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): 22-1876 Caption [use short title] Kane et al. v. de Blasio et al.

Motion for: emergency temporary stay of NYC DOE deadlines for vaccination as a condition of employment (or reemployment) until decision on the associated motion for emergency injunction by a three judge panel.

Set forth below precise, complete statement of relief sought:

Appellants seek an emergency injunction reinstating them to their positions and enjoining enforcement of the DOE vaccine mandate against them pending appeal; Appellants further seek expedited consideration of this motion and a stay of the DOE's vaccine deadlines for employees denied religious accommodation to return to work or remain on leave without pay pending decision by the motions panel.

MOVING PARTY: Kane et al. **OPPOSING PARTY:** de Blasio et al.

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Sujata S. Gibson **OPPOSING ATTORNEY:** Hon. Sylvia Hinds-Radix, Corporation Counsel

[name of attorney, with firm, address, phone number and e-mail]

Gibson Law Firm, PLLC
832 Hanshaw Rd., Suite A, Ithaca, NY 14850
(607) 327-4125, sujata@gibsonfirm.law

Corporation Counsel for the City of New York
100 Church Street, New York NY 10007
(212) 356-1000, shradix@law.nyc.gov

Court- Judge/ Agency appealed from: USDC SDNY - Hon. Naomi Reice Buchwald

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

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

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency: Appellants denied religious accommodation have been asked to choose between their job or their faith on or before 9/6/2022 (9/5/2022 for those on leave without pay). They seek an immediate stay of the September deadlines on or before Friday, 9/2/2022, and a decision by an expedited motions panel by 9/15/2022 or as soon as possible.

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Sujata S. Gibson **Date:** 8/29/2022 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

22-1876

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, NATASH SOLON, AMARYLLIS RUIZ-TORO,

Plaintiffs-Appellants,

– v. –

BILL DE BLASIO, personally and 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 NAOMI REICE BUCHWALD
Case No. 21-CV-7863 (NRB)

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK, SARAH BUZAGLO, EDWARD (ELI) WEBER, CAROLYN GRIMANDO, AMOURA BRYAN, JOAN GIAMMARINO, and BENEDICT LOPARRINO, individually, and for all others similarly situated,

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 NAOMI REICE BUCHWALD
Case No. 21-CV-8773 (NRB)

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL – RELIEF REQUESTED BY FRIDAY, SEPTEMBER 2, 2022

Barry Black
Jonathan Robert Nelson
Sarah E. Child
Nelson Madden Black LLP
475 Park Avenue South, Suite 2800
New York, New York 10016
(212) 382-4303

John J. Bursch
Alliance Defending Freedom
440 First Street NW, Suite 600
Washington, DC 20001
(616) 450-4235

Sujata S. Gibson
Gibson Law Firm, PLLC
832 Hanshaw Rd., Suite A
Ithaca, NY 14850
(607) 327-4125

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

EMERGENCY MOTION FOR INJUNCTIVE RELIEF PENDING APPEAL
RELIEF REQUESTED BY FRIDAY, SEPTEMBER 2, 2022

PRELIMINARY STATEMENT

On August 11, 2022, the CDC—recognizing that the worst of the Covid-19 pandemic is over now that 95% of people have immunity from natural infection or vaccines—revised its guidance to stop differentiating between vaccinated and unvaccinated.[1] Though there is no longer any scientific basis to argue that vaccination meaningfully stops transmission, New York City continues to impose a multitude of particularized Covid-19 vaccine mandates (collectively, "Mandate") on nearly every City employee, including Appellants and similarly situated Department of Education ("DOE") employees.

Rather than revise its draconian religious accommodation policies, Appellees responded to the CDC's update by sending letters to the terminated DOE employees denied religious accommodation, offering them their jobs back if they agree to violate their faith and get vaccinated before September 6, 2022.[2] Those currently on

[1] Massetti GM, Jackson BR, Brooks JT, et al. Summary of Guidance for Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care Systems — United States, August 2022. MMWR Morb Mortal Wkly Rep. ePub: 11 August 2022. DOI: http://dx.doi.org/10.15585/mmwr.mm7133e1

[2] *See* Susan Edelman, *1300 NYC School Staffers Must Now Get COVID Vaccine – Or Will Be Let Go*, N.Y. Post (Aug. 27, 2022), https://nypost.com/2022/08/27/1300-nyc-school-staffers-must-get-covid-vaccine-or-be-fired/.

leave without pay must be vaccinated by September 5th or be terminated. To avoid imminent harm, Appellants seek an immediate emergency temporary stay of the September vaccination deadlines pending review by a motions panel, and expedited consideration of their concurrent application for an emergency injunction enjoining enforcement of the DOE Mandate against them with an order of reinstatement pending appeal.

