APP NO. 22A-_____

IN THE SUPREME COURT OF THE UNITED STATES

NEW YORKERS FOR RELIGIOUS LIBERTY; et al.,

Applicants,

v.

CITY OF NEW YORK; et al.,

Respondents.

To the Honorable Sonia Sotomayor,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Second Circuit

EMERGENCY APPLICATION FOR AN INJUNCTION PENDING APPELLATE REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicant New Yorkers for Religious Liberty, Inc., states that it is a not-for-profit corporation organized under New York law, and that it neither issues stock nor has a parent company. The remaining Applicants are individuals.

PARTIES TO THE PROCEEDING

Applicants (Plaintiffs-Appellants below) are New Yorkers for Religious Liberty, Inc.; Gennaro Agovino, Curtis Cutler, Liz Delgado, Janine DeMartini, Brendan Fogarty, Sabina Kolenovic, Krista O'Dea, Dean Paolillo, Dennis Pillet, Matthew Rivera, Laura Satira, Frank Schimenti, James Schmitt, Michael Kane, William Castro, Margaret Chu, Heather Clark, Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu, Ingrid Romero, Natasha Solon, Trinidad Smith, and Amaryllis Ruiz-Toro, individually and for all others similar situated; Sasha Delgado, Matthew Keil, John De Luca, Dennis Strk, Sarah Buzaglo, Benedict Loparrino, Joan Giammarino, Amoura Bryan, Edward Weber, and Carolyn Grimando.

Respondents (Defendants-Appellees below) are the City of New York, Eric Adams, Dave Chokshi, in his official capacity as Health Commissioner of the City of New York, and the New York City Department of Education. Roberta Reardon was also a Defendant below.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Second Circuit, No. 22-1801, *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, order denying injunction pending appeal, entered October 11, 2022.

U.S. District Court for the Southern District of New York, No. 21-cv-7863 (NRB), No. 21-cv-8773 (NRB), *Kane et al.* v. *Bill de Blasio, et al.*, order denying motion for a preliminary injunction and dismissing Plaintiffs' complaint with prejudice, entered August 26, 2022.

U.S. District Court for the Eastern District of New York, No. 22-cv-00752 (DG), *New Yorkers for Religious Liberty, Inc.* v. *City of New York*, order denying Plaintiffs' motion for a preliminary injunction, entered August 11, 2022.

DECISIONS BELOW

As noted in the List of All Proceedings, this consolidated appeal involves three different actions—*Kane* and *Keil*, which were consolidated in the district court, and *NYFRL*, into which *Kane* and *Keil* were consolidated by the Second Circuit. The *Kane* and *Keil* district court's unreported August 26, 2022 Memorandum and Order dismissing the complaints is reprinted in Appendix ("App.") A. The *NYFRL* district court's unreported August 11, 2022 Order and relevant pages from the transcribed bench opinion are reprinted in App.B. The Second Circuit's summary, unreported October 11, 2022 Order denying an injunction pending appeal in *Kane*, *Keil*, and *NYFRL* is reprinted in App.C.

JURISDICTION

Kane and *Keil*

The *Kane* and *Keil* Applicants filed their verified complaints in late 2021 alleging, among other things, that New York City violated their right to freely exercise their faith by forcing them to choose between maintaining public employment or taking the COVID-19 vaccine against their sincere religious beliefs. *Kane* v. *De Blasio*, No. 1:21-cv-07863 (S.D.N.Y.), ECF No. 1; *Keil* v. *City of New York*, No. 1:21-cv-08773 (S.D.N.Y.), ECF No. 10. The *Kane* and *Keil* Applicants then moved for emergency injunctive relief. *Kane*, ECF No. 12; *Keil*, ECF No. 8. Those motions were denied, *Kane*, ECF No. 60; *Keil*, 10/28/21 Text Order, and the *Kane* and *Keil* Applicants promptly appealed. *Kane*, ECF No. 67; *Keil,* ECF No. 33. The Second Circuit consolidated the appeals and reversed, holding that the *Kane* and *Keil* Applicants were likely to succeed and remanding the case for further proceedings. *Kane*, 2d Cir. No. 21-2678, ECF No. 98.

On remand, the *Kane* and *Keil* Applicants moved for further emergency relief after the City failed to obey the Second Circuit's order. *Kane*, ECF No. 85; *Keil*, ECF No. 50. The district court denied that motion. *Kane*, ECF No. 90; *Keil*, ECF No. 54. The *Kane* and *Keil* Applicants appealed again. *Kane*, ECF No. 91; *Keil*, ECF No. 55. This time, the Second Circuit denied the appeal on procedural grounds only. *Keil*, 2d Cir. No. 21-3043, ECF No. 163.

In February 2022, the City moved to dismiss the consolidated cases. *Kane*, ECF No. 111. Two months later, the *Kane* and *Keil* Applicants moved again for preliminary

injunctive relief, providing the fuller record the Second Circuit requested. *Kane*, ECF No. 121. The district court denied the *Kane* and *Keil* Applicants' motion and granted the City's motion to dismiss. *Kane*, ECF No. 184, App.A. The *Kane* and *Keil* Applicants timely appealed, *Kane*, ECF No. 186, and moved for injunctive relief pending appeal in the district court, *Kane*, ECF No. 187. After the district court denied that request, *Kane*, ECF No. 188, the *Kane* and *Keil* Applicants moved the Second Circuit for emergency relief, *Kane*, 2d Cir. No. 22-1876, ECF No. 12, which that court summarily denied on October 11, 2022, *NYFRL*, 2d Cir. No. 22-1801, ECF No. 107, App.B.

The district court had jurisdiction under 28 U.S.C. 1331 and 1343 and authority to issue declaratory and injunctive relief under 28 U.S.C. 1343 and 2201. The United States Court of Appeals for the Second Circuit had jurisdiction over the *Kane* and *Keil* Applicants' appeal under 28 U.S.C. 1291. This Court has jurisdiction under 28 U.S.C. 1651. The *Kane* and *Keil* Applicants' application is "in aid of [this Court's] jurisdiction," *id.*, because it will take several months to obtain a ruling from the Second Circuit on the *Kane* and *Keil* Applicants' appeal of the district court's dismissal and their appeal of the district court's denial of their preliminary injunction, during which time the irreparable harm to the *Kane* and *Keil* Applicants' families and the Applicants' First Amendment rights will be irreversible.

New Yorkers for Religious Liberty (NYFRL)

On February 10, 2022, the *NYFRL* Applicants filed a complaint alleging, among other things, that New York City had violated their right to freely exercise

their faith by forcing them to choose between maintaining public employment or taking the COVID-19 vaccine against their sincere religious beliefs. *New Yorkers for Religious Liberty, Inc. (NYFRL)* v. *City of New* York, No. 22-CV-0752 (E.D.N.Y.), ECF No. 1. They then moved for a preliminary injunction and temporary restraining order. ECF No. 7, 7-1. After several interim rulings and submissions, the district court denied the *NYFRL* Applicants' request for preliminary relief on August 11, 2022, reading its ruling into the record that same day. ECF No. 107, App.B. The *NYFRL* Applicants timely appealed, ECF No. 109, and moved for injunctive relief pending appeal in the district court, ECF No. 111. After that motion was denied, they moved the Second Circuit for the same relief. *NYFRL*, 2d Cir. No. 22-1801, ECF No. 13. The Second Circuit summarily denied that motion in an order dated October 11, 2022. 2d Cir. No. 22-1801, ECF No. 110, App.C.

The district court had jurisdiction under 28 U.S.C. 1331 and 1343 and authority to issue declaratory and injunctive relief under 28 U.S.C. 1343 and 2201. The United States Court of Appeals for the Second Circuit had jurisdiction over the *NYFRL* Applicants' interlocutory appeal under 28 U.S.C. 1292. This Court has jurisdiction under 28 U.S.C. 1651. The *NYFRL* Applicants' application is "in aid of [this Court's] jurisdiction," *id.*, because it will take several months to obtain a ruling from the Second Circuit on the *NYFRL* Applicants' appeal of the district court's denial of their preliminary injunction, during which time the irreparable harm to the *NYFRL* Applicants' families and the Applicants' First Amendment rights will be irreversible.

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To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

It is now widely acknowledged that COVID-19 vaccines are "non-sterilizing" and cannot meaningfully halt the spread of disease. Yet the City of New York continues to insist that public employees set aside their religious objections and be vaccinated to work for the City and, until November 1, 2022, the City barred the unvaccinated from working for *any* employer within the City's jurisdiction.

That decision might be afforded substantial discretion if it allowed exceptions for no one. But the exact opposite is true. The City provides exemptions from its omnibus COVID vaccination requirements for athletes, entertainers, and strippers; exempts thousands of unvaccinated municipal employees whose applications have been allowed to pend indefinitely because of staffing shortages and other secular concerns; offers a medical exemption; and provides a religious exemption for City employees—one granted rarely in officials' unfettered and standardless discretion.

