22-1801(L),
22-1876 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORKERS FOR RELIGIOUS LIBERTY, INC., GENNARO AGOVINO, CURTIS CUTLER, LIZ DELGADO, JANINE DEMARTINI, BRENDAN FOGARTY, SABINA KOLENOVIC, KRISTA ODEA, DEAN PAOLILLO, DENNIS PILLET, MATTHEW RIVERA, LAURA SATIRA, FRANK SCHIMENTI, JAMES SCHMITT, MICHAEL KANE, individually, and for all others similarly situated, WILLIAM CASTRO, individually, and for all others similarly situated, MARGARET CHU, individually, and for all others similarly situated, HEATHER CLARK, individually, and for all others similarly situated, STEPHANIE DI CAPUA, individually, and for all others similarly situated, ROBERT GLADDING, individually, and for all others similarly situated, NWAKAEGO NWAIFEJOKWU, individually, and for all others similarly situated, INGRID ROMERO, individually, and for all others similarly situated, TRINIDAD SMITH, individually, and for all others similarly situated, AMARYLLIS RUIZ-TORO, individually, and for all others similarly situated

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

On Appeal from the United States District Court
for the Eastern and Southern Districts of New York

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Consolidated Plaintiffs-Appellants,

– v. –

CITY OF NEW YORK, ERIC ADAMS, DAVE CHOKSHI, in his official capacity as Health Commissioner of the City of New York, NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendants-Appellees,

ROBERTA REARDON,

Defendant.

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Introduction 1

Argument 4

I. Appellants have more than adequately documented which portions of the record support their arguments on appeal. 4

II. The district courts erred in denying preliminary injunctive relief. 7

A. Plaintiffs have shown irreparable harm 7

1. Unconstitutional employment conditions cause irreparable harm. 7

2. Appellants are also suffering other irreparable harms 12

B. Appellants have a clear and substantial likelihood of success on the merits of their Free Exercise Claims. 13

1. The City offers no factual support for its neutrality argument 13

2. The City implemented this Court's remand instruction by making yet more discretionary exemption decisions. 15

C. The equities weigh in Appellants' favor, not the City's. 23

III. The *Kane*/*Keil* consolidated complaint was improperly dismissed. 27

A. Appellants preserved their as-applied claims. 27

B. Appellants plausibly alleged that the City violated their constitutional rights as applied. 28

Conclusion 35

Certificate of Compliance 36

Certificate of Service 37

TABLE OF AUTHORITIES

Cases

Agudath Israel of America v. Cuomo,
983 F.3d 620 (2d Cir. 2020) 9

American Postal Workers Union v. United States Postal Service,
766 F.2d 715 (2d Cir. 1985) 11

Beazer East, Inc. v. Mead Corp.,
412 F.3d 429 (3d Cir. 2005) 32

Cantwell v. Connecticut,
310 U.S. 296 (1940) 33

Elrod v. Burns,
427 U.S. 347 (1976) 3, 7, 8, 9

Employment Division, Department of Human Resources of Oregon v. Smith,
494 U.S. 872 (1990) 14, 19, 20, 21

Employment Division, Department of Human Ressources v. Smith,
485 U.S. 660 (1988) 19, 20

Faiveley Transport Malmo AB v. Wabtec Corp.,
559 F.3d 110 (2d Cir. 2009) 10

Frazee v. Illinois Department of Employment Security,
489 U.S. 829 (1989) 15

Fulton v. City of Philadelphia,
141 S. Ct. 1868 (2021) 2, 22, 23

Hardy v. City Optical Inc.,
39 F.3d 765 (7th Cir. 1994) 32

Harris v. Progressive Direct Insurance Company,
740 F.App'x 900 (10th Cir. 2018) 5

Hernandez v. Commissioner,
490 U.S. 680 (1989) 15

Higgins v. New York Stock Exchange, Inc.,
942 F.2d 829 (2d Cir. 1991) 28

In re Nortel Networks Corp. Securities Litigation,
539 F.3d 129 (2d Cir. 2008) 28

International Dairy Foods Association v. Amestoy,
92 F.3d 67 (2d Cir. 1996) 24

Jolly v. Coughlin,
76 F.3d 468 (2d Cir. 1996) 14

Kane v. De Blasio,
19 F.4th 152 (2d Cir. 2021) ..... passim

LaFaro v. New York Cardiothoracic Group, PLLC,
570 F.3d 471 (2d Cir. 2009) 30

Larson v. Valente,
456 U.S. 228 (1982) 32

M.A. on behalf of H.R. v. Rockland,
53 F.4th 29 (2d Cir. 2022) 30, 31

New York Progress & Protection PAC v. Walsh,
733 F.3d 483 (2d Cir. 2013) 9, 24

Paulsen v. County of Nassau,
925 F.2d 65 (2d Cir. 1991) 24

Roach v. Morse,
440 F.3d 53 (2d Cir. 2006) 34

Savage v. Gorski,
850 F.2d 64 (2d Cir. 1988) 10, 11

Stewart v. INS,
762 F.2d 193 (2d Cir. 1985) 10

Trump v. Hawaii,
138 S. Ct. 2392 (2018) 31

TWA v. Thurston,
469 U.S. 111 (1985) 31

We the Patriots USA, Inc. v. Hochul,
17 F. 4th 266 (2d Cir. 2021) 1, 2

Other Authorities

Transcript: Mayor Eric Adams Launches COVID-19 Booster Campaign, Announces Additional Flexibility for NYC Businesses, Parents, City of New York (Sept. 20, 2022) 26