Last November, this Court already held Appellants are likely to succeed on the merits and vacated the district court's denial of preliminary injunctive relief. *Kane v. De Blasio*, 19 F.4th 152, 175 (2d Cir. 2021). New facts underscore that holding. As applied to any DOE employee with religious objections, the Mandate still burdens the free exercise of religion and is not neutral or generally applicable.

To be sure, the City is free to exempt well-paid artists and athletes and those with medical needs yet exercise discretion to arbitrarily deny most applicants for religious accommodation while openly preferring the religious beliefs of Christian Scientists over others. But doing so subjects the City's religious accommodation decisions to strict scrutiny, which the City cannot satisfy.

Appellants face imminent harm. Starved of any income for ten months, some Appellants already lost their homes and had to move. Without this Court's timely intervention, most of the rest of these beloved teachers will be forced to violate their

faith or leave the City forever. Appellants respectfully ask this Court to swiftly put an end to the City's unconstitutional coercion.

STATEMENT OF THE CASE

Plaintiffs-Appellants are 21 educators from two suits (consolidated into a proposed class-action lawsuit, ECF No. 102) filed on behalf of themselves and similarly situated DOE employees with sincerely held religious objections to the COVID-19 vaccines. In August 2021, the Mayor and the Commissioner for Health issued an executive order requiring vaccination for all DOE employees and contractors with odd exceptions, such as bus drivers. By design, the original DOE Mandate had no exception for religious or medical accommodations. Lawsuits and a TRO ensued. [ECF No. 102 ¶¶ 77-81]. The DOE was able to get the TRO dissolved through an arbitration award granting religious and medical accommodation ["Stricken Standards," ECF No. 1-2].

When asked at a press conference what criteria would be used to determine religious accommodations, Mayor de Blasio bragged that the City would preference Christian Scientists and discriminate against employees who, in the City's view, hold unorthodox religious views. The Mayor said this was because Pope Francis "has been abundantly clear that there's nothing in scripture that suggests people shouldn't get vaccinated," [ECF No. 102 ¶ 95].

The DOE's written policies mirror the Mayor's discriminatory statements. [ECF No. 1-1]. The Stricken Standards require rejection of personally held or unorthodox beliefs, and privilege "established" state-recognized religions, such as Christian Scientists: "[e]xemption requests shall be considered for recognized and established organizations (e.g., Christian Scientists)." They also use government power to resolve religious controversies: "requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine." *Id.*

Originally, the Stricken Standards were only applied to DOE employees. All applicants were denied through a boilerplate email. [ECF No. 102 ¶¶ 111, 833]. Appellants had one day to appeal to an arbitrator's Zoom hearing. *Id.* ¶¶ 112-13. DOE representatives aggressively engaged in heresy inquisitions during the appeals. For example, they argued that Appellant Michael Kane, a non-denominational Buddhist, should be denied because his religious beliefs conflict with the Catholic Pope's. *Id*. ¶¶ 221-22, 323. Such comments were common and are well documented in the record. Out of thousands of applicants, only 165 were accommodated.

This Court vacated the district court's initial denial of injunctive relief, holding that the Stricken Standards are unconstitutional and discriminatory, and that they trigger strict scrutiny of Appellants' free exercise claims because they are neither neutral nor generally applicable. *Kane*, 19 F.4th at 167. The case was remanded for "fresh consideration" by a new "Citywide Panel" consisting of three

individuals working with the City and the Mayor's office. The Court ordered the Citywide Panel to follow state, local, and national statutory standards governing religious accommodation and the First Amendment.