Plaintiffs-Applicants in these consolidated cases are New York City firefighters, teachers, police officers, sanitation workers, and other public employees who lost their livelihoods and are losing their homes due to the City's discretionary vaccine policies. Below, one district court dismissed a case brought by the City's teachers (*Kane* and *Keil*), and another district court denied a preliminary injunction in a case brought by a broader range of public employees (*New Yorkers for Religious Liberty*, or *NYFRL*). And while Applicants appealed both decisions, the Second Circuit denied Applicants an injunction pending appeal, causing irreparable harm.

A law that burdens religious exercise is not generally applicable and triggers strict scrutiny if (1) "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," or (2) "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (cleaned up). Here, the City's Mandates do both, triggering strict scrutiny two ways, a standard that the City has not even tried to satisfy.

First, the City provides a mechanism for individualized exemptions—a "Citywide Panel" to consider religious exemptions—that is entirely discretionary. Eric Eichenholtz, the Panel's architect, testified that the Panel's decisions are not supported by any objective evidence or individualized assessment of need. "[T]hese determinations truly are individualized," he testified. *NYFRL*, ECF No. 81-29 at 326:8-15]. This Court has already held that where the government "has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Emp. Div., Dep't of Hum. Res. of Or.* v. *Smith*, 494 U.S. 872, 884 (1990) (*Smith II*). Specifically, *Smith II* recognized the possibility of a ceremonial exemption as the type of mechanism that would defeat general applicability. Other circuits, too, apply strict scrutiny to religious exemption denials if, as here, government actors have discretion. *E.g.*, *Dahl* v. *Bd. of Trs. of W. Mich. Univ.*, 15 F.4th 728, 733–34 (6th Cir. 2021) (per curiam).

Second, at the policy-making level, the City exempts secular conduct that impacts the City the same way as granting Applicants an exemption would. Chief

among these exemptions is the City's decision to allow thousands of other unvaccinated City employees to continue working simply by not processing their exemption requests. They also included the Mayor's blanket exemptions for athletes, performing artists, and strippers. The City never justified why an unvaccinated stripper can spend hours in close proximity to customers in an indoor venue, while a City sanitation worker cannot pick up refuse, outside, with virtually no person-to-person contact absent a vaccination that violates his religious convictions.

Applicants do not ask for merits review at this stage. The Second Circuit has expedited Applicants' appeal, and that decision should issue within a few months. But in the meantime, as detailed in the Argument, below, Applicants are suffering the loss of First Amendment rights, are facing deadlines to move out of homes in foreclosure or with past-due rents, are suffering health problems due to loss of their City health insurance and the stress of having no regular income, and resorting to food stamps and Medicaid just to keep their families afloat. As each Applicants' situation becomes more fraught, the coercion to violate their faith so that they can return to their City job increases. Forcing a person to choose between job and faith is per se irreparable harm. *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976).

Accordingly, the Court should grant the Application and enter a preliminary injunction on appeal, partially restoring the status quo ante by enjoining the enforcement of any City Mandate against any Applicant—including reinstatement and the removal of any negative personnel file notations resulting from a Mandate—while the Second Circuit proceeds with the expedited appeal.

STATEMENT OF THE CASE

A. Applicants and the City's vaccine Mandates

Applicants are firefighters, building inspectors, police officers, EMTs, teachers, sanitation workers, and other hardworking New Yorkers, including New Yorkers for Religious Liberty, Inc. (NYFRL), a New York not-for-profit membership organization that consists of applicants and others affected by New York City's COVID-19 vaccine mandates. These heroes are dedicated to serving their neighbors. But the City suspended and fired them because they cannot take the COVID-19 vaccine without violating their religious beliefs.

Through a series of "emergency" executive orders, the City forced most public and private sector employees to take the COVID-19 vaccine. First, in late August 2021, the Mayor and the Commissioner of the Department of Health and Mental Hygiene issued an order requiring all Department of Education ("DOE") employees and contractors to become fully vaccinated by September 27, 2021. *Kane* and *Keil* Consolidated Am. Class Action Compl. [CACAC], ECF No. 102 ¶¶ 61–62. The original mandate contained no medical or religious exemptions. *Id.* ¶ 62. Lawsuits ensued and a TRO issued. *Id.* ¶¶ 77–81. The TRO was resolved through an arbitration award—later held unconstitutional by the Second Circuit—granting religious and medical accommodations, referred to herein as the "Stricken Standards." *Kane*, ECF No. 1-2.

Applicants each have sincerely held religious objections that do not allow them to take a COVID-19 vaccine. CACAC ¶¶ 218–780. Most *Kane* and *Keil* Applicants and many of their colleagues timely applied for religious exemptions in September 2021.

Others, like Applicant Trinidad Smith, elected to file or support a proposed class-action lawsuit because the Stricken Standards were discriminatory and designed to result in widespread denials. *Kane*, ECF No. 1. As the lawsuit foreshadowed, all applications were denied through an auto-boilerplate email that DOE issued to the City's public-school employees. CACAC ¶¶ 111, 833.

Applicants had one day to appeal their denial to an arbitrator's Zoom hearing. CACAC ¶¶ 112–13. DOE representatives aggressively engaged in heresy inquisitions during the appeals, discriminating even more zealously than the already unconstitutional policy required. For example, they argued that Applicant Michael Kane, a non-denominational Buddhist, should be denied because though sincere, his religious beliefs conflict with the Catholic Pope's. *Id.* ¶¶ 221–22, 232. Such comments were common and well documented. Only 162 were accommodated.

Last November, on interlocutory appeal, the Second Circuit declared the DOE's religious exemption policies unconstitutional, holding that denying a religious exemption "based on someone else's publicly expressed religious views—even the leader of her faith—runs afoul" of the First Amendment. *Kane* v. *De Blasio*, 19 F.4th 152, 168 (2d Cir. 2021) (per curiam). The Court also held that government should not second-guess religious adherents' "interpretations of [their] creeds." *Ibid.* (quoting *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989)).

While the *Kane* appeal was pending, the City issued dozens of additional vaccine mandates that require vaccination for nearly all private sector and municipal jobs in the City (collectively, the "Mandates"). After the Second Circuit held the

Stricken Standards unconstitutional, the City *expanded* their use to most municipal employees. CACAC ¶ 805–06; *NYFRL* First Am. Proposed Class-Action Compl. [FAPCAC], ECF No. 77 ¶¶ 192–97.

Alternatively, the City offers the new Citywide Panel process to determine religious accommodations, leading to *more* religious discrimination. The Stricken Standards do not provide a mechanism for denial based on undue hardship. So, if an employee is lucky enough to have a "valid" religious objection under the discriminatory criteria, they keep their jobs. CACAC ¶ 70(i); *Kane*, ECF No. 1-2 at 12. But the Citywide Panel tacks on "undue hardship" as an alternative, unsupported reason for denial on most religious accommodation decisions.

Consider *NYFRL* applicant Sabina Kolenovic. The DOE denied her a religious exemption under the Stricken Standards because DOE representatives alleged that though Kolenovic was sincere, a Muslim leader—whom Kolenovic does not follow—publicly said he was vaccinated against COVID-19. *NYFRL*, ECF No. 52 ¶ 37. The DOE believed this announcement somehow invalidates religious exemption claims of *all* Muslims. If Kolenovic had been part of a religious organization whose leader publicly *opposed* the vaccine, the City would have had to approve her exemption under the Stricken Standards, as it has done for 162 other workers. Conversely, when the City provided "fresh consideration" of Kolenovic's exemption request by the Citywide Panel, the City again denied her request, now claiming "undue hardship," which is *not* an available reason for denial under the Stricken Standards. *Id.* ¶ 52. So as applied, the City plays denominational favorites.

This result surprised no one. The Citywide Panel exercises substantial and unchecked discretion. At his deposition, Eric Eichenholtz—the architect of the Citywide Panel and Chief Assistant Corporation Counsel for Employment Policy and Litigation at the Office of the New York City Corporation Counsel—testified that Panel decisions are truly "individualized" and are constrained by no objective criteria. *NYFRL*, ECF 81-29 at 101, 147–48, 263, 271, 308, 326. Panelists are not given formal training other than vague links to EEOC guidance which do not reflect the heightened undue hardship standard that state and local statutes require. *E.g.*, N.Y. Exec. Law § 296 (McKinney) ("undue hardship" means an accommodation requiring significant expense or difficulty). And Mr. Eichenholtz admitted that the Panel was not following statutory standards for undue hardship even under the more forgiving federal standards: the Panel did not review or rely on objective evidence to establish that Applicants are a direct threat and need to be segregated based on their religious practices, nor any economic evidence to support the determination that they cannot be reasonably accommodated.

