.

PROCEDURAL HISTORY

Appellants filed a motion for emergency injunctive relief on October 4, 2021, the day the mandate took effect. They were denied and appealed. This Court issued a Decision and Order on November 28, 2021, vacated the denial, and remanded the case back to the district court for relief. (ECF 77, 85-1). Over objection, the district court kept the docket stayed from October 25, 2021 to December 14, 2021, denying repeated requests to lift the stay so that Appellants could file for class certification and preventing Appellants from receiving any consideration of their amended complaint or proposed motion for class certification.

On December 11, 2021, Appellants renewed their motion for preliminary injunctive relief and sought provisional certification of a class for purposes of seeking class-wide injunctive relief. The district court denied both motions. Appellants filed a notice of appeal on December 15, 2021 and moved for injunctive

[4] The emergence of Omicron, upon which vaccination has little effect, has raised that number now to 221 as of December 16, 2021.

relief pending appeal in the district court (ECF 92). The district court issued a denial on December 17, 2021, and this motion as filed the same day.

STANDARD OF REVIEW

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

The grant or denial of a preliminary injunction is reviewed for abuse of discretion. "Such an abuse occurs when the district court bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013).

Where, as here, the injunction stays enforcement of a state executive branch "emergency" order, this Court "grant[s] no special deference to the executive when the exercise of emergency powers infringes on constitutional rights" because "courts may not defer to the Governor simply because he is addressing a matter involving science or public health." *Agudath Israel*, 983 F.3d at 635.

ARGUMENT

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

This Court already held, just two weeks ago, that Appellants are likely to succeed on the merits, because in implementing the DOE Mandate, Appellees adopted a facially discriminatory religious exemption policy that violates basic religious rights.

a. This Court Correctly Held that Strict Scrutiny Applies

This Court appropriately held that Strict Scrutiny applies to the religious exemption policy challenge because Appellees implemented the Mandate through facially unconstitutional policies that violate the First and Fourteenth Amendments to the U.S. Constitution.

The First Amendment protects both an individual's private right to hold a religious belief and "the performance of (or abstention from) physical acts that constitute the free exercise of religion." *Agudath Israel*, 983 F.3d at 631 (2d Cir. 2020). Though the Free Exercise protection "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability," *Emp. Div. Dep't of Hum. Res. Of Or. v. Smith*, 494 U.S. 872, 879 (1990), any evidence of a lack of neutrality, emerging facially or as applied, triggers strict scrutiny review. *See, e.g*; *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868 (2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020).

Here, the Court rightly held that the Mandate is not likely to survive strict scrutiny as applied by the DOE. Even the DOE concedes that they implemented the

Mandate through an unconstitutional policy which facially requires religious discrimination. Pursuant to this policy, Appellees suspended and retaliated against *thousands* of employees. In so doing, they violated the most basic commands of the Establishment Clause by openly preferencing the viewpoints of the Pope and other popular leaders over those held by religious minorities. *Larson v. Valente*, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.") Strict scrutiny clearly applies. "In short, when we are presented with a state law granting denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality." *Larson,* 456 U.S. at 244.

b. Strict Scrutiny Should be Applied to the Whole Mandate

The same scrutiny should be applied to the whole Mandate. Under Constitutional analysis, laws which appear neutral on their face, but which are regularly implemented in an unconstitutional manner, are not neutral and thus must be strictly scrutinized when they function to burden religious rights. *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("in evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."); *See also MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000) ("When evaluating a First

Amendment challenge of this sort, we may examine not only the text of the ordinance, but also…we are permitted — indeed, required — to consider the well-established practice of the authority enforcing the ordinance"); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1035 (9th Cir. 2006) ("Administrative interpretation and implementation of a regulation are…highly relevant to [facial constitutional] analysis").

This is especially true if a facially neutral, related policy still functions to burden religious exercise, as the Mandate does here. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 540 (1993) ("We need not decide whether the [the city's fourth facially neutral ordinance] could survive constitutional scrutiny separately; it must be invalidated because it functions, with the rest of the enactments in question, to suppress Santeria religious worship").

Appropriate guidance to avoid discrimination can insulate a regulation from facial challenge. *Ward v. Rock Against Racism*, 491 U.S. 781, 793-95 (1989) (reasonable guidelines protect city ordinance against facial attack). But here, the Mayor, who is the architect of the DOE Mandate and exercises control over the NYC DOE, openly guided the DOE to discriminate against personally held relief because, according to the Mayor, the Pope had convinced him that religious objections to vaccination are illegitimate. It is well-settled law that the government "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious

beliefs and practices." *Masterpiece Cakeshop, LTD. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1731 (2018).