Instead, the Citywide Panel issued conclusory denials that simply stated "does not meet criteria" to all but Appellant Castro, who also received "does not meet criteria" as the explanation for his acceptance. Appellants were instructed that they needed to vaccinate within three days or face termination. They immediately filed a letter motion seeking injunctive relief. After filing their reply, the City provided "summaries" purporting to show "reasons" for the denials ("Concocted Summaries"). The district court did not receive these summaries before denying the motion. Appellants appealed. This Court denied the appeal on procedural, not substantive grounds. [*Keil et al. v. City of New York, et al.*, No. 21-3043 (2nd Cir.), ECF No. 163].

The Concocted Summaries show the City continued to discriminate against personally held religious beliefs and beliefs grounded in prayer or objection to abortion. They also show the City did not follow the statutory requirements governing reasonable accommodation, much less the First Amendment. The City claimed that these Concocted Summaries were not made for litigation. But *no* other teachers who applied to the Panel were provided with similar summaries.

While the *Kane* appeal was pending, the City issued dozens of additional Mandates, which collectively require vaccination for nearly all private sector or municipal jobs in the City. After this Court held that the Stricken Standards were unconstitutional, the City did not disavow them but *expanded their use* to offer them to most municipal employees [ECF No. 102 ¶ 805]. Alternatively, the City offers the Citywide Panel.

The result? Two "separate but equal" religious exemption-review options, one for the heretics and one for those whose views align with state-approved religions and dogma. But the two tracks are not even equal. Under the Stricken Standards, undue hardship is not a factor, and those lucky few deemed to have *acceptable* religious beliefs keep their jobs. The DOE asserts that 165 employees, many of them teachers, were accommodated under the Stricken Standards. Not so at the Citywide Panel, which has denied all but one teacher and says it would be an undue hardship to accommodate *any* teacher.

The City provided no explanation why the DOE can accommodate all teachers accepted under the Stricken Standards but must deny accommodation to all but one under the Panel process. Nor did the City show why religious objectors pose a "direct threat" significant enough to require segregating them from students. The City's attorney admitted in depositions that no objective evidence was used to make undue hardship determinations as required by federal, state and local statutes, and that the

Citywide Panel did not consider the heightened state and local statutory standards for undue hardship. [ECF No. 167-1 at 62:19-63:16, 63:22-64:12, 276:16-20, 291:19-292:12].

PROCEDURAL HISTORY

Appellants first filed a motion for emergency injunctive relief on October 4, 2021, the day the Mandate took effect. They were denied and appealed. This Court reversed, holding that Appellants are likely to succeed and remanding the case for further relief on November 28, 2021. [ECF Nos. 77, 85-1].

On December 11, 2021, Appellants filed an emergency letter motion seeking to renew their motion for further injunctive relief after the City failed to comply with this Court's order, and summarily denied them accommodation again through conclusory denials that do not meet statutory or constitutional standards. They were denied and appealed. On March 3, 2022, this Court issued a decision denying the interlocutory appeal on procedural not substantive grounds, holding that Appellants rushed to court on a letter motion, which did not contain sufficient legal argument or attach necessary summaries of reasons from the Citywide Panel to find abuse of discretion. The Court stressed that "we express no view on the ultimate merits of this case, which may be determined in the future upon a complete and carefully presented record." [USCA2 21-3043, ECF. No. 163 at 8-9.]

On February 14, 2022, Appellees filed a motion to dismiss. On April 12, 2022, Appellants filed a new motion for preliminary injunction, providing a complete and carefully presented record as instructed by this Court. At the end of the day Friday, August 26, 2022, the district court denied preliminary injunctive relief and dismissed all claims in Plaintiffs' Amended Complaint. [ECF No. 184]. Appellants filed a notice of appeal on Monday, August 28, 2022, and sought an injunction pending appeal in the district court under Fed. R. Civ. P. 62(d), which was denied. [ECF No. 188].

JURISDICTION

The Court has jurisdiction because this appeal involves the denial of a preliminary injunction, 28 U.S.C. § 1292(a)(1), and final judgment dismissing all claims. *Id.* § 1291.