Rules

Fed. R. App. P. 30 ..... 5, 6

INTRODUCTION

This Court's decision in *Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021) (per curiam), dictates the outcome here. There, this Court granted Appellants' relief on their as-applied challenges, holding that New York City's religious accommodation policy was not generally applicable—and therefore subject to strict scrutiny—because Arbitrators reviewing the claims often exercised "substantial discretion" in determining religious exemptions. *Id.* at 169.

That holding is determinative here, where the architect of the Citywide Panel that reviewed religious exemptions testified that Panel members were provided with "no" objective criteria for determining "whether an exemption request ought to be granted" [A455] and exercised substantial "discretion": weighing the facts and "coming to a reasonable conclusion" in the judgment of each Panel member [A440]—whatever that means. As in *Kane*, Appellants have shown "they are likely to succeed on their claim that the [Citywide Panel] procedures as applied to them were not generally applicable." 19 F.4th at 169.

The City misunderstands *We the Patriots USA, Inc. v. Hochul*, 17 F. 4th 266 (2d Cir. 2021) (per curiam), as holding that a mechanism for individualized exemptions "is not enough to render a law not generally applicable" "absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct." City.Br.36, ECF No. 125 (citing *We the Patriots USA*, 17 F.4th at 288–89). But these

are separate prongs, either of which defeats general applicability: "A law may not be generally applicable . . . 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 interest in a similar way.'" *Kane,* 19 F.4th at 165 (citing *Fulton v. City of Phila.,* 141 S. Ct. 1868, 1877 (2021) (emphasis added). In *We the Patriots*, this Court denied relief on prong one because the State of New York's medical exemption "provide[d] for an *objectively* defined category of people to whom the vaccine requirement does not apply." 17 F.4th at 289 (emphasis added). Unlike the religious exemption here—which was subject to the discretionary "reasonable conclusion" of each Panel member—the State's medical exemption in *We the Patriots* "afford[ed] no meaningful discretion to the State or employers [to grant or deny an exemption], and Plaintiffs [did] not put forth any evidence suggesting otherwise." *Id.*

Nor has the City advanced any reason why this Court should overturn its prior holding that the Mandate, as applied to Appellants, is not neutral. *Kane,* 19 F.4th at 168–69. The City's response is based almost entirely on its unsupported and disputed claim that on remand, the Citywide Panel remedied the denominational preferences and lack of neutrality that this Court found in the DOE's initial accommodation denials. City.Br.35, ECF No. 125. But as discussed in the opening brief,

Appellants established that discrimination, denominational preferences, and animus continue to infect the new accommodation policy, triggering strict scrutiny under the Free Exercise Clause, the Establishment Clause and the Equal Protection Clause. Applt.Br.43–47, ECF No. 114. At a bare minimum, this Court should reinstate the claims in *Kane* and *Keil*.

Once this Court determines—again—that Appellants are likely to succeed on the merits, a preliminary injunction allowing Appellants to retake their prior posts is appropriate. The City does not contest that Appellants could re-apply for their old posts or new positions with the City if they violated their religious beliefs and were vaccinated. So, the City's coercion is ongoing: by attaching unconstitutional "conditions" on Appellants' employment opportunities with the City, the City causes irreparable harm, *Elrod v. Burns*, 427 U.S. 347, 358 n.11 (1976), one that cannot be remedied by mere damages, as in other employment disputes.

The public interest also does not support the City's callous disregard for its former first responders, teachers, and sanitation workers, who, during a Citywide staffing crisis plaguing the City, are forced to stay home or move out of the area because of this senseless mandate rather than receive reasonable accommodation.

For all these reasons, Plaintiffs-Appellants ask this Court to reverse the decisions below and remand, instructing the lower courts to issue a preliminary injunction that allows them to retake their prior posts.

ARGUMENT

I. Appellants have more than adequately documented which portions of the record support their arguments on appeal.

Fed. R. App. P. 30(a)(1)(D) requires plaintiffs to prepare an appendix that includes "*parts* of the record to which the parties wish to direct the court's attention," not "*all* of the record." And with good reason. In their initial conference, counsel for Appellants and the City defendants identified 88 potentially relevant docket entries (constituting nearly all the docket entries below, save legal briefs) that would have resulted in an appendix that burdened the Court with tens of thousands of unnecessary pages. A third-party printer quoted Appellants' counsel—who are working pro bono—a price of $60,000 to print that appendix. And while some portion of those costs may be recoverable if Appellants succeed, the City has yet to pay even a dollar of the appendix printing costs that counsel incurred in their previous successful appeal to this Court—*last year*.