Even facially neutral laws of general applicability must be subjected to strict scrutiny when, as here, commentary from the decision makers shows animus towards the legitimacy of impacted religious beliefs. *Lukumi,* 508 U.S., at 540. "Animus" includes not only hostility but also any lack of neutrality. It is black letter law that "[t]he government must be neutral when it comes to competition between sects." *Zorach v. Clauson*, 343 U.S. 306 (1952); *see also, Epperson v. Arkansas*, 393 U.S. 97 (1968) ("The First Amendment mandates government neutrality" and "the State may not adopt programs or practices…which 'aid or oppose' any religion…This prohibition is absolute.") (citations omitted).

The Mayor's comments likely trigger strict scrutiny. *See, e.g., Dr. A. v. Hochul*, 595 U.S. ___ (2021) (GORSUCH, J., dissenting) (holding that strict scrutiny likely applies to the related state mandate for healthcare workers because "by the Governor's own admission the State 'intentionally' targeted for disfavor those whose religious beliefs fail to accord with the teachings of 'any organized religion' and 'everybody from the Pope on down").

c. The District Court Erred by Applying Rational Basis Review

The district court erred by assessing likelihood of success for both the as applied and facial challenges under rational basis review, despite this Court's

holding that strict scrutiny applies at least to the religious exemption policy challenges.

The fact that the unlawful suspensions were allegedly given a "fresh look" does not moot the need for strict scrutiny. As a threshold matter, any religious exemption policy decided by a state actor, including this "fresh look", is entitled to strict scrutiny, because these decisions, by their very nature, are not neutral or generally applicable. "Like the good cause provision in Sherbert," the vaccine mandate "incorporates a system of individual exemptions, made available" at Defendants' "sole discretion," giving rise tostrict scrutiny. *Fulton v. City of Phila*.,_US_,_, 141 S Ct 1868, 1878 (2021). While private employers might be able to exercise lower Title VII standards in religious accommodation decisions, no act of Congress can have the effect of diminishing First Amendment protections against discriminatory state action. *See, e.g., COBCS W., Inc. v. Humphries,* 553 U.S. 442, 455 (2008) ("Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination.")

But strict scrutiny is particularly important here, where just weeks ago, the DOE boldly engaged in heresy tribunals and unapologetically argued for persecution of religious minorities. The DOE's lawyers now assert that they looked at the applications and think the denials were appropriate because, though they acknowledge that the religious beliefs are sincere, they deem personally held beliefs

non-religious. This type of discretionary decision about the validity of religious beliefs, even from a neutral state actor, cannot avoid strict scrutiny. *Cantwell v. Connecticut,* 310 U.S. 296, 310 (1940) (invalidating a neutral and generally applicable licensing system under which the administration had discretion to deny any cause he deemed non-religious).

The panel's affirmations will not likely succeed. Their reasoning does not even meet Title VII standards, leave aside the more stringent requirements required under the First Amendment or the New York State Human Rights Law and the New York City Human Rights Law. Rejecting personally held beliefs as non-religious was one of the primary defects of the facially unconstitutional policy this "fresh look" was supposed to reject. It is black letter law that personally held or unorthodox religious beliefs are just as protected as those beliefs supported by the orthodoxy or leadership of a church. *See, e.g., Sherr v. Northport-E. Northport Union Free Sch. Dist*., 672 F. Supp. 81 (E.D.N.Y. 1987) (religious exemption standards that denied vaccine exemptions to people with personally derived religious beliefs are blatantly unconstitutional). Even Title VII defines religious beliefs to "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional views…" and cautions, "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief

is a religious belief." 29 C.F.R. §1605.1 By claiming that Appellants' views were sincerely held, but not "religious" in nature because they were personally derived, Appellees blatantly violated the Constitution again.