ARGUMENT

I. LEGAL STANDARD

When a preliminary injunction will affect government action taken in the public interest pursuant to a regulatory scheme, the moving party must demonstrate "(1) a likelihood of success on the merits, (2) irreparable harm absent injunctive relief, and (3) public interest weighing in favor of granting the injunction." *Agudath Isr. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020). Where First Amendment rights are at issue, the test reduces essentially to a single prong: "the likelihood of success on

the merits." *N.Y. Progress & Prot. PAC v. Walsh, 73*3 F.3d 483, 488 (2d Cir. 2013). The deprivation of rights "for even minimal periods of time, unquestionably constitutes irreparable injury," protection of First Amendment rights is *per se* "in the public interest," and the "the Government does not have any interest in enforcing an unconstitutional law." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

II. APPELLANTS ARE LIKELY TO SUCCEED.

Appellants are likely to succeed because they established that the DOE's widespread denials of religious accommodation are subject to strict scrutiny. "If they succeed at that step, the burden shifts to the state to show that it is likely to succeed in defending the challenged Rule under strict scrutiny." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 281 (2d Cir. 2021), *opinion clarified*, 17 F.4th 368 (2d Cir. 2021).

A. Appellants' Free Exercise Claims Trigger Strict Scrutiny.

Emp. Div. v. Smith, 494 U.S. 872 (1990), limited the Free Exercise Clause's reach by declaring that the Constitution "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Id.* at 879. But laws like those here, that are either non-neutral or not generally applicable, are subject to "strict scrutiny" and must be "narrowly tailored" to serve a "compelling" state interest. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020).

1. The DOE Mandate is not generally applicable.

"A law may not be generally applicable under *Smith* for either of two reasons: first, 'if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions'; or, second, 'if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.'" *Kane v. De Blasio*, 19 F.4th 152, 165 (2d Cir. 2021) (citing *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021))." Both bases are present here.

a. The availability of a mechanism for exemption triggers strict scrutiny.

The DOE Mandate is not generally applicable because it provides mechanisms for individualized religious and medical exemptions. The district court erred by refusing to apply strict scrutiny to the religious-exemption denials. That violated *Smith*, which rested its determination of whether the law at issue was "generally applicable" on an analysis of whether the state offered any mechanism for ceremonial exception to its controlled substance laws. *Emp. Div., Dep't of Human Res. v. Smith*, 485 U.S. 660, 672 (1988) ("*Smith I*"); *Smith*, 494 U.S. at 874 ("*Smith II*").

In *Smith I*, the Court reasoned "A substantial number of jurisdictions have exempted the use of peyote in religious ceremonies from legislative prohibitions against the use and possession of controlled substances. If Oregon is one of those

States, respondents' conduct may well be entitled to constitutional protection." *Smith I*, 485 U.S. at 672. Only because the Court determined on remand that *no* mechanism for religious exemption was allowed under Oregon law, did it then hold in *Smith II* that the drug law was thus "generally applicable" and exempt from strict scrutiny analysis. *Smith,* 494 U.S. 872. *Smith* could not be clearer – if a state allows religious exemptions, the law is not generally applicable and denial of religious accommodation must be strictly scrutinized. *Id.*

There is no dispute that the Mandate offers a religious-exemption mechanism. The district court acknowledged that "[t]he creation of a formal mechanism for granting exceptions renders a policy not generally applicable." *Fulton* at 1879. Nonetheless, the court refused to apply strict scrutiny, opining that if "*Fulton* required strict scrutiny for every religious exception, 'such an interpretation would create a perverse incentive for government entities to provide no religious exemption process in order to avoid strict scrutiny." [ECF No. 184 at 25; citing *Ferrelli v. Unified Ct. Sys.*, No. 22 Civ. 0068 (LEK) (CFH), 2022 WL 673863, at *7 (N.D.N.Y. Mar. 7, 2022)].

That reasoning is flawed. Strict scrutiny is not a barrier to providing religious accommodation; it merely ensures a principled application of that accommodation. Moreover, such reasoning does not render *Smith* and *Fulton* bad law. In any event, the Mayor has no authority to ignore Title VII or the New York State and New York

City Human Rights Laws, each of which requires that employers offer a formal mechanism for individualized religious accommodation.