Appellants notified the City defendants that Appellants could not include unnecessary parts of the record due to excessive costs the wrongfully terminated and unemployed Appellants could not carry. Yet,

despite the requirement that "[i]f the appellant considers parts of the record designated by the appellee to be unnecessary, the appellant may advise the appellee, who must then advance the cost of including those parts," the City has advanced no funds and ignores the admonition that "[t]he parties must not engage in unnecessary designation of parts of the record, because the entire record is available to the court." Fed. R. App. P. 30(b)(1), (2).[1]

Most important, Appellants did *not* leave it to this Court to hunt for "truffles buried in the record." City.Br.25, ECF No. 125. Appellants' opening brief is replete with citations to the as-filed Appendix. And nearly every sentence of Appellants' Statement of the Case cites either the Appendix or a specific ECF document that the Court can access with the click of a button. Applt.Br.7–23, ECF No. 114.

The City defendants' more specific objections are equally inapposite. For example, Appellants included only the *relevant* deposition pages for the Citywide Panel architect, Mr. Eichenholtz, *see* City.Br.26, ECF No. 125, because those were the "parts of the record to which

[1] Nor would costs even be available to Appellees, as they were well advised of the excessive costs. *See, e.g., Harris v. Progressive Direct Ins. Co.*, 740 F.App'x 900, 919 (10th Cir. 2018).

[Appellants] wish[ed] to direct the court's attention." Fed. R. App. P. 30(a)(1)(D). The City says Appellants cherry picked Mr. Eichenholtz's testimony, but as explained below, none of the Eichenholtz testimony to which the City now points conflicts with the testimony Appellants submitted to the Court.

The City also criticizes Appellants for not including (1) Appellants' own voluminous declarations, or (2) the City's vaccination requirements in the Appendix. City.Br.26, ECF No. 125. But the former are largely duplicative of the complaints Appellants *did* include in the Appendix in their entirety. [A78–265, A301–425.] And the latter are undisputed.

In sum, this Court has *not* been "tasked with searching out which, if any, of plaintiffs' exhibits may provide support for their claims." City.Br.26, ECF No. 125. To the contrary, Appellants provided the Court with an Appendix exceeding 500 pages and with additional, specific ECF cites for relevant documents not in the Appendix. That is more than adequate to enable appellate review. That the City would claim otherwise speaks volumes about its confidence in the merits of its appellate positions.

II. The district courts erred in denying preliminary injunctive relief.

A. Plaintiffs have shown irreparable harm.

1. Unconstitutional employment conditions cause irreparable harm.

The City's primary argument against preliminary injunctive relief is based on an erroneous reading of *Elrod v. Burns*, 427 U.S. 347 (1976). Specifically, the City says that because its latest coercive offer to reinstate Appellants expired during the pendency of this appeal, so did Appellants' irreparable harm.[2] This argument ignores *Elrod*'s facts and holding and is contradicted by the City's own factual assertions here.

Most of the *Elrod* plaintiffs were already terminated for failing to comply with a coercive condition when they sought a preliminary injunction. (Though unlike here, no additional chances to change their minds were afforded.) Nonetheless, the Supreme Court held that since "First Amendment interests were [clearly] either threatened or in fact

[2] The City says that the September 6, 2022 deadline was not before the district court. Not so. As soon as the DOE announced the new offer of reinstatement in late August 2022, Appellants presented this fact with a sworn declaration and sought expedited decision on their pending motion for preliminary injunction. *Kane*, ECF No. 183–183.2.

being impaired at the time relief was sought," "irreparable injury" was shown. *Elrod*, 427 U.S. at 373.

Here, the ongoing coercion is even stronger because the City offered multiple, new, coercive "last chances" for terminated employees to be reinstated if they get vaccinated. Though the latest formal offer expired after this appeal was filed, the City admits that "terminated employees can get vaccinated and reapply for their jobs" on an ongoing basis. City.Br.37 n.11, ECF No. 125.

It is well settled that such "conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement to the individual to forsake those rights," are prohibited and constitute irreparable harm. *Elrod*, 427 U.S. at 358 n.11. Here, the inducement is hardly slight, even if the City does not offer any additional "last chances," and the inducement only allows eligibility for employment with the City rather than a guarantee of reinstatement of all former seniority and position. Most Appellants lost or are at imminent risk of losing their homes and their entire lives and careers in New York City. Several Appellants were already forced to vaccinate in violation of their religious beliefs, to avoid

homelessness and other serious consequences of the coercive new condition. Applt.Br.19–20, ECF No. 114. But even if no plaintiff ever did break, the constitutional harm is in *the ongoing coercive employment-condition itself*. *Elrod*, 427 U.S. at 358 n.11 (unconstitutional "conditions" on public employment that require giving up First Amendment freedoms are "prohibited").

Further undercutting the City's argument, *Elrod*, too, involved reversal of a district court's denial of injunctive relief; the Court did not defer to the district court's decision. Indeed, "[w]hen an alleged deprivation of a constitutional right is involved, . . . most courts hold that no further showing of irreparable injury is necessary. Because the deprivation of First Amendment rights is an irreparable harm, in First Amendment cases the likelihood of success on the merits is the dominant, if not the dispositive, factor." *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020) (quotation omitted). *Accord, e.g.*, *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013) (same). And the City's unconstitutional conditioning of Appellants' ability to go back to their posts—or even to re-apply for *any* position with the City—on Appellants' willingness to violate their constitutional rights is such a deprivation.