Far from mooting Appellants claims, the fresh consideration process adds yet another basis upon which Appellants must receive strict scrutiny.

d. The Vaccine Mandate Will Not Likely Survive Strict Scrutiny

It is unlikely that the challenged regulation, or the religious exemption policies, will pass strict scrutiny. "A government policy can survive strict scrutiny under the First Amendment's Free Exercise Clause only if it advances interests of the highest order and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct at 1888. "So long as the government can achieve its interests in a manner that does not burden religion, it must do so, in order to survive strict scrutiny under the Free Exercise Clause of the First Amendment." *Id.*

Stemming the spread of COVID-19 may be a compelling interest, but it is not clear that requiring vaccination can even achieve this interest. Appellees have not provided evidence to support this claim. Appellants, on the other hand, submitted sworn declarations from experts who were prepared to testify (but precluded from testifying by the lower court) about the *de minimis* impact the vaccine requirement has on stopping the spread of COVID-19. As the declarations point out, there are

also far less burdensome and more effective methods to keep the community safe, such as testing, social distancing and daily health checks.

The DOE's own data has born this out. Excluding the unvaccinated teachers has not had a meaningful impact on the spread of COVID-19 among teachers and staff at all. Fully vaccinated teachers are still infected at the same or higher rates than the unvaccinated teachers were before exclusion. COVID-19 vaccines are non-sterilizing vaccines, meaning they cannot stop infection and transmission. They are for personal protection. Studies show conclusively that even the highest levels of vaccine uptake has no impact on community spread of COVID-19. The DOE's data shows the same thing.

No other school district in the state has vaccine mandates for their staff. The Court can safely enjoin enforcement of the mandate while the district court reviews the evidence to avoid irreparable harm to Appellants. In the meantime, measures such as testing and symptom checks should suffice, alongside all the other tools that these schools have used for the last year and a half to keep everyone safe while still respecting minority religious views.

II. APPELLANTS ARE SUFFERING DAILY IRREPARABLE HARM

It is well-settled law that deprivation of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. Nevertheless, the lower court, relying on language from this Court's

decision, discards this *per se* rule as applied to the Appellants because, "'[t]he City is not threatening to vaccinate Appellants against their will and despite their religious beliefs, which would unquestionably constitute irreparable harm. Appellants instead face economic harms, principally a loss of income[.]'" 21-cv-08773, ECF 54, at 7. By assuming that Appellants suffer only economically, the District Court completely misstated the standard for what constitutes a Free Exercise violation or the harm caused by it.

A state actor does not just violate the Free Exercise Clause when it physically forces a religious adherent to "perform or abstain from any action that violates [his or her] religious beliefs". It also violates the Free Exercise Clause when it coerces religious adherents to violate their religious beliefs. The district court erred in holding that coercive financial penalties that force religious people to choose between their faith and job are not "irreparable harm." Coercion to violate one's faith is in itself a constitutional harm. *See, e.g., Espinoza*, 140 S. Ct. at 2264 (2020) (THOMAS, J and GORSUCH, J Concurring) (Establishment clause forbids "coercion of religious orthodoxy and of financial support by force of law and threat of penalty.")

The DOE Mandate is blatantly coercive, and this coercion itself constitutes daily irreparable constitutional harm. The City will not even allow employees to use their accrued vacation or sick time while they are excluded, or to earn any income

even outside of the school system, or to collect unemployment insurance. Instead, employees are literally being starved out of house and home in an effort to force them to violate their faith. Forcing a person to choose between their job and their faith constitutes daily imminent harm. *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 716–17 (1981); see also *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("[t]he ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship"). While these economic harms by themselves would not constitute irreparable harm, the Appellees use of them to coerce Appellants to violate their sincerely held religious beliefs indisputably does.

This is an untenable situation and these are working class people in a crisis without resources at their disposal. To pretend they are not harmed, is an insult. Appellants are in urgent need of this Court's help. They are not willing and should not have to waive their right to sue, but they cannot survive much longer without intervention from this Court either. Many provide the sole income for their families. They have children to feed and care for. Some have children on the way. They depend on their benefits and income to survive. No amount of money can make them whole if they find themselves without insurance when their babies are born, or

when their families get sick, or when they face eviction and hunger. Nor can money fix the psychological damage of being daily coerced and bullied by the Government into violating their faith.