This Court recently imposed a discretion requirement, holding that because the state's medical exemption provided "no meaningful discretion to the State or employers" since checking for a doctor's note was essentially a ministerial act, the state regulation at issue was still generally applicable. *We the Patriots USA, Inc.*, 17 F.4th at 288-89. The individualized determinations, if any, said this Court, was on the part of the "physicians and nurse practitioners," and not the government. *Id.*

That holding was wrong, but here, the Mandate grants the City discretion. As this Court noted previously: "Plaintiffs have offered evidence that the arbitrators reviewing their requests for religious accommodations had substantial discretion over whether to grant those requests . . .. Plaintiffs have thus shown that they are likely to succeed on their claim that the Arbitration Award procedures as applied to them were not generally applicable." *Kane*, 19 F.4th 167, 167 (2021). The same holding applies to the Citywide Panel's denials because Panel members exercise discretion in deciding who to accommodate. Individualized review is required by law (and the orders of this Court), and Appellees admitted that the Panel did not rely

on *any* objective criteria: "these determinations truly are individualized," [ECF. No. 167; ECF No. 167-1 at 326:8-15, 101:4, 147:21-22, 148:20, 263:19, 271:16-20. [3]

b. The Mayor's discretion to make carve outs also triggers strict scrutiny.

Another mechanism for individual exemption lies in the Mayor's discretion to create Mandate carve outs. If a law allows the executive branch to make exceptions at officials' "sole discretion," the law is not generally applicable, even if that power is never exercised. *Fulton*, 141 S. Ct. at 1877. Here, the Mayor's 71 (and counting) new Mandates and exemptions since this Court made its last substantive decision shows that the Mayor has power to make exemptions. These edicts constitute *specifically applicable* and ever-changing discretionary executive orders

[3] Appellants brought this deposition transcript to the district court's attention, seeking to supplement the pending motion record with it. The district court abused its discretion by denying this request. The district court first denied Plaintiffs' request because it purportedly violated Individual Practice Rule 4.H.ii.(e) of Judge Caproni, an earlier presiding judge, which states that "[t]he Court will not search through the record in support of facts relevant to a party's claim or defense." But Plaintiffs provided more than 10 citations to the transcript in their request, letting the Court know exactly where the relevant language was located. ECF No. 167. The district court also found that supplementing the record with the transcript would not alter its decision. But, as Plaintiffs noted in their request, the deposition contained repeated admissions from the City that the Panel determinations were based on unfettered discretion and constituted the archetypal "mechanism for individualized exemptions" that *Fulton* states independently requires strict scrutiny. Such evidence disposes of one of the main issues in this case; the district court's decision to exclude it, after it has criticized Plaintiffs repeatedly for failing to supplement the record, is mystifying.

and are the opposite of "an across-the-board" policy exempt from review under *Smith*, 494 U.S. at 884 (emphasis added).

c. Exemptions for secular reasons trigger strict scrutiny.

The Mayor's carve outs also favor the secular over religious. Though the Mandate purportedly protects public health, the Mayor grants exceptions unrelated to that purpose. Most egregiously, EEO 62 exempts the Mayor's favorite sports teams, millionaire athletes, and artists (including adult entertainment artists) and their entourages, while the City refuses most exemptions to similarly situated religious objectors. The Mayor admitted the carve outs were motivated by economics, not health risks. [Katie Honan, *Eric Adams 'Kyrie Carve Out' Has NYC Unions and Workers Fuming, The City* (Mar. 24, 2022 8:00 PM), https://www.thecity.nyc/2022/3/24/22995486/adams-kyrie-irving-carve-out-nyc-unions-workers-angry]. Where a City grants economic exemptions while denying religious, strict scrutiny applies. "Comparability is concerned with the risks various activities pose, not the reasons" for exemption. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

Harry Nespoli, chair of the Municipal Labor Committee representing 102 unions, told the New York Times, "[t]here can't be one system for the elite and another for the essential workers of our city." [Jeffery C. Mays and Dana Rubinstein,

Inside New York City's Decision to End Vaccine Mandate for Pro Athletes, The New York Times (Mar. 24, 2022), https://www.nytimes.com/2022/03/24/nyregion/vaccine-mandate-kyrie-adams.html]. Jay Varma, former health advisor to Mayor de Blasio, warned that the carve out "opened the city up to legal action." *Id.* Again, strict scrutiny applies.

2. The DOE Mandate is Not Neutral.

"The minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993). But the Stricken Standards do not even meet that minimal requirement. They openly express denominational preferences for Christian Scientists and denominations the City "recognizes" and establishes. This Court already held that strict scrutiny applies, and Appellants are likely to succeed, because the DOE implemented the Mandate through polices that are not neutral. "Denying an individual a religious accommodation based on someone else's publicly expressed religious views — even the leader of her faith —runs afoul of the Supreme Court's teaching that "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Kane*, 19 F.4th at 168.