The City's cited authority is inapposite. For example, the City cites *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009), for the proposition that irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." City.Br.27, ECF No. 125. But *Faiveley* was a trade-secret case and involved neither the deprivation of a constitutional right nor the existence of unconstitutional conditions.

The same is true of *Stewart v. INS*, 762 F.2d 193, 199 (2d Cir. 1985), which the City cites for the proposition that irreparable harm is not generally "shown in employee discharge cases simply by a showing of financial distress or difficulties in obtaining other employment." City.Br.33, ECF No. 125. *Stewart* was a garden-variety employment discrimination case that likewise did not involve claims of constitutional violations or the existence of unconstitutional conditions.

Savage v. Gorski, 850 F.2d 64 (2d Cir. 1988), *did* involve claims that public employees had been covertly discharged in violation of their First Amendment rights. City.Br.33, ECF No. 125. But this Court did not find likelihood of success, and the *Savage* plaintiffs had never been asked to choose between their jobs and their First Amendment rights. They "did

not allege, nor did the [district] court find, that they were being coerced into joining the Democratic Party." 850 F.2d at 67. With no evidence there had been any coercion to choose between job and First Amendment rights, the *Elrod* presumption of harm did not attach. *Id.* at 67–68.

The exact opposite is true here. Every day that Appellants refuse to be vaccinated, they are barred not only from serving in their previous posts but from even *re-applying* for those positions. That unconstitutional condition has an undeniably coercive effect. But if this Court issues a preliminary injunction and orders reinstatement, that coercion goes away. This case is controlled by *Elrod*, not *Savage*.

Finally, this Court's earlier decision in these proceedings, in *Kane,* does not authorize deviation from the *Elrod* presumption of irreparable harm. *Contra* City.Br.32, ECF No. 125. There, this Court held that the *Kane* Appellants *do* face irreparable harm because "[t]hey have demonstrated that they were . . . threatened with imminent termination if they did not waive their right to sue" or acquiesce to the unconstitutional condition. *Kane*, 19 F.4th at 169–70 (citing *Am. Postal Workers Union v. U.S. Postal Serv.*, 766 F.2d 715, 722 (2d Cir. 1985)). "This is sufficient to show irreparable harm." *Kane*, 19 F.4th at 170.

The City conflates this Court's holding in *Kane* with the Court's subsequent dicta regarding Appellants' (then) additional request for pay pending the two week "fresh consideration" ordered on remand. In denying that further request, this Court stressed that "[t]his case does not require us to address whether an employer's decision to place its employees on leave without pay for an extended period — *i.e.*, longer than the few weeks required by the Motions Panel Order — could inflict irreparable harm." *Id.* at 171 n.19. And even there, this Court declared: "[w]e do not gainsay the principle that those who are unable to exercise their First Amendment rights are irreparably injured *per se*." *Id.* at 171. That statement is still true today.

2. Appellants are also suffering other irreparable harms.

In addition to ongoing coercion caused by the City's unconstitutional conditions, Appellants have shown additional irreparable harm. For example, numerous Appellants alleged ongoing harm to their physical and mental health due to their loss of health insurance attributable to the City's actions. Applt.Br.96–98, ECF No. 114. These harms cannot be easily redressed by finding employment elsewhere—even now that the City has abandoned its ill-advised vaccine

mandate for private employers—because most employers have a significant waiting period before a new employee's health benefits begin. The City's brief does not even address these harms and therefore concedes them. Accordingly, Appellants have established irreparable injury.

B. Appellants have a clear and substantial likelihood of success on the merits of their Free Exercise Claims.

1. The City offers no factual support for its neutrality argument.

Regarding Appellants' likelihood of success, the City pretends that Appellants' primary argument is that the vaccination requirements were infected with religious animus. City.Br.35, ECF No. 125. But that is Appellants' fourth argument. Applt.Br.42–47, ECF No. 114. And the City only addresses one, small component of it: an email to Mr. Eichenholtz—which was not corrected in Mr. Eichenholtz's response—explaining a Panel member's "understanding" that per Mr. Eichenholtz's instructions, objections to vaccines that contain or were tested with fetal stem cells "would not constitute sincerely held religious beliefs." *Id.* at 45.

The City asserts that the "Panel had no such policy: it examined each employee's objection to the use of fetal cell lines to determine whether it was based in religion." City.Br.35, ECF No. 125. But the

verified complaints and additional evidence showed that the Citywide Panel routinely rejected objections grounded in concerns about aborted fetal cells, just as the email reveals members were instructed to do. Applt.Br.45, 69, 77–78, 78–80, 80–81, 83–84, ECF No. 114; *but see id.* at 60–61 (granting accommodation following three-month suspension after explaining that abortion-related concerns were not the sole basis of Appellant's religious objection). In fact, when pressed, Mr. Eichenholtz admitted that the Panel often rejected concerns about aborted fetal cells because he believes applicants are wrong about the facts. *See, e.g.,* [A443–44]. This testimony supports Appellants' claims that there is religious animus towards beliefs grounded in objection to abortion. *Contra Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) ("*Smith II*") (the government cannot "punish the expression of religious doctrines it believes to be false."); *Jolly v. Coughlin*, 76 F.3d 468, 476 (2d Cir. 1996).