Applicants submitted evidence that the Panel used that discretion to judge not only the sincerity of workers' beliefs but their *value*. For example, the City instructed the Panel to deny exemptions based on personal—versus institutional—beliefs and those rooted in opposition to participating in abortion, such as taking COVID-19 vaccines tested on or developed from aborted fetal cell lines. *NYFRL*, ECF No. 64-1.

Most Applicants were arbitrarily denied under this deeply flawed, discretionary process. Applicant Agovino, a 26-year employee of the Department of Corrections

("DOC"), was denied on the basis of "undue hardship" even though, under the municipal mandate, "uniformed" unvaccinated DOC officers were able to continue working in person due to the secular concern of "staffing shortages," FAPCAC ¶¶ 186–89, inmates and visitors could remain unvaccinated, and Agovino had no contact with detainees and little contact with anyone. *Id.* ¶ 341.

Applicant Paolillo, a dedicated police officer who worked through the worst of the pandemic on the front lines, was terminated March 25, 2022, after the Citywide Panel denied his application, stating only "does not meet criteria." Discovery revealed that two panelists found him sincere, one voted to deny because they disputed whether aborted fetal cells are in fact implicated in the production or testing of the vaccines (they are), and the Law Department voted to deny based on "undue hardship," which Mr. Eichenholtz admitted was not supported by any objective data or analysis. FAPCAC ¶¶ 456–61. Meanwhile, 4,650 of Paolillo's similarly situated unvaccinated colleagues are still working today due to secular considerations about staffing and administrative backlog. *NYFRL*, ECF No. 81-21.

Applicant Fogarty, who worked for the FDNY for almost 20 years and was a captain, was denied religious accommodation based on the "*potential* for undue hardship." FAPCAC ¶ 350 (emphasis added). Mr. Eichenholtz admitted that the FDNY submitted nothing to support this determination. *NYFRL,* ECF No 81-29 at 236–38. The FDNY, like all municipal departments, now faces a staffing crisis. FAPCAC ¶ 314–318. If Applicant Fogerty were to get vaccinated, he could easily recover his job.

Applicants O'Dea and Pillet, also FDNY employees, worked until February and May 2022, respectively, all while engaging in periodic testing, daily temperature checks, and daily masking. *NYFRL*, ECF Nos. 15, 17, 53, and 55. During this time, O'Dea helped save the life of a patient in cardiac arrest. *NYFRL*, ECF No. 53 ¶ 51. Nevertheless, their religious exemption requests were denied due to the "potential undue hardship." *Id.* ¶ 49; *NYFRL*, ECF No. 55 ¶ 33. O'Dea now works at the same job in New Jersey, and Pillet was vaccinated in violation of his religious beliefs, causing spiritual trauma.

Applicant Cutler worked for the Sanitation Department since 2014. Mr. Eichenholtz denied Cutler's religious exemption because he received vaccines before he became religious. FAPCAC ¶ 373. Cutler is a born-again Christian, a deacon at his church, and provided ample evidence of his deep religious commitments to his church and religious objections to vaccination. *Id.* ¶ 371; *NYFRL*, ECF No. 10-1, 10-2, 10-4. His application explained that since the date when he was born again, he has received no vaccine. FAPCAC ¶ 372. His exemption was denied based solely on the fact that he got vaccinated *before* his conversion years ago, even though Mr. Eichenholtz testified that such a conversion would "compel a grant of an accommodation . . . ." *NYFRL*, ECF No. 81-29 at 166–67. The stories go on.

B. Carve outs and ongoing coercion

As public views shifted, the Mayor exercised his discretion to exempt from the City's omnibus COVID Mandates many more preferred workers. For example, in March, Mayor Adams issued Emergency Executive Order 62, which exempted from

the City's blanket employee mandates classes of athletes, entertainers, and strippers—not because they posed less risk of infection, but because the Mayor believed the City would benefit from this economically. FAPCAC ¶¶ 13–14. So, while NBA star Kyrie Irving could return to the basketball court, Broadway entertainers could return to the stage (along with their make-up artists and entourages), and strippers could return to airless, enclosed adult entertainment parlors, hardworking sanitation workers, building inspectors, police officers and other public and private-sector workers could not return to work—even if they had no in-person contact with the public. This favoritism worried Jay Varma, a physician, epidemiologist, and senior advisor to Mayor Bill de Blasio for public health and COVID-19, who warned that the new carve-outs would open the City to "legal action" on the basis that its remaining mandates were "arbitrary and capricious." *NYFRL*, ECF No. 81-22 at 5.[1]

Since then, the City continues to make arbitrary exceptions. The *New York Times* reported that the City is enforcing very little of its private-employee mandates. Lola Fadulu, *Eric Adams Stopped Enforcing Covid Vaccine Mandate for NYC Business*, The New York Times (June 23, 2022), https://www.nytimes.com/2022/06/23/nyregion/nyc-vaccine-mandate-adams.html. And the *New York Post* reported that the City exercised discretion to "pause" its review of appeals for over 4,600 unvaccinated NYPD workers denied an exemption, allowing them to continue working. *NYFRL*, ECF No. 81-21. While Applicants' appeal was pending in the

[1] See also, *Jay Varma*, Wikipedia (May 16, 2021, 3:14 PM), https://en.wikipedia.org/wiki/Jay_Varma.

Second Circuit, the Mayor even announced that mandates for all private sector employees would end November 1, 2022. Yet, the City continues to refuse to reinstate municipal employees, including Applicants, with sincere religious objections to the vaccines on the unsupported claim of "undue hardship." No public health justification was ever used to explain this discrimination—each carve out was justified by secular concerns such as the "economic health of the city" or "staffing shortages" or "administrative backlog."

Meanwhile the religious coercion continues. The City regularly offers new "last chances" for terminated municipal employees to be reinstated if they take the vaccine. FAPCAC ¶¶ 257–58. The June and September 2022 "last chances" have come and gone while motions for injunctive relief and appeals pended. But the City's staffing crisis persists. *E.g.*, Yoav Gonen, *One in Five Jobs Unfilled at Health and Buildings Departments, City Council Finds*, The City (Sept. 6, 2022), https://on.nyc.gov/3yy3sc9; Dana Rubinstein and Emma G. Fitzsimmons, *Why City Workers in New York Are Quitting in Droves*, The New York Times (July 13, 2022), https://nyti.ms/3RUZgdB. These last-chance offers will likely continue. But no matter; every employee knows that given staffing shortages, all they need to do is get vaccinated and they can return to work for the City, if not in their same position, at least in some comparable position.

When Applicants first moved for preliminary relief, all were still employed and able to work unvaccinated. *E.g.*, *NYFRL*, ECF No. 1 ¶¶ 266–67, 271–72, 278–79, 286, 295, 300–302, 306–307, 311, 328–29, 334–35. Today, all but four of the *NYFRL* applicants and three of the *Kane* and *Keil* applicants have been terminated or forced

to resign. Some already had to violate their faith to keep their jobs. *E.g.*, *Kane*, ECF No. 162. Those Applicants are emotionally traumatized. *Ibid.* Each day this discrimination persists, the remaining Applicants are faced with the same unconstitutional choice—hold out or capitulate their beliefs to avoid eviction. They each submitted sworn statements that the pressure to violate their faith is causing unbearable, irreparable harm, including lost health insurance, having to apply for food stamps, and forced moves out of the City and even the country. *E.g.*, *NYFRL*, ECF No. 47 ¶ 39, ECF No. 48 ¶¶ 45–49, ECF No. 49 ¶¶ 41–42, ECF No. 51 ¶ 28, ECF No. 52 ¶¶ 60–64, ECF No. 54 ¶ 57, ECF No. 55 ¶ 46, ECF No. 58 ¶¶ 76–77, 80, ECF No. 59 ¶¶ 56–57; *Kane*, ECF No. 123 ¶¶ 30–39, ECF No. 124 ¶¶ 10–14, ECF No. 125 ¶¶ 10–14, ECF No. 126 ¶¶ 18–23, ECF No. 127 ¶¶ 7–13, ECF No. 128 ¶¶ 27–28, 31, ECF No. 129 ¶¶ 335–36, 48–49, 52, 55, 57, ECF No. 130 ¶¶ 7–13, ECF No. 131 ¶¶ 13–17, ECF No. 132 ¶¶ 22, 38–39, 41, ECF No. 133 ¶¶ 10, 12, 18, 21–25, ECF No. 134 ¶¶ 42, 45–46, ECF No. 135 ¶¶ 13, 15–16, 18–22, ECF No. 136 ¶¶ 29–32, ECF No. 137 ¶¶ 17–25, ECF No. 138 ¶¶ 12–21, ECF No. 139 ¶¶ 24–33, ECF No. 140 ¶¶ 37–39, 42–44, 46–47, ECF No. 163 ¶¶ 5–9, 16–17.