III. THE PUBLIC INTERESTS WEIGH IN FAVOR OF THE APPELLANTS

Where First Amendment rights are at issue, the test for obtaining preliminary injunctive relief essentially reduces to a single prong: "the likelihood of success on the merits is the dominant, if not the dispositive, factor." *N.Y. Progress & Prot. PAC v. Walsh,* 733 F.3d 483, 488 (2d Cir. 2013). This is so because the deprivation of rights itself "for even minimal periods of time, unquestionably constitutes irreparable injury," protection of First Amendment rights is *per se* "in the public interest," and the balance of hardships is entirely one-sided because "the Government does not have any interest in enforcing an unconstitutional law." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Here, where Appellees failed to "demonstrate that public health would be imperiled if less restrictive measures were imposed," the public interest favors granting injunctive relief. *Roman Cath. Diocese*, 141 S. Ct. at 68; *Agudath Israel*, 983 F.3d at 637. "No public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal." *Id.*

Additionally, while there is no evidence that draconian and discriminatory policies are advancing public health, substantial evidence establishes that the staffing crisis caused by the removal of thousands of qualified teachers from the already struggling New York City school system has caused chaos, trauma and loss of needed services and programming which is severely harming children. The public interest strongly supports broad injunctive relief.

IV. CLASS ACTION RELIEF

Injunctive relief should be afforded to all DOE Employees (current or recently separated as a result of noncompliance with the DOE Mandate) who have religious objections that prevent them from getting vaccinated.

This Court does not typically require class certification before issuing preliminary injunctive relief against purportedly unconstitutional regulations or policies. *See, e.g., We the Patriots v. Hochul*, 21-2179 (No. 65) (issuing a statewide preliminary injunction against a policy though the case was not a class action suit). According to this Circuit's traditionally applied precedent:

> an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs…[W]hat is important in such a case for the plaintiffs or, more accurately, for their counsel, is that the *judgment* run to the benefit not only of the named plaintiffs but of all others similarly situated. *Galvan v. Levine* , 490 F.2d 1255, 1261 (2d Cir. 1973) (citations omitted).

This case deserves the same class-wide preliminary relief. Regardless of whether the entire DOE mandate is declared facially unconstitutional, the religious exemption policy *has* been acknowledged to be facially unconstitutional and discriminatory. Thousands of employees were suspended and terminated pursuant to the facially unconstitutional policy. They are entitled to relief. *Thibodeau v. Portuondo*, 486 F.3d 61, 71 (2d Cir. 2007) (internal quotation marks omitted) ("[a] facial challenge is a species of third party (*jus tertii*) standing by which a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question"); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016) ("we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper'").

Moreover, the district court repeatedly blocked Appellants good faith efforts to move for class certification. Though Appellants filed an amended complaint with class allegations as a matter of course on November 16, 2021, and filed multiple letter motions to lift the stay and consider motions for class certifications, the court refused to allow consideration of these documents. The district court similarly obstructed the *Keil* plaintiffs efforts. As soon as the district court's unconstitutional stay was finally lifted yesterday, the *Keil* plaintiffs filed an amended complaint

adding class allegations. Today, the district court vacated that complaint, without *any* apparent legal justification.

The district court denied Appellants the right to access courts, in violation of the most basic constitutional protection, and without legal authority. It would be a grave injustice to deny class-wide injunctive relief on the basis that they were unable to file class certification motions. Common questions of law and fact predominate in this case, as acknowledged by the Appellees and by the district court when it joined the *Kane* and *Keil* matters yesterday. This is not a case about random acts of discrimination, but rather about a facial challenge to a religious exemption policy that everyone agrees is unconstitutional.

CONCLUSION

For the foregoing reasons, Appellants respectfully request the Court to enjoin enforcement of the DOE Mandate pending resolution of appeal against any DOE employee who asserts sincere religious objections and to order the DOE to immediately offer reinstatement to any DOE employee who was suspended without pay despite their asserted religious objections to the COVID-19 vaccines.

Dated: December 17, 2021

Respectfully submitted,

/s/Sujata S. Gibson

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. Pro., I certify the following: This emergency motion complies with the type-volume limitation of Fed. R. App. Pro. 27 and the corresponding local rules because this brief contains 5,200 words, excluding the exempted parts of the motion and complies with the typeface requirements.

Dated: December 17, 2021

Respectfully submitted,

/s/Sujata S. Gibson

CERTIFICATE OF SERVICE

I, Sujata Gibson, hereby certify under penalty of perjury, that on 12/17/2021, before filing these papers, I served them on Susan Paulson, Esq., counsel for the Appellees by email at spaulson@law.nyc.gov and telephonic notice.

Dated: December 17, 2021

Respectfully submitted,

/s/Sujata S. Gibson