The evidence also shows that the Citywide Panel routinely discriminated against and rejected personally held religious beliefs, such as those arising from prayer, or guidance from the Holy Spirit, as opposed to guidance from a denominational leader. Applt.Br.46, ECF No. 114. The City does not respond to this evidence at all and therefore concedes it.

But the City would have no answer anyway. Over 30 years ago, the Supreme Court "rejected" the proposition that "one must be responding to the commands of a particular religious organization" "to claim the protection of the Free Exercise Clause." *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829, 834 (1989). Nor can the Citywide Panel permissibly substitute its opinions for those of the applicants about whether their religious beliefs preclude vaccination, as the record shows the Panel did repeatedly. The government should not second-guess adherents' "interpretations of th[eir] creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). For all these reasons, strict scrutiny applies.

2. The City implemented this Court's remand instruction by making yet more discretionary exemption decisions.

Turning to Appellants' primary argument—lack of general applicability—the City's appeal arguments fare no better. The City concedes that a mechanism for individualized exemptions defeats general applicability but argues that this is only the case if those exemptions are "wholly discretionary." City.Br.37, ECF No. 125. Even if true (it's not), here the record is unrebutted that the Citywide Panel made its religious exemption decisions with "no" objective criteria for determining whether

an exemption request should be granted or denied, as the architect of the Citywide Panel testified. [A455.] Indeed, while Mr. Eichenholtz declined to say that the Panel's decision-making was as bad as a "shoot a dart at the dartboard discretionary call" [A440], he candidly conceded that Panel members were making individualized determinations and reaching their own "reasonable conclusion" [*id.*]—the very definition of discretion. That lack of any objective standard gave the Panel the same "substantial discretion" that caused this Court to rule in Appellants' favor in *Kane*. 19 F.4th at 169. It is equally dispositive here.

Recognizing that discretionary decision-making is dispositive on Appellants' Free Exercise claim, the City says that because this Court in *Kane* "endorsed the very process that plaintiffs challenge," it must be generally applicable. City.Br.36, ECF No. 125. That's incorrect. This Court in *Kane* endorsed a process whereby a central citywide panel would consider religious exemptions by adhering "to the standards established by Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law ["NYSHRL"], and the New York City Human Rights Law ["NYCHRL"]." *Kane*, 19 F.4th at 177. Government employers "must [also] abide by the First Amendment." *Id.* at 175.

But as discussed above, the evidence shows the Panel did not even follow statutory standards—which define religion broadly and caution employers not to reject unorthodox beliefs or an applicant's interpretation of his creed. Mr. Eichenholtz's own testimony admits that the Citywide Panel either did not follow that guidance at all or, at minimum, was given wide discretion to interpret and apply that guidance in ways that individual Panel members concluded were "reasonable." [A440.] The substantial discretion given to the Panel defeats general applicability for the same reason *Kane* invalidated the Arbitrators' decisions.

Similarly, Mr. Eichenholtz admits that the Panel declined to apply heightened state and local statutory standards in undue hardship determinations and failed to comply with Title VII, under which the employer bears the burden of proof to show undue hardship by a preponderance of non-speculative evidence. Mr. Eichenholtz testified that the City's departments did not even provide individualized assessments of undue hardship to the Panel. [*NYFRL*, ECF No. 81-29 at 237-39; A446]. And the Panel summarily denied nearly every exemption request for "undue hardship," no matter the employee's proximity to other people at work or the existence of and capacity for remote workers.

The City resists these points by citing to other portions of Mr. Eichenholtz's deposition testimony, specifically pages 123, 173–75, 266, and 355 of the Supplemental Appendix. City.Br.38, ECF No. 125. But that evidence does not contradict Mr. Eichenholtz's reasonable-discretion testimony.

- On SA123, Mr. Eichenholtz rejects the proposition that the Citywide Panel applied the same unconstitutional standard as the Arbitrators. He does so by invoking this Court's directive to apply Title VII's standards. But notably, he does *not* say what he believes those standards to be, nor does he testify that the Panel followed such standards. He makes the identical point on pages 173–75. None of this testimony contradicts Mr. Eichenholtz's admission that the Panel was delegated and exercised substantial individual discretion. [A440.]

- On page 266, Mr. Eichenholtz testified that if the Panel received an exemption application containing objections based on factual beliefs that were inconsistent with the Panel's beliefs, then the Panel was supposed to consider the conflict applying Title VII standards. Again, he does *not* say what he believes those standards to be, nor does he testify that the Panel followed them. None of this testimony contradicts Mr. Eichenholtz's admission that the Panel was delegated and exercised substantial individual discretion. [A440.]

- Finally, on page 355, Mr. Eichenholtz testified that the Panel was "charged with applying the standards necessary to review an appeal of the denial of a reasonable accommodation under the framework of federal, state, and city law." But he again does *not* say what he believes those standards to be, nor does he testify that the Panel followed them. None of this testimony contradicts Mr. Eichenholtz's admission that the Panel was delegated and exercised substantial individual discretion. [A440.]