C. Repeal of the private sector Mandate

While these appeals were pending below, the City made another carve-out, announcing that the Mandate for private sector employees would be repealed beginning November 1, 2022.[2] But the same relief is still arbitrarily withheld from municipal employees with religious objections.

[2] New York City Department of Health, *COVID-19: Vaccine Workplace Requirement*.

D. Lower court proceedings

The lower-court proceedings are set forth in the Jurisdiction section, above. In sum, one district court dismissed and denied preliminary injunctive relief in the *Kane* and *Keil* actions, App.A, and another district court denied preliminary injunctive relief in *NYFRL*, App.B. The Second Circuit then summarily denied Applicants' motion for an injunction pending appeal, failing to explain why the City can use an individualized system for granting religious exemptions while categorically exercising discretion to exempt athletes and strippers without running afoul of the First Amendment. App.C. The Second Circuit has ordered expedited merits briefing.

Below, the *Kane* and *Keil* district court did not address the City's admission that the Citywide Panel rendered its decisions with unfettered discretion and without discernible standards. Instead, that court said it was enough that the Panel claimed to act "in accordance with Title VII," App.A at 25, despite no evidence of that.

Similarly, the *NYFRL* court did not address the City's admission. Instead, the court stated that Applicants "failed to demonstrate that the mandates and/or the Citywide Panel process for determining religious exemptions allows secularly-motivated conduct to be favored over religiously-motivated conduct," App.B at 38–39, not addressing the City's favoritism for some religious adherents over others.

ARGUMENT

The All Writs Act, 28 U.S.C. 1651(a), authorizes a Justice or the Court to issue an injunction in "exigent circumstances" when the "legal rights at issue are indisputably clear" and relief is "necessary or appropriate in aid of the Court's

jurisdiction." *Ohio Citizens for Responsible Energy, Inc.* v. *Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (cleaned up). The Court's discretion is broad: it may issue an injunction "based on all the circumstances of the case [without] express[ing] . . . the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver* v. *Sebelius*, 134 S. Ct. 1022, 1022 (2014).

Relief is warranted. The Mandates' exemptions are rife with discretion and denominational preference. And the Mayor has unfettered discretion to carve out individuals and classes for secular reasons. When officials exceed the "broad limits" of their discretion to such a degree, an injunction should issue. *S. Bay United Pentecostal Church* v. *Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring).[3]

[3] If this Court considers whether "four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction," *Lucas* v. *Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers), Justices Thomas, Alito, and Gorsuch, would have granted the petition in *Dr. A.* v. *Hochul*, No. 21-1143, which involved *non*-discretionary COVID medical exemptions.

I. Applicants plausibly alleged, and will likely succeed in showing, that New York City's vaccine Mandates violate their right to freely exercise their religion.

The First Amendment forbids laws that curb "the free exercise" of religion. U.S. Const., amend I. Here, Applicants faced adverse employment actions because their sincere religious beliefs kept them from taking the COVID-19 vaccine. Laws and regulations that are not generally applicable or lack neutrality facially or as applied trigger strict scrutiny. *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531–32 (1993). Facially and as applied to Applicants, the Mandates are neither neutral or generally applicable and are therefore subject to strict scrutiny.

A. The City's Mandates are not generally applicable.

1. The Citywide Panel exercises unfettered discretion in deciding religious exemptions.

The City's Mandates are not generally applicable because the Citywide Panel exercises substantial discretion in deciding religious exemptions. This is consistent with *Fulton*, which held that a law is not generally applicable if "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (cleaned up). "Accordingly, where a state extends discretionary exemptions to a policy, it must grant exemptions for cases of "religious hardship" or present compelling reasons not to do so." *Dahl*, 15 F.4th at 733 (vaccine mandate not generally applicable because it allows discretion to grant or deny religious exemptions). Here, the Panel's discretion can hardly be questioned. As noted, Mr. Eichenholtz, the Panel architect, admitted that the Panel makes undue hardship determinations that (1) are unsubstantiated

by any objective scientific or financial evidence, and (2) do not even consider whether Applicants are a threat and require segregation based on their religious need to decline a vaccine. This is a constitutional problem. See *Fulton*, 141 S. Ct. at 1881–82 (criticizing Philadelphia for not showing that giving CSS an exception would put the City's goals at risk).

Mr. Eichenholtz also admitted that the Panel exercises enormous discretion to judge the sufficiency of individual religious beliefs. This problem is seen in the Citywide Panel's improper denials of Appellicants' exemption requests. But it also appears on the Panelists' notes, which show that they routinely substituted their own judgment for the applicants' about what their faith requires. *NYFRL*, ECF No. 64-3 at 1; *Kane*, ECF No. 122-2 at 1–5. The spreadsheet notes even show that Panelists denied applicants whose religious beliefs are formed by prayer instead of orthodoxy. To the Panel, these Applicants had personal choice, so their decision could not be "religious." *Ibid*. That's wrong. "[T]he government . . . cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices" because the "Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd*. v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018).

Mr. Eichenholtz further admitted the Citywide Panel denied applicants whose views the City disagrees with—particularly those with objections to products using aborted fetal cell lines in testing or development. *NYFRL*, ECF No. 64-3 at 1; *Kane*, ECF No. 122-2 at 1–5. Whether Mr. Eichenholtz and his Panel members believe the

connection is strong enough to merit concern, or whether they disagree with Applicants' facts, is irrelevant to the determinations of the Panel. The Panel's decisions violate the command that religious beliefs are entitled to protection if sincerely held, even if some reasonable observers would view them as unreasonable or illogical. *E.g.*, *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

Importantly, as noted above, Mr. Eichenholtz admitted that *there are no real governing standards* employed by Panel members; the process is completely discretionary and "individualized." *NYFRL*, ECF No. 81-29 at 101, 147–48, 263, 271, 308, 326. Such "a formal system of entirely discretionary exceptions . . . renders" a government policy or scheme "not generally applicable." *Fulton*, 141 S. Ct. at 1878. Adoption of the Citywide Panel did not change the Second Circuit's prior holding that these religious exemption decisions involve the exercise of discretion and denials must be strictly scrutinized. *Kane*, 19 F.4th at 169.

2. The City's Mandates play denominational favorites.

The Mandates are also not generally applicable because they prefer some religious denominations over others. Under the Stricken Standards, the City specified that "Requests [for religious accommodation] shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine." *Kane*, CACAC ¶ 70(c). That is why the City denied Sabina Kolenovic a religious exemption twice—even though she does not follow the Muslim leader who publicly said he was vaccinated against COVID-19.

The City did not cure the constitutional infirmity in its approach by offering a second level of review through the Citywide Panel. The City continued to discriminate

against personally held religious beliefs and minority denominations, and it continued to offer the Stricken Standards and preference those who meet the discriminatory criteria therein. Religious adherents who can demonstrate that their denomination's leader opposed the vaccine automatically receive an exemption. Those who cannot—such as Roman Catholics who in good faith have reached a different conclusion as to the COVID vaccine's morality than Pope Francis—or those to whom the Panel imputes such beliefs—such as Sabina Kolenovic—are still denied as an "undue hardship." Such denominational favoritism also triggers strict scrutiny.

This was the precise issue in the *Smith* cases, which specifically noted that a law could not be "generally applicable" if the state allows religious exemptions, even if no secular reasons for exemption are ever favored. *Emp. Div., Dep't of Hum. Res. of Or.* v. *Smith*, 485 U.S. 660, 672 (1988) *(Smith I)*; *Smith II*, 494 U.S. at 874. There, this Court twice addressed whether plaintiffs were improperly denied unemployment benefits after being fired for ceremonial peyote use. In *Smith I*, the Court held that strict scrutiny would apply if Oregon drug laws had a mechanism for exemption for ceremonial peyote use. 485 U.S. at 672 ("A substantial number of jurisdictions have exempted the use of peyote in religious ceremonies from [state drug laws…]. If Oregon is one of those States, [plaintiffs'] conduct may well be entitled to constitutional protection."). Only after the state court decided there was *no* mechanism for a religious exemption for ceremonial drug use did the Court define the drug law as generally applicable and allow a lesser standard of review. *Smith II*, 494 U.S. at 877–90. So, if a state allows religious exemptions, this Court has already held that the law

is not generally applicable and denial of the religious accommodation must be strictly scrutinized. *Ibid.* And that is doubly true where, as here, the government uses a religious-accommodation system to favor some religious denominations and adherents over others.

Accordingly, this case presents a straightforward application of *Smith.* There is no dispute that the City's Mandate offers a religious-exemption mechanism that is applied unevenly depending on one's denomination. Nonetheless, neither district court applied strict scrutiny, or even addressed the clear holding in *Smith,* both electing instead to cite a non-precedential district court opinion stating that if "*Fulton* [and presumably *Smith* which *Fulton* rests on] 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.'" App.A at 24–25 (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 ensures a principled application of that accommodation. Moreover, such reasoning does not render *Smith* and *Fulton* bad law.