This history of religious animus cannot be wiped away because the DOE gave some Appellants (but not all) "fresh consideration" and made conclusory new

denials. In *TWA v. Thurston*, 469 U.S. 111 (1985), the Supreme Court held that in the rare case, such as this one, where the government adopts policies which, on their face, target certain protected classes for special disability or privilege, the government cannot prevail by alleging that they would have made the same finding under a non-discriminatory standard. *Id.* Such cases warrant summary judgment, a higher standard than likelihood of success. *Id.*

a. Animus is not mooted by the "fresh look."

In addition to textual neutrality, courts must examine whether there are "subtle departures" from religious neutrality as evidenced by "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Lukumi*, 508 U.S. at 533-40 (1993); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018).

"Animus" is not just hostility but any indication that shows taking sides. The government "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices," *Id.* at 1731. Here, the Mayor's public statements, in which he expressed denominational preferences and presupposed the illegitimacy of religious objections to vaccination because the Pope convinced him they were wrong, violate this standard. Initially, this Court disregarded the Mayor's

incendiary comments, reasoning that on the record then before it, "the Mayor did not have a meaningful role in establishing or implementing the Mandate's accommodation process." *Kane*, 19 F.4th at 165. No longer. The Citywide Panel came from the Mayor and his counsel's office. It is run by the City and is now the operative process for most DOE employees. The Mayor's comments about his intention to discriminate against minority religious denominations are highly relevant, particularly since the Citywide Panel decisions reflect the same animus.

Moreover, DOE representatives made similar comments. For example, they argued that Jewish objectors should be denied accommodation because a random Jewish leader in Israel expressed a different viewpoint than their rabbi. [ECF No. 102 ¶ 90]; that Buddhists and non-denominational Christians must be denied because their views conflict with Pope Francis's, [*Id.* ¶¶ 232, 265]; and that personally held or unorthodox beliefs are invalid and wrong, as is any concern about the use of aborted fetal cell lines. [*Id.* ¶¶ 293-98]. Any one of these statements triggers strict scrutiny.

When a law is regularly implemented in an unconstitutional manner, it is subject to facial challenge and must be strictly scrutinized. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *MacDonald v. Safir*, 206 F.3d 183, 191 (2d Cir. 2000). These consistent, discriminatory comments from DOE and City officials are too widespread to be ignored, especially after being codified into a

written policy adopted by the DOE and the City. Also, as in *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1721, the City never "disavowed" the Stricken Standards which "casts doubt on the fairness and impartiality" of all religious accommodation denials.

b. The Citywide Panel continues to discriminate.

The Citywide Panel has no written standards. But the evidence shows the Panel's process is similarly infected with religious animus and denominational preferences and fails to meet statutory or constitutional standards.

For example, the Concocted Summaries reveal that, in violation of this Court's order, the Panel discriminated against religious beliefs derived from personal prayer. Panel members denied all applications based on personal belief because they allegedly allow the applicant "to choose to take or abstain from vaccination based on his view of the facts and circumstances." *E.g.,* [ECF No. 134 Kane Decl.], [ECF No. 136 Gladding Decl.], [ECF No. 128 Clark Decl.], [ECF No. 139 DiCapua Decl.], [ECF No. 140 Smith Decl.], [ECF No. 132 Chu Decl.].

Similarly, City emails show that the Panel was instructed to deny religious objections based on the use of aborted fetal cell lines in vaccine testing or development. *See, e.g.* [ECF No. 122-5 Gibson Decl. Ex. E.] ("I'm mostly seeing folks expressing their view that all Covid vaccines contain or were tested using fetal stem cells...My understanding from our conversation is that those would not constitute sincerely held religious beliefs, but what would?").