Mr. Eichenholtz's vague assertions that the Citywide Panel was "charged" with issuing decisions that comported with federal, state and local statutory standards is further undercut by the inconsistencies in the testimony. For example, though Mr. Eichenholtz acknowledged in his deposition that statutory standards would not allow him to deny an applicant based on use of a vaccine prior to religious conversion, *that is precisely what he did* when faced with Curtis Cutler's application for relief, denying Mr. Cutler because he was vaccinated before he was born again. Applt.Br.15–16, ECF No. 114. In sum, if this Court is trying to determine whether the Citywide Panel members were making objective, nondiscretionary decisions or were instead exercising their personal, "reasonable" discretion, the best evidence is Mr. Eichenholtz's sworn testimony that it was the latter. [A440]. Accordingly, strict scrutiny applies to the City's accommodation decision.

Yet there's more. Under *Smith I & II*, the assessment of general applicability turned on whether there was *any* mechanism for religious exemption from the Oregon state drug laws, which would defeat general applicability. *Emp. Div., Dep't of Human Res. v. Smith*, 485 U.S. 660, 672 (1988) ("*Smith I*"); *Smith II*, 494 U.S. at 874. In *Smith I,* the Court

acknowledged that facially, the criminal statute did not allow for any religious exemption and was thus seemingly generally applicable. "But in the absence of a definitive ruling by the Oregon Supreme Court we are unwilling to disregard the possibility that the State's legislation regulating the use of controlled substances *may* be construed [through case law] to permit peyotism or that the State's Constitution may be interpreted to protect the practice." *Smith I,* 485 U.S. at 673 (emphasis added). If it was possible to obtain a religious exemption under Oregon state law, even though the criminal statute did not state such on its face, then the *Sherbert* strict scrutiny test would have applied. *Id.* at 672. Only after determining following remand that no such mechanism for religious exemption existed under Oregon law did the Court in *Smith II* hold that the peyote law was generally applicable and thus exempt from strict scrutiny. *Smith II*, 494 U.S. at 877–90.

The City recasts the Court's focus on whether there was a mechanism for religious exemption as a neutrality issue. But nothing in either case supports that reading. Rather, *Smith* held that since there was no mechanism for religious exemption, the state's peyote law was generally applicable, so absent a showing that it lacked neutrality or

violated the Establishment Clause, strict scrutiny would not apply. *Smith II,* 494 U.S. at 876–78.

Here, the Mandate recognizes that state and local law provide a mechanism for religious exemption. Accordingly, that triggers strict scrutiny when the City denies accommodation. The City demeans this straightforward application of *Smith I & II* as nonsensical. City.Br.41–42, ECF No. 125. But applying strict scrutiny in these circumstances is a feature of the Free Exercise Clause, not a defect. The concern is that if government officials have discretionary power to grant religious exemptions, they could use it to play favorites or to deny an exemption to those whose beliefs the officials disfavor. That is exactly what happened here. But by using denominational preferences, second-guessing the truth of Appellants' beliefs, and denigrating those whose beliefs were grounded in prayer and a personal relationship with God rather than denominational leaders, the Citywide Panel demonstrated the very religious discrimination that the Free Exercise Clause prevents.

Yet there's still more. As Appellants explained in their opening brief, *Fulton* holds that even the *power* to issue individualized exemptions renders a policy not generally applicable and subject to strict

scrutiny, even if never exercised. Applt.Br.38, ECF No. 114 (citing *Fulton*, 141 S. Ct. at 1879). And it is undisputed here that the City's Mayor possesses such power. *Id.* That, too, triggers strict scrutiny.

The City responds in a single footnote, contending that the Mayor's unfettered discretion "merely reflects the fact that the City is authorized to make decisions regarding the adoption of vaccination measures to protect the health of the public." City.Br.37 n.15, ECF No. 125. That dog does not hunt following *Fulton*. After all, the Supreme Court would have reached the same result in *Fulton* even had the City of Philadelphia argued that its Commissioner of the Department of Human Services' discretion merely reflected the fact that the Commission was authorized to make decisions regarding the qualifications of foster-care providers to protect the well-being of children in the City's care.

In other words, the reasons *why* a mechanism for individualized exemptions is afforded to the executive branch do not matter to the general applicability analysis. Rather, if the government has discretion to issue exemptions and yet denies religious accommodation, the decision needs to be strictly scrutinized: "the inclusion of a formal system of

entirely discretionary exceptions [ ] renders [a government] requirement not generally applicable." *Fulton*, 141 S. Ct. at 1878.

Equally inapposite is the City's argument that it "should enjoy greater leeway . . . when setting rules for contractors than when regulating the general public." *Id.; see* City.Br.39, ECF No. 125. As the Supreme Court held in rejecting the City of Philadelphia's identical argument in *Fulton,* no matter the level of deference afforded, "principles of neutrality and general applicability still constrain the government in its capacity as manager." *Fulton,* 141 S. Ct. at 1878.

In sum, once it is established three (or more) ways that strict scrutiny applies, Appellants' likelihood of success is not just substantial or clear, it is certain. And where Appellants explain why the City's policies cannot survive strict scrutiny, Applt.Br.94–95, ECF No. 114, the City's appeal brief is silent, conceding the issue. Accordingly, Appellants have satisfied their likelihood-of-success burden. Conclusively.