Similarly, the district court in *Kane* made a clear error in deciding that the Citywide Panel's religious accommodation determinations are somehow ministerial in nature and can avoid strict scrutiny pursuant to the Second Circuit's holding in *We the Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 290 n.29 (2d Cir. 2021). According to the Second Circuit in *We the Patriots,* medical exemptions in that case provided

"no meaningful discretion to the State or employers" to issue exemptions since checking for a doctor's note was essentially a ministerial act. *We the Patriots USA, Inc.*, 17 F.4th at 288-89. The individualized determinations, if any, said the court, was on the part of the "physicians and nurse practitioners," and not the government. *Ibid*. In so holding, the Court distinguished the situation where the government is afforded discretion in medical and religious exemption determinations, such that there exists a potential for religious discrimination or arbitrary results. *Id.* at 290 n.29. The Second Circuit was wrong about that; if medical exemptions affect the government interest the same way as religious exemptions, then strict scrutiny applies to the denial of request for a religious exemption. Nevertheless, the three cases here undeniably involve a discretionary determination and secular carveouts.

There can be no serious question that religious accommodation denials involve discretion and carry the risk of arbitrary or even discriminatory denial. This issue was examined in depth in *Cantwell* v. *Connecticut*, 310 U.S. 296, 305 (1940), where the Supreme Court expressly rejected the claim that a state actor's religious exemption decision could be deemed ministerial in nature. Because the Mandates themselves contain a mechanism for individualized review, the Mandates are not generally applicable.

3. The City's Mandates allow ample executive discretion to make arbitrary additional exemptions.

Over the past year, the City's Mayor has issued over 150 executive orders, which function collectively to impose the mandate on nearly every employee in New York, with some notable and ever-expanding exceptions. *E.g.*, *Keil*, ECF No. 57-2.

These Mandates and exemptions clarify that the City's vaccine mandate cannot be deemed a generally applicable "across the board" law in any sense.

General applicability involves "general laws" that govern society at large, not a multitude of *specifically* applicable ever-changing executive branch edicts tailored to differently govern various arbitrary groups and individuals at the whim of a mayor or health commissioner. That a municipality, through executive orders, would create 150 (and counting) vaccine regulations subject to extension, modification or repeal at the mayor's whim, is hardly generally applicable and is subject to strict scrutiny facially and as applied. The government cannot evade the Free Exercise Clause's requirements merely by slicing and dicing mandates into small pieces, each of which is "generally applicable" to a microcosm of the regulated class, at least without explaining the difference in rules. Here for example, Respondents have never attempted to explain why strippers should be exempt from the vaccine mandate but sanitation workers cannot. That's because there is no explanation possible.

Nor is the notion that the Mayor can "peel away" his own promulgations at his discretion—effectively applying the law at his whim—consistent with general applicability. In *Fulton*, the Court held that because the Commissioner *could* issue exemptions to the city's public-accommodation law governing foster-care placement, the law was not generally applicable. 141 S. Ct. at 1879. This was true no matter whether the Commission had ever "granted one." *Ibid.* Here, Mayor Adams has granted many exceptions and exercises substantial discretion in deciding "which reasons" justify bucking the City's mandate. *Ibid.* That, too, triggers strict scrutiny.

4. The City uses its executive discretion to prefer secular conduct that undermines the government's asserted interest in similar ways as non-exempted religious conduct.

This Court has also explained that a "law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. The City's Mandates cross that line as well.

For example, in March, Mayor Adams issued Emergency Executive Order 62, which exempted from the City's Mandate athletes, entertainers, and strippers—not because they posed less risk of infection, but because the Mayor believed the City would benefit economically. FAPCAC ¶¶ 13–15. So, while strippers could return to their venues, and NBA star Kyrie Irving could return to the basketball court, normal hardworking citizens were denied religious exemptions to work anywhere, even in the same stadium where athletes and their entourages were exempted.

Shockingly, Mayor Adams admitted he had no public health justification for these carve-outs. *E.g.*, *NYFRL*, ECF No. 81-24 at 7–8. As noted, the decision was economically motivated. And the public took notice. For example, Harry Nespoli, chairman of the Municipal Labor Committee, which represents over 100 unions and over 400,000 employees citywide, told the New York Times, "[t]here can't be one system for the elite and another for the essential workers of our city." *NYFRL*, ECF No. 81-22 at 3.

And that's not all. The City's Mandates allow most municipal employees to continue working unvaccinated indefinitely until the Citywide Panel issues a final

decision. *E.g.*, FAPCAC ¶¶ 470–71. Facing an extreme staffing crisis in many departments, City officials intentionally paused reviewing thousands of appeals of unvaccinated public employees. *E.g.*, *NYFRL*, ECF No. 81-21. So, to this day, thousands of unvaccinated City workers are allowed to remain on the job, while Applicants and other religious individuals unlucky enough to have been formally denied accommodation are unable to work or get paid. (Remarkably, the Private Sector Mandate is rescinded as of November 1, 2022. That means that nearly four million private sector workers will be subject to no City vaccine requirement, while religious objectors to the City Mandates are freely terminated.[4])

Nothing explains why religious objectors cannot be accommodated while thousands of other City workers can continue to report to work for months on end without compromising public health. An unvaccinated police officer poses no greater risk to the public after he receives his denial. If thousands who have not been processed can safely work in person each week, Applicant Paolillo can as well. Because "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather," the City cannot preference its economic or administrative concerns over the religious concerns of Paolillo and other Applicants. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

[4] New York State Department of Labor, *Labor Statistics for the New York City Region*, https://dol.ny.gov/labor-statistics-new-york-city-region#:~:text=%EF%BB%BFLabor%20Statistics%20for%20the%20New%20York%20City%20Region,-Bronx%2C%20Kings%2C%20New&text=Private%20sector%20jobs%20in%20New,to%203%2C961%2C100%20in%20September%202022 (last visited October 31, 2022).

And it is no excuse that the City is acting here as manager rather than lawmaker. Contra App.A at 25–26, citing *Engquist* v. *Or. Dep't of Agr.*, 553 U.S. 591, 598 (2008). Even if Respondents had been acting as managers, not lawmakers,[5] *Fulton* rejected the argument that *Engquist* would allow a lesser standard of review to religious exemption denials, 141 S. Ct. at 1878–79. So too here. Accordingly, strict scrutiny must be applied.

B. The City's Mandates are not neutral.

Laws that 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 Cnty.* v. *Nationalist Movement*, 505 U.S. 123, 131 (1992). The City's Mandates fail this neutrality standard, too.

For example, emails produced in discovery and submitted in all cases to the district courts show that the Citywide Panel members believed that objections to vaccines based on the use of aborted fetal cell lines in vaccine testing or development were *not* religious objections. *E.g.*, *NYFRL*, ECF No. 64-1 at 2. Indeed, for all but one Applicant who was raised Jehovah's Witness, the Panel arbitrarily rejected applications focused on religious objections to use of aborted fetal cells, substituting

[5] This point is contested. Two recent state court decisions have held that the Mayor and DOH lack the authority to issue employment conditions, specifically the vaccine requirement, on municipal employees outside of the collective bargaining process. *Police Benevolent Ass'n of N.Y.* v. *City of New York,* Index No. 151531-2022 (Sup. Ct. N.Y. Cnty. Sep. 23, 2022); *Garvey* v. *City of New York*, Index No. 85163-2022 (Sup. Ct. N.Y. Cnty. Oct. 25, 2022). And, the City did not issue these mandates as employee policies, but instead issued them as laws, which covered not only municipal employees, but departments outside of the City's technical control and even most of the private sector.

their judgment about what each person's faith requires, and impermissibly denying applicants because they disagree with their facts. As further proof, Respondents provided correspondence to decision-makers in the appeals stating that such concerns are invalid, which the Citywide Panel referred to as a basis for denying relief. *Kane*, ECF No. 102 ¶¶ 564, 569, 626.

Similarly, the Citywide Panel discriminated against personally held religious beliefs, particularly those arising from prayer, or guidance from the Holy Spirit or one's moral conscience, denying all such applications on the ground that the beliefs, while sincere allegedly allow the applicant to choose to take or abstain from vaccination based on his view of the facts and circumstances. *E.g.*, *Kane*, ECF Nos. 128, 132, 134, 136, 139, 140. When Respondents castigate Applicants' views as sincerely held but "not religious" because they were derived from a personal relationship with Spirit or God rather than denominational dogma, Respondents violate the Constitution. Such determinations indicate impermissible entanglement with religious questions, *Cantwell*, 310 U.S. at 310, and violate other statutory and constitutional standards. And it does not matter whether the religious objector is right about what his or her religion requires; the government cannot "punish the expression of religious doctrines it believes to be false." *Smith II*, 494 U.S. at 877.