Indeed, for all but one Appellant who was raised Jehovah's Witness, the Panel arbitrarily rejected applications focused on religious objections to use of aborted fetal cells, substituting their judgment about what each person's faith requires, and impermissibly contesting facts. *See, e.g.,* [*Keil* ECF No. 25 Strk Decl.] (Panel accused Plaintiff of relying on incorrect facts regarding aborted fetal cells); [ECF No. 128 Clark Decl. ¶¶ 11, 15] (Panel concluded that Plaintiff Clark's abstinence from anything developed using aborted fetal cells due to her profound spiritual beliefs about the sanctity of life were merely "fact-based choices about foods and medicines"); [ECF No. 132 Chu Decl.] (acknowledging that Plaintiff Chu has a sincere religious objection to use of aborted fetal cells in research and development but concluding that this should not prevent vaccination).

These reasons violate Appellants' religious rights. Sincerity tests must be limited to "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious." *United States v. Seeger*, 380 U.S. 163, 185 (1965). Religious beliefs are "safeguarded against secular intervention." *Patrick v. Le Fevre*, 745 F.2d 153, 158 (2d Cir. 1984). Title VII tracks these standards, defining defines religious beliefs to include any "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional views . . ." 29 C.F.R. § 1605.1.

When Appellees castigate Appellants' views as sincerely held but "not religious" because they were derived from a personal relationship with Spirit or God rather than denominational dogma, Appellees violate the Constitution. Such determinations indicate impermissible entanglement with religious questions, *Cantwell v. Conn.*, 310 U.S. 296, 310 (1940), and violate other statutory and constitutional standards. And it doesn't matter whether the religious objector is right; the government cannot "punish the expression of religious doctrines it believes to be false." *Smith*, 494 U.S. at 877; *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996).

B. Establishment Clause Violations Trigger Strict Scrutiny.

The Establishment Clause independently triggers strict scrutiny. The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another," and that the government may "effect no favoritism among sects." *Larson v. Valente*, 456 U.S. 228, 244, 246 (1982). The government violated this command three ways.

First, as discussed, the City implemented its DOE Mandate by preferencing Christian Scientists and "established" religious leaders and sects. These policies had the effect of burdening unorthodox religious denominations, as in *Larson*, but were worse because here the City even announced its intention to target certain religious denominations and individuals for discriminatory treatment. [ECF No. 102 ¶¶ 82-101; *see also* ¶¶ 15, 95]. These facts establish denominational preference and trigger

strict scrutiny. And by extending these unconstitutional policies to every department, the City has created an Establishment Clause problem citywide.

Second, extending the use of Stricken Standards while offering the Citywide Panel as another option compounds the Establishment Clause problem. The Constitution does not allow the government to provide separate but equal religious accommodation policies, one for Christian Scientists and another for religious objectors with beliefs that are not shared by "established and recognized" church leaders. And here, the options are not equal. For those lucky few that qualify under the Stricken Standards, continued employment is guaranteed where those reviewed by the Citywide Panel are nearly always denied based on "undue hardship." The City does not explain why it can accommodate the 165 DOE employees found "acceptable" under the Stricken Standards (many of them teachers), but cannot extend the same accommodation to those whose religious beliefs qualify under non-discriminatory standards.

Third, several Plaintiffs were never even offered a "fresh consideration" and were summarily suspended and terminated under the unconstitutional Stricken Standards. [ECF No. 102 ¶¶ 633-89, 732-80; Grimando Decl. ¶¶ 5-14; LoParrino Decl. ¶¶ 5-14; Weber Decl. ¶¶ 5-13; Giammarino Decl. ¶¶ 5-13].

The District Court justified its dismissal of Plaintiffs' Establishment Clause claim because "there is a long history of vaccination requirements in this country

and in this Circuit,"[4] citing *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022), to interpret the Establishment Clause "by reference to historical practices and understandings." This analysis fails to acknowledge that "the history and logic of the Establishment Clause" also requires that "no State . . . pass laws which aid one religion or that prefer one religion over another." *Larson*, 456 U.S. at 246 (cleaned up). And there is no "history" of imposing vaccination requirements based on religious preferences. The Supreme Court's instructions are clear and binding: "In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny." *Id.*

C. The Accommodation Denials Cannot Survive Strict Scrutiny.

The denials fail strict scrutiny because the City has not even tried to establish that their religious accommodation policies are "narrowly tailored" to achieve a compelling interest. *Fulton*, 141 S. Ct. At 1881. Every other school district in the state allows testing in lieu of vaccination. Defendants did not explore this option. The Panel's "undue hardship" determinations underscore this point. For instance, Appellant Bryan was employed as a remote worker before the DOE Mandate was implemented, yet the Panel granted no accommodation. [ECF No. 102 Amended

[4] None of the cases the Court cited in support of this proposition address a religious exemption policy for a vaccine mandate that contains an express denominational preference, or even involve Establishment Clause claims at all.