C. The equities weigh in Appellants' favor, not the City's.

Appellants have shown that the City's mandates violate their First Amendment right to freely exercise their faith. Because that alone constitutes "irreparable injury," *Int'l Dairy Foods Ass'n v. Amestoy*, 92

F.3d 67, 71 (2d Cir. 1996); *accord Paulsen v. Cnty. of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991), Appellants' likely "success on the merits is the dominant, if not the dispositive, factor" in the equities analysis. *Walsh*, 733 F.3d at 488. But the balance of equities strongly favors Appellants anyway.

The City says that Appellants suffer *no* "imminent or irreparable harm," and that the public interest favors selectively punishing religion. City.Br.44, ECF No. 125. Wrong. First, money alone will not solve Appellants' problems. A damages recovery will not remedy the spiritual and emotional harm of being forced to choose between job and faith. Nor will it ensure that Appellants can recover their jobs—which the City does not contest that Appellants are eligible for if they are willing to violate their faith and get vaccinated.

The City's coercion—through imposition of an unconstitutional condition—is ongoing and causing irreparable damage, much of which is unlikely to improve even if Appellants find a job with a private employer. Health-insurance benefits, for example, would not kick in until after the standard waiting period. Nor can money repair harm to emotional and physical health. Take Appellant Buzaglo, who after losing her job

developed severe asthma, could no longer afford her rent, and had to leave the country. Applt.Br.97, ECF No. 114. Likewise, consider Appellant Cutler and his wife, who had to sell their home, move out of state, and leave their son behind to finish high school—inflicting severe emotional distress and lost time with their son that they will never regain. *Id.* at 97–98. Then there is Appellant Schimenti who was forced to apply for Medicaid and obtain a forbearance on his mortgage. The stress of losing his job caused him to develop high blood pressure and cardiac issues—both of which he has never experienced before. *Id.* at 98. Money cannot solve these health problems or restore to Appellants their lost community.

No public interest supports the City's callous disregard for its former first responders, teachers, and sanitation workers, who, during a Citywide staffing crisis, have been forced to stay home or move because of the discriminatory mandate rather than receive reasonable accommodation. It does not promote the public interest to fire hardworking public servants based on a discriminatory religious test.

The City does not attempt, in its response here or below, to present facts showing a public health necessity for the continuation of these

Mandates. Indeed, while this appeal was pending, the City dropped the private sector Mandates altogether—perhaps trying to avoid the constitutional impact of the Mayor's arbitrary carve out for athletes and entertainers. At a recent press conference, Mayor Adams could not provide a rationale for keeping the municipal mandate but dropping the private sector mandates: "I don't think anything dealing with COVID makes sense and there's no logical pathway of – one can do." Faced with the same question, Commissioner Vasant was unable to provide any further clarification, instead noting that the Mandates, which should all be considered as one, push people to get vaccinated "which it's been extraordinarily successful in doing whether it's the city worker mandate, private sector mandate, the childhood athletics mandate, and anything else. So, it's important not to see these things in isolation and then say, '[w]ell, what's the narrow rationale for this one decision.'"[3]

New York City residents will only benefit from Appellants returning to work—teaching students, tackling emergencies, tending

[3] Transcript*: Mayor Eric Adams Launches COVID-19 Booster Campaign, Announces Additional Flexibility for NYC Businesses, Parents*, City of New York (Sept. 20, 2022), https://www.nyc.gov/office-of-the-mayor/news/688-22/transcript-mayor-eric-adams-launches-covid-19-booster-campaign-additional-flexibility.

sanitation, and more. Conversely, City residents lose every day the City treats people as second-class citizens and unwanted workers—especially during a critical staffing crisis. The requested injunction would benefit all New Yorkers.

III. The *Kane*/*Keil* consolidated complaint was improperly dismissed.

Disregarding well-pled allegations showing the City's rampant discrimination against religious workers, the lower court improperly dismissed the *Kane*/*Keil* complaint. That was shocking given this Court had already held that Appellants were likely to succeed on the merits of their Free Exercise claims because the City's mandates were not neutral or generally applicable as applied. *Kane*, 19 F.4th at 169. Nothing suggests this holding should change when reviewed under the far more generous motion-to-dismiss standard. Yet the City now says Appellants failed to preserve their as-applied claims and somehow pled themselves out of court. That is incorrect.

A. Appellants preserved their as-applied claims.

While it is a "general rule" that this Court "will not consider an issue raised for the first time on appeal"—such as when a party "never argued" the issue below, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d

129, 132 (2d Cir. 2008) (per curiam)—nothing forbids Appellants on appeal from developing more fully an argument they raised below. Appellants conspicuously raised their as-applied claims below, not in "37 pages" of course, City.Br.46, ECF No. 125—because that would have consumed the entire district-court brief—but in sufficient detail to preserve the claims. The City fails to specify any specific as-applied argument in the opening brief that is unpreserved. But all the basic arguments made in the as-applied brief were made below, too. [*See, e.g.*, SA22, 24, 26,31–32, 34–35, 47–55]. And the facts in this section of the opening brief are nearly all derived from the operative *Kane* complaint, which was incorporated by reference into the memoranda below. [SA21.] That's sufficient. Preservation does not require that all points of fact and law be pressed the same way below, provided that an appellant "at least introduced the notion" in district court. *See Higgins v. N.Y. Stock Exch., Inc.*, 942 F.2d 829, 832 (2d Cir. 1991).