C. The City's Mandates violate the Establishment Clause and the Equal Protection Clause.

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). Yet the City makes a facial denominational preference, offering a straight path to exemption for those of denominations for which the City decides have no internal dispute about vaccines. If someone meets those criteria, they "shall be permitted the opportunity to remain on payroll" with no undue-hardship exception. *Kane*, ECF No. 102 ¶ 70(i); *Kane*, ECF No. 1-2 at 12. But the City offers another path entirely—including a virtually insurmountable "undue hardship" exception—for those who have personally held or minority religious beliefs, or for those who (like Sabina Kolenovic) happen to be Muslim, when even a single Muslim leader that the individual does not follow has publicly said he was vaccinated.

By applying such a facially discriminatory standard, the City "establish[es]" preferred religion, "impose[s] special disabilit[y]" on religious minorities who do not fall within the definition, takes a position and "lend[s] its power to one or the other side in controversies over religious authority or dogma" and "punish[es] the expression of doctrines it believes to be false," any one of which violates the Establishment Clause and triggers strict scrutiny. *Smith II*, 494 U.S. at 877.

Even if the two religious accommodation policies were equal, the adoption of a facially discriminatory policy itself requires strict scrutiny. When, as here, a government employer adopts a facially discriminatory policy they cannot "rebut" a claim of such direct discrimination by demonstrating the existence of a non-discriminatory reason for reaching the same result – rather, such cases are entitled to summary judgment unless the government can present a valid affirmative defense. *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985). None are available

here. There is no valid reason why Christian Scientists should be reviewed under a separate policy than Muslims, Jews, Catholics, or the other religions that the City rejects under the Stricken Standards, and religious discrimination is *per se* unconstitutional. *Trump* v. *Hawaii*, 138 S. Ct. 2392, 2423 (2018) (overruling *Korematsu* v. *United States*, 323 U.S. 214 (1944)).

D. The City's Mandates are unconstitutional as applied.

The district court in *Kane* and *Keil* committed further error by dismissing most of Applicants' cases on the ground that the Citywide Panel properly denied accommodations based on undue hardship, because "Plaintiffs' inability to teach their students safely in person presents more than a de minimis cost." App.A at 39. On a motion to dismiss, the issue of undue hardship is irrelevant. The concept of undue hardship is a substantive defense employed in the context of a motion for summary judgment or at a trial on the merits. See, *e.g.*, *Trans World Airlines, Inc* v. *Hardison*, 432 U.S. 63 (1977) (defense adjudicated after bench trial). And the City does not dispute that Applicants established a prima facie case alleging improper denial of accommodation. It was improper to dismiss their case based on Respondents' conclusory and unsupported claim that they could not reasonably accommodate them.

To the extent that undue hardship is even relevant at this early stage, the City did not try to prove it. Mr. Eichenholtz admitted that the Panel did not rely on *any* objective evidence to support undue hardship determinations. *NYFRL*, ECF No. 81-29 at 101, 147–48, 263, 271, 308, 326. And Mr. Eichenholtz admitted that none of the departments even provided any individualized assessment of undue hardship to the Panel. *NYFRL*, ECF No. 81-29 at 236–39.

For example, the City provided *no* evidence that religious employees posed a direct threat because of their religious need to opt out of COVID-19 vaccination and thus need to be segregated. Contra *Hargrave* v. *Vermont*, 340 F.3d 27, 35–36 (2d Cir. 2003) (in a direct threat analysis, employers must consider the best available objective evidence, and, after employing a four-part test, show that the harm is serious and "likely" to occur, not remote or speculative). By contrast, in support of their motions for injunctive relief, Applicants in each case provided the lower courts with extensive evidence and offers of testimony reflecting the fact that they pose *no* direct threat based on their need to remain unvaccinated. *E.g.*, *Kane*, ECF No. 17-6 to 17-8, 18, 19, 85-2 to 85-8.

Conversely, the Citywide Panel even denied Applicants *who already worked remotely* based on "undue hardship," *Kane*, ECF No. 123 ¶¶ 12, 14, and failed to demonstrate why at least 162 employees (many of them classroom teachers) were able to be accommodated under the Stricken Standards, while Applicants cannot be. Nor has the DOE explained why more teachers cannot teach remotely. Thousands of students are still engaging in remote instruction and need teachers, and the various off-site remote accommodation sites for the unvaccinated have ample space to accommodate more teachers, including one site currently only being used to accommodate approximately 30 DOE employees when it has the capacity to accommodate up to 312. *Kane*, ECF No. 137 ¶¶ 26, 28–30.[6]

[6] The *Kane* district court also erred dismissing the as-applied challenges on the theory that vaccination is a condition of employment. DOE policy, and the Mandate itself,

With all that as background, consider the as-applied claims that the district court dismissed, thus denying Applicants any opportunity to prove their claims and request damages:

- Michael Kane's religious beliefs—which the DOE and City acknowledged are sincerely held—are grounded in personal communion with God, prayer, and the sacred teachings of Buddha, Christ and other spiritual guides. *Kane*, ECF No. 102 ¶¶ 222–25. In his initial hearing before the arbitrator's panel, DOE officials argued that Kane should be denied accommodation because his religious beliefs are not supported by Pope Francis. *Id.* ¶ 232. The Citywide Panel denied Kane's exemption on reevaluation because they believe that following guidance from prayer is a personal choice, even though they found Kane sincere. *Id.* ¶ 236; ECF No. 122-2 at 4. At a bare minimum, Kane is entitled to damages from October (when he was placed on leave without pay pursuant to the Stricken Standards) through December 2021 (when he received the new denial).

- William Castro was denied an exemption under the Stricken Standards. Though acknowledging that his beliefs were sincere, and that he met all the Stricken Standards' defined criteria, the DOE representatives argued that he should nevertheless be denied because his church, which is not a Catholic church, holds beliefs contrary to those of the Catholic Pope. *Kane*, ECF No. 102 ¶ 265. The DOE also argued that because former Appellee Commissioner Chokshi says that aborted fetal cells were not used in testing or development of the vaccines (which is incorrect), Castro's religious concerns in that regard were invalid. *Id.* ¶¶ 266–67. Castro was the one Applicant that the Citywide Panel admitted should have been accommodated; it reinstated him, with the condition that he be segregated from students. *Id.* ¶ 271. Yet the district court improperly held that because he was finally accommodated months after the initial improper denial, Castro's case should be dismissed. That ignores damages resulting from the three-month suspension, including severe health consequences resulting from the stress, and severe financial and emotional damages resulting from his inability to select appropriate health care coverage during his suspension, which meant that his pregnant wife could not get the care she otherwise would have been able to receive had the improper suspension never occurred. *Id.* ¶¶ 273–83.

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permit exemption from vaccination on medical and religious grounds. Thus COVID-19 is *not* a condition of employment for exemption-eligible employees.

- DOE representatives and the arbitrator harassed Margaret Chu, a Catholic, about her beliefs in the arbitration hearing, stating that she must be denied because the views of Pope Francis were more likely to be correct than Chu's moral conscience. *Kane*, ECF No. 102 ¶¶ 289–94; *Kane*, ECF No. 22 ¶ 12. Though the Citywide Panel found her beliefs sincere, they denied her application on the ground that following one's moral conscience is not "religious in nature" but a personal choice. *Kane*, ECF No. 102 ¶¶ 298–99.

- Heather Jo Clark's sincere religious objection to vaccines is grounded in guidance from the Holy Spirit as well as her objection to the use of aborted fetal cell-lines in the production and testing of vaccines. *Kane*, ECF No. 102 ¶¶ 308–13. The DOE denied Clark's accommodation request because, in its view, she could not safely enter school buildings. But Clark worked remotely, and her job did not require her to enter *any* school building. *Id.* ¶¶ 314–16. The Citywide Panel also denied Clark's request, holding that beliefs derived from guidance from the Holy Spirit are not "religious in nature." *Id.* ¶ 319.

- Stephanie DiCapua's sincere religious objection to vaccines is long-standing and rooted in the teachings of her Christian church. *Kane*, ECF No. 102 ¶¶ 326–27. The DOE summarily denied her application, and after the Second Circuit ordered fresh consideration, DiCapua submitted a six-page letter detailing her sincere religious beliefs. *Id.* ¶¶ 335–37. But the Citywide Panel denied DiCapua's request, believing her opposition was solely due to political opposition to the Mandate. *Id.* ¶ 338. Nothing in her submissions articulated any such sentiment. *Ibid.*

- Robert Gladding taught 20 years in the City's public schools before he was denied a religious accommodation last fall. *Kane*, ECF No. 102 ¶¶ 354–55. His mother lived in Germany during World War II, where she witnessed the horrific effects of religious intolerance and official dogma, so she raised Gladding to find God personally. *Id.* ¶ 358. After prayer and fasting, Gladding declined the COVID-19 vaccine based on his sincere religious opposition. Yet the DOE and Citywide Panel denied his accommodation request because, in their view, guidance from prayer is a personal choice, not "religious in nature." *Id.* ¶ 368.