Complaint ¶¶ 38, 694-95, 697-99, 718, 19]. And the DOE allowed infected teachers to return to school while barring unvaccinated teachers who have tested negative for Covid. *Id.* ¶ 816.

Such decisions flunk *any* standard of scrutiny, even statutory standards. For example, to justify segregating employees based on religion, something 42 U.S.C. § 2000e-2(a)(1), (2) prohibits, the City would have to claim undue hardship under an ADA "direct threat" theory, i.e., that the employees' vaccination status endangers others and requires segregation. *see* 29 C.F.R. § 1630.2[5]. Employers must consider the best available evidence, and, after employing a four-part test, show the harm is serious and "likely" to occur. *Hargrave v. Vermont*, 340 F.3d 27, 35–36 (2d Cir. 2003). But the Panel did none of these things. And conclusory statements offered here do not meet the burden of showing direct threat *or* undue hardship under any of the three governing statutes. 42 U.S.C. § 2000e(m); N.Y. Exec. Law § 296(10)(d); NYC Admin. Code, 28 U.S.C. §§ 8-107(3)(b).

Recently, a state court held that the Citywide Panel's conclusory denials, including their claims of "undue hardship," cannot even meet deferential Article 78 standards: "the March 28, 2022 denial of petitioner's request was arbitrary and capricious because the reasons for denial were vague and conclusory...That compels

[5]This perception of threat triggers ADA protection under 42 U.S.C. § 12102(3)(1)(C)

the Court to grant the petition." *Loiacono v. Bd. of Educ. of the City of N.Y.*, Index No. 154875/2022, NYSCEF Doc. No. 46, at 6. (Sup. Ct. New York Cnty. 2022). Particularly now that the CDC itself recommends ending any distinction between vaccinated and unvaccinated people in prevention strategies, Appellees cannot even likely meet their burden under rational basis standards.

III. APPELLANTS ARE SUFFERING IRREPARABLE HARM, AND THE BALANCE OF INTERESTS WEIGHS IN FAVOR OF GRANTING AN INJUNCTION.

Appellants have diligently sought injunctive relief since last October. When they first filed, the City complained that their claims were "not yet ripe" since most religious-exemption applications were still pending. Now, most are terminated, and all face a deadline next week to choose between their careers and their faith. And, because the Mandates cover nearly every job in the public or private sector in the City, Appellants are precluded from working *anywhere* in the City unless they violate their sincerely held religious beliefs. One named Appellant already had to capitulate to survive. [ECF No. 162].

Every day that passes increases the pressure on the rest. Such deprivation of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373. The constant coercion and daily adverse impacts on those who refuse to violate their faith are irreparable. And given the CDC's recent pronouncements, the balance of harms and equities weighs

definitively in favor of an injunction, particularly given that the City need only accommodate nineteen Appellants out of hundreds of thousands of employees.

CONCLUSION

Appellants respectfully request an emergency order staying the September 5th and 6th vaccination deadlines and expedited consideration of this motion to enjoin the City's enforcement of the DOE Mandates against Appellants and ordering reinstatement pending appeal.

Dated: New York, New York
August 29, 2022

GIBSON LAW FIRM, PLLC

/s/ Sujata S. Gibson

By: Sujata S. Gibson
832 Hanshaw Rd., Suite A
Ithaca, NY 14850
(607) 327-4125

NELSON MADDEN BLACK LLP

/s/ Barry Black

By: Barry Black
Jonathan R. Nelson
Sarah E. Child
475 Park Avenue South, Suite 2800
New York, NY 10016
(212) 382-4300

ALLIANCE DEFENDING FREEDOM

/s/ John J. Bursch

By: John J. Bursch
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235

Attorneys for Appellants

To: All counsel via ECF

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify the following: This emergency motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) and 32(a)(7)(b) and Fed. R. App. P. 32(c) because this brief contains 5,186 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This emergency motion complies with the type face requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionately spaced typeface in 14-point Times New Roman font.

Dated: August 29, 2022

/s/ Sujata S. Gibson