- Nwakaego Nwaifejokwu taught first grade in the New York City public school system for 12 years. *Kane*, ECF No. 102 ¶¶ 375–76. While the Citywide Panel acknowledged that Nwaifejokwu had sincere religious opposition to taking the COVID-19 vaccine, it denied her an accommodation based on undue hardship without explanation. *Id.* ¶ 382.

- Ingrid Romero taught for 18 years at the same Queens elementary school that she attended as a child. *Kane*, ECF No. 102 ¶ 396, 398. While she has long been a person of faith, within the last few years, her husband got cancer and she recommitted to God on a deep level. *Id.* ¶ 406. She sincerely opposed taking the COVID-19 vaccine because it was developed or tested from aborted fetal cells. But the Citywide Panel denied her accommodation because she took the flu shot years before she learned about the use of aborted fetal cells in vaccines and years before she re-committed to God. *Id.* ¶ 409.

- Trinidad Smith was a special education teacher for over 20 years. While she remains a devout Catholic, Smith left the Church due to scandals and now practices her faith through direct communion with God. *Kane*, ECF No. 102 ¶ 421. She sincerely opposes the COVID-19 vaccine on religious grounds and filed a lawsuit to protect her rights. The Second Circuit said she was likely to win and allowed her to submit her accommodation request to the Citywide Panel. Smith explained that her beliefs are grounded in guidance from God and that she has never taken any vaccine. As a child, Smith was adopted from an orphanage in Colombia by very religious people. They never once took her to the doctor but instead taught her to use prayer to heal. The Panel denied her request because she would not rule out the possibility of taking vaccines in the future, though she explained her guidance comes from prayer, and she has always thus far been guided to abstain. *Id.* ¶ 428.

- Natasha Solon is an Assistant Principal in the Bronx. She prays about all medical decisions and has declined life-saving treatments including blood transfusions before. *Kane*, ECF No. 102 ¶ 451. While Solon sincerely opposes taking the COVID-19 vaccine, she was denied accommodation, denied a hearing, and suspended without pay under the Stricken Standards. When given fresh consideration, the Citywide Panel declined to issue a decision, keeping her on leave without pay for months. And while she applied to over 60 jobs during that span, she received no offers because, as one interviewer told her, the DOE attached a problem code for her due to alleged "misconduct." While she waited for a decision, her home went into foreclosure, her son had to leave college, and she was forced to get vaccinated to feed her family.

- Amaryllis Ruiz-Toro has been an Assistant Principal for almost 20 years. She was denied accommodation because her Christian beliefs conflicted with those of Pope Francis. But Ruiz-Toro is not Catholic. On appeal, the arbitrator reversed, saying while many colleagues were following DOE protocol and denying applicants who belong to minority churches, he saw there were important differences between faiths. *Kane*, ECF No. 102 ¶¶ 482–87. Yet Ruiz-Toro still faces segregation and

discrimination while she remains on the payroll—some of which threaten her career-advancement opportunities. *Id.* ¶¶ 490–94.

- Matthew Keil worked at the DOE over 20 years. He is also an ordained deacon in the Russian Orthodox Church, has spent many summers living in a Monastery, and has made many religious pilgrimages. *Kane*, ECF No. 102 ¶¶ 495–97. Geronda Ephraim, Keil's spiritual leader and the head of many North American Orthodox monasteries, enjoined monks from getting vaccinated. And after studying the Scriptures, prayer, and engaging other spiritual disciplines, Keil agreed and has not taken any vaccinations. Yet he was denied accommodation under the Stricken Standards because he has taken Advil or Tylenol not knowing that they were developed or tested using aborted fetal cells. Then, after fresh consideration, the Citywide Panel also denied him accommodation, citing undue hardship without evidence.

- John De Luca was a teacher who worked remotely from 2020 to 2021. He's a devout Catholic and opposed COVID-19 vaccines because they are tested or developed using aborted fetal cell lines. *Kane*, ECF No. 102 ¶¶ 516–21. After submitting a supportive letter from his spiritual leader, De Luca was denied accommodation because, according to the DOE, his beliefs differed from the Pope. *Id.* ¶¶ 525–30. The arbitrator said research "proves" the vaccines were not produced using aborted fetal cell lines (this is not so) and told De Luca, "when you find out I'm right, you'll understand." *Id.* ¶ 526. On fresh consideration, the Citywide Panel denied accommodation based on undue hardship.

- Sasha Delgado worked 15 years as an Individualized Education Program teacher. She worked remotely from 2020 to 2021. Delgado sincerely opposes the COVID-19 vaccines because, in her view, they are defiled and were developed or tested using aborted fetal cell lines. *Kane*, ECF No. 102 ¶¶ 550–51. She takes her faith so seriously that she does not eat pork, drink alcohol, or consume anything that could pollute her mind and body, as she understands from Scripture and prayer. While Delgado submitted a pastoral support letter, the DOE denied her accommodation, saying most Christian denominations do not object to the vaccine and disputing Delgado's belief that the vaccines were tested or developed using aborted fetal cell lines. *Id.* ¶¶ 557–63. The Citywide Panel also denied Delgado accommodation because she appeared unaware if Tylenol or other drugs were tested or developed using aborted fetal cell lines. *Id.* ¶ 569.

- Dennis Strk taught social studies in Queens for 13 years. He declines vaccines, including the COVID-19 vaccines, based on his religious conviction that taking them would defile his blood and that they were

tested or developed using aborted fetal cell lines. The DOE denied him accommodation, saying his beliefs were "wrong." The Citywide Panel also denied Strk accommodation, holding that he "rel[ied] on incorrect facts . . ., such as that all COVID vaccines contain fetal cells." *Kane*, ECF No. 102 ¶ 592.

- Sarah Buzaglo has taught children since 2017. She is an Orthodox Jew who sincerely opposes the COVID-19 vaccines. While she submitted a support letter from her Rabbi, detailing a scriptural basis for her belief and affirming she shared the congregation's view, the DOE denied her accommodation under the Stricken Standards—citing another Jewish leader that disagreed with Buzaglo's Rabbi. *Kane*, ECF No. 102 ¶¶ 599–619. On fresh consideration, the Citywide Panel denied her accommodation because, at one point, she suggested the Mandate was unconstitutional, and it believed her beliefs were wrong. *Id.* ¶ 626.

- Eli Weber taught children for 20 years. He is a devout Chassidic Jew who, consistent with his Rabbi's teaching, sincerely opposes the COVID-19 vaccines. *Kane*, ECF No. 102 ¶¶ 633–53. Under Jewish law, Weber is bound by his Rabbi's authority. *Id.* ¶¶ 639–40. The DOE denied him accommodation and placed him on leave without pay. Weber did not appeal, believing it was futile in part because City officials announced that Jews who oppose the vaccine hold wrong beliefs. Once the Second Circuit declared the DOE practices unconstitutional, Weber immediately sought fresh consideration but that was denied.

- Carolyn Grimando worked for the DOE 18 years. She had COVID-19 when the Mandate was issued. The SOLAS system would not accept both a medical and religious exemption. So Grimando applied for a medical exemption, believing she would automatically qualify for 90 days. Without explanation, she was denied twice. On her third try, the DOE granted her exemption for a shorter span than the rules required. *Kane*, ECF No. 102 ¶¶ 658–66. When that exemption expired, she requested a religious one. Grimando is a devout Catholic who believes she must follow Christ over any earthly authority. She also believes taking vaccines would defile her blood and that the COVID-19 vaccines were tested or developed using aborted fetal cell lines. The DOE denied her accommodation without adequate justification and refused to give her an opportunity to appeal. *Id.* ¶¶ 680–81.

- Amoura Bryan worked as a special education teacher 13 years. And she was working remotely when the Mandate issued. *Kane*, ECF No. 102 ¶¶ 690–91, 697. Bryan is a Seventh Day Adventist who firmly believes if she keeps God's commands and gets sick, that God will heal her—for Exodus 15:26 says God is "the Lord that heal[s]." Yet she also believes

healing may only come in the next life. The DOE denied Bryan accommodation citing "undue hardship" because she could not enter a school building. *Id.* ¶¶ 694–95. Yet Bryan worked remotely. On appeal, the DOE changed tack, saying her Church does not oppose the vaccine. The Citywide Panel denied Bryan accommodation, saying she did not sincerely oppose vaccines and citing "undue hardship given the need for a safe environment for in-person learning." *Kane*, ECF No. 123 ¶ 21.

- Joan Giamarrino worked for the DOE almost 15 years. She is a devout Catholic who opposes the COVID-19 vaccines because they were tested or developed using aborted fetal cell lines. *Kane*, ECF No. 102 ¶¶ 732–40. Indeed, she has not taken any vaccine in 20 years for this reason. *Id.* ¶ 740. The DOE denied Giamarrino an accommodation under the Stricken Standards because her view differed from the Pope's. She did not appeal, believing that would be futile. After the Second Circuit declared the Stricken Standards unconstitutional, Giamarrino tried to apply for accommodation under the new process, but the DOE never responded. *Id.* ¶¶ 743–48. Nor did the Citywide Panel review her case.

- Benedict LoParrino taught elementary school for 17 years. He is a devout Catholic who originally did not apply for accommodation because the Stricken Standards precluded relief for Catholics who did not share the Pope's views. *Kane*, ECF No. 102 ¶¶ 757–68. But he struggled with this decision, so later he applied for accommodation via certified mail and received no response. After the Second Circuit declared the Stricken Standards unconstitutional, LoParrino was notified he should reapply using the SOLAS system. But when he tried this, the system forbade it. *Id.* ¶¶ 773–75. LoParrino emailed the DOE for help, but he was denied any decision or review by the Citywide Panel.

II. Respondents failed to satisfy strict scrutiny.

A law will only pass strict scrutiny against a religious burden if the government proves the burden is necessary to achieve an "interest[ ] of the highest order." *Fulton*, 141 S. Ct. at 1881. "Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Ibid.* "[B]roadly formulated interests" likely do not suffice; they must be "properly narrowed" to "the asserted harm of granting specific exemptions to particular religious claimants." *Ibid.*

Here, the City offers no sufficient evidence showing why it needs to selectively punish religion—or any of the individual Applicants. Indeed, targeting religious minority groups, including those who hold personal religious objections rather than orthodox ones, in response to real or perceived threats, no matter how well-intentioned the reason, is forbidden under our laws and cannot withstand strict scrutiny review as a matter of law. *Trump*, 138 S. Ct. at 2423 (overruling *Korematsu* v. *United States*, 323 U.S. 214 (1944)). Because the City cannot justify preferring some religions over others—or exercising broad discretion to allow unvaccinated athletes, performers, and strippers to work but not unvaccinated religious officers, firefighters, teachers, and other public servants—the City cannot "deny[ ]" Applicants "an exception." *Fulton*, 141 S. Ct. at 1881. Accordingly, the City cannot apply its Mandates to Applicants or any other religious objectors.

III. Applicants meet all the requirements for an injunction.

Because the City's Mandates provide for individualized exemptions, play denominational favorites, grant the government substantial discretion, and treat religious objectors less favorably than secular (e.g., economic) objectors, the Mandates violate Applicants' free-exercise rights. And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparably injury." *Elrod*, 427 U.S. at 373.

Applicants have also alleged continuing substantial harms from the City's bad conduct that go beyond the loss of their constitutional rights, harms that will be difficult to compensate with mere economic damages. For example, Applicant Sarah Buzaglo could not afford to treat a worsening cough once she lost her health insurance

and developed a severe case of asthma. *Kane*, ECF No. 163 ¶¶ 5–8. She was forced to accept charity to afford an inhaler and almost required hospitalization. *Id.* ¶¶ 8–9. Unable to pay her rent, Ms. Buzaglo had no choice but to decide whether to go to a homeless shelter or leave the country. *Id.* ¶¶ 16–17. She was forced to move to Israel after she lost her home, leaving behind the life and career she built here.

Or consider Applicant Curtis Cutler. As a result of being placed on leave without pay, he had no health insurance to support his son when he suffered a collapsed lung earlier this year. *NYFRL*, ECF No. 48 ¶ 47. He and his wife were later forced to sell their first home and move out of state, leaving his son behind to finish high school. *Id.* ¶ 45. He was deeply distressed at splitting his family up, as well as leaving behind his beloved church community, of which he was the sole deacon. *Ibid.*

Applicant Frank Schimenti was forced to apply for Medicaid and had to obtain a forbearance on his mortgage to keep from losing his home. *NYFRL,* ECF No. 58 ¶ 76. The stress of losing his job has caused him to have high blood pressure and cardiac issues—both of which he has never experienced before. *Id.* ¶ 77.

Applicant Heather Jo Clark lost her rent-controlled apartment due to her suspension and termination, and she had to move out of state to live with family. *Kane*, ECF No. 102 ¶¶ 322–24. She is deeply depressed and suffering adverse health consequences from the lack of health insurance. *Id.* ¶ 324.

And Applicant Matthew Keil, a Deacon in the Russian Orthodox Church, was forced to go on food stamps to feed his family of seven, including his child with Downs Syndrome. *Kane*, ECF No. 133 ¶¶ 9–10, 23.

These are just a few of the many specific examples of harm the City is causing Applicants that warrants an injunction pending appeal. When Applicants first moved for preliminary relief, most were still employed and allowed to work unvaccinated as they had done throughout the pandemic. Now, after being denied an exemption through the City's discriminatory scheme, nearly all have been terminated or forced to violate their religious beliefs. The City also continues to offer new "last chances" for terminated employees to be reinstated if they take the vaccine. This is a coercive condition that presents ongoing, irreparable harm.

Moreover, the balance of equities weighs heavily in Applicants' favor. If it is worth allowing strippers to work unvaccinated in small, enclosed venues, it is worth allowing a small number of people—some of whom work outside and have no contact with members of the public at all—to work unvaccinated while taking proper precautions. Applicants ask for no special favors; they just "want to be treated equally." *S. Bay*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting).

The public interest also strongly favors an injunction pending appeal. It is undisputed that New York City is suffering massive workforce shortages, creating dangerous understaffing of fire departments, police stations, and schools. At a time when the CDC has revised its guidance to stop differentiating between vaccinated and unvaccinated persons due to the overwhelming scientific consensus that COVID-19 vaccines cannot stop infection and transmission,[7] it is nothing short of ludicrous

[7] Massetti GM, Jackson BR, Brooks JT, et al., *Summary of Guidance of Minimizing the Impact of COVID-19 on Individual Persons, Communities, and Health Care*

that the City would strain to maintain its power to persecute people of faith at the expense of New York City citizens being victimized by violent crime or watching their homes burn down because of a lack of City public employees. So the public interest also weighs strongly in Applicants' favor.

One note about timing. As explained in footnote 5, above, a New York trial court in *Garvey* invalidated the City's Mandates under state law, which might allow Applicants to return to their City positions (though they are not parties). That decision was automatically stayed, and a New York intermediate appeals court has ordered the plaintiffs to show cause by November 7, 2022, why the trial-court order should not continue to be stayed pending appeal. *Garvey*, Index No. 85163-2022, Order to Show Cause (Oct. 31, 2022). If that court lifts the stay, and Applicants can return to their City posts, then they will withdraw this Emergency Application. If the Court continues the stay, then the Application will be ripe for this Court to grant.

Each day that goes by, as Applicants' situation becomes more desperate, they must choose whether to violate their faith to return to work. The fact that the City lifted its private-employer mandate is small comfort. The DOE has attached a problem code for alleged "misconduct" to many of the Applicants' employment files, preventing employment elsewhere in the City—as with Natasha Solon, discussed above. Newly hired employees often also wait before they are eligible for healthcare benefits. And all Applicants are being penalized for their religious exercise, an

Systems – United States, August 2022, CDC Morbidity & Mortality Wkly. Rep. (Aug. 11, 2022), DOI: http://dx.doi.org/10/15585/mmwr.mm7133e1.

ongoing, irreparable harm. This Court should reverse the decisions below denying injunctive relief, as it did in *Elrod*, and grant an injunction while the Second Circuit proceedings take their course.

CONCLUSION

President Biden's pronouncement that the pandemic is over has done little to reverse the ongoing constitutional nightmare in New York City. Moreover, it has been widely reported that a "tripandemic" may loom ahead this winter,[8] greatly increasing the likelihood that the Mandates will remain in place or new ones will replace them.

Applicants ask this Court to enter a preliminary injunction on appeal, partially restoring the status quo ante by enjoining the enforcement of any City Mandate against any Applicant—including reinstatement and the removal of any negative personnel file notations resulting from a Mandate—while the Second Circuit proceeds on the merits. Such an injunction would not harm the City's interests an iota but would merely place Applicants on par with New York City's nearly four million private sector employees, who were just freed from the City's mandates on November 1, 2022, and thousands of other unvaccinated municipal employees who the City has not yet enforced the Mandate against due to staffing issues, administrative delay, and other secular reasons. Grant of the Application is warranted.

[8] See Apoorva Mandavilli, *A 'Tripledemic'? Flu, R.S.V. and Covid May Collide This Winter, Experts Say,* The New York Times (Oct. 27, 2022), (https://www.nytimes.com/2022/10/23/health/flu-covid-risk.html).

Respectfully submitted.

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CERTIFICATE OF SERVICE

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