B. Appellants plausibly alleged that the City violated their constitutional rights as applied.

What's more, Appellants' claims are plausible. First, Appellants plausibly allege free exercise claims. This Court has already held that Appellants were likely to succeed on those claims. *Kane*, 19 F.4th at 169.

Yet the City now says the *Kane*/*Keil* Appellants borrow wholly from material outside the operative complaint to support them. City.Br.47, ECF No. 125. Not so. Appellants amply support their as-applied challenge based on the *Kane*/*Keil* complaint itself. [*E.g.*, A102–105, 108, 114, 123–213 ¶¶ 82–95, 117, 156–57, 218–780; *see also,* Applts.Br.67–94, ECF No. 114 (citing to these and other paragraphs of the operative complaint)]. And the lower court cited this complaint throughout its dismissal order. [SPA2, 4, 6, 10, 13, 28, 35–38.]

As a fallback, the City says that Appellants pled themselves out of court, and that the Citywide Panel review removes all unconstitutional taint. City.Br.50–51, ECF No. 125. That's also wrong. To the City, a single allegation that one plaintiff had his religious accommodation denial reversed by the Citywide Panel means this Court should distrust the many other well-supported allegations showing the Panel discriminated against Appellants because of their faith. That does not logically follow – it ignores the fact that accepting one person on court-ordered remand could be a cover or arbitrary. Nor does it accept as true factual allegations and draw all inferences in Appellants' favor, as required. *See LaFaro v. N.Y. Cardiothoracic Grp., PLLC*, 570 F.3d 471,

475 (2d Cir. 2009). Assessing the relevance of statements made by public officials, or other evidence of religious animus, is "a close factual question that should be left to the jury." *M.A. on behalf of H.R. v. Rockland*, 53 F.4th 29, 37–38 (2d Cir. 2022). The Court cannot resolve factual questions about neutrality or general applicability on summary judgment—much less a motion to dismiss. *Id.* at 39.

As for neutrality, Appellants plausibly alleged that the City showed impermissible animus toward religion. The Citywide Panel has treated private religion as no religion [*E.g.*, A125 ¶¶ 235–36; A140–41 ¶¶ 367–68], translated some religion as political belief, [*E.g.*, A137 ¶¶ 335–38] and disregarded other religion when it disagreed with City-preferred views or religious leaders—including those of faiths that Appellants do not hold [*E.g.*, A284; A124–25 ¶ 222, 232–33; A129 ¶ 265–67]. Despite these well-pled allegations, the City says this Court should affirm dismissal because "[t]here simply is no evidence that the vaccination requirement is infected with religious animus." City.Br.35, ECF No. 125. But plaintiffs avoid summary judgment on a free exercise claim if they show that a decisionmaker's decisions or comments are even debatably

hostile. *Rockland*, 53 F.4th 36–38.[4] So Appellants' plausible allegations of religious animus easily suffice to avoid dismissal.

Second, Appellants plausibly allege equal protection claims. The "fresh consideration" cannot moot claims of discrimination. When, as here, an employer adopts a facially discriminatory policy, *see* Section II.B, it cannot "rebut" the discrimination claim by demonstrating the existence of a non-discriminatory reason for terminating the employee. Rather, it is subject to summary judgment unless it can prove a valid affirmative defense. *TWA v. Thurston*, 469 U.S. 111, 121 (1985). None are available here, as religious discrimination is *per se* unconstitutional. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Because the City fails to respond to this argument on the merits, the City has "waive[d] . . . any objections

[4] For example, the Mayor's hostile comments in which he admitted the City intended to preference Jehovah's Witness and Christian Scientists for accommodation, and that all other religious objection to vaccines is invalid, are even more relevant now that the City controls the religious exemption process, which was not the case the last time this issue was before the Court. *Kane,* 19 F.4th at 165 (excusing Mayor's comments because "the Mayor did not have a meaningful role in establishing or implementing the Mandate's accommodation process" before remand).

not obvious to the [C]ourt." *Beazer E., Inc. v. Mead Corp.*, 412 F.3d 429, 437 n.11 (3d Cir. 2005); *accord Hardy v. City Optical Inc.*, 39 F.3d 765, 771 (7th Cir. 1994). With no such objection, the Court should reverse on this basis alone.

Third, Appellants plausibly allege an Establishment Clause violation. As discussed above, the DOE's decision to adopt standards that express denominational preferences on their face (a clear Establishment Clause violation) is not mooted because some of the Appellants (but not all) were given "fresh consideration," particularly as the City refused to renounce the Stricken Standards. In any event, the complaint alleges that the Panel—like the Arbitrators before—also applied unconstitutional standards, preferencing institutional over private religion. [A111–72 ¶¶ 134–45, 156, 236, 298, 319, 368, 508, 570]; *see* Section II.B.

This attempt to play denominational favorites—i.e., to call balls and strikes for what constitutes a "valid" religious belief—violates the cardinal First Amendment command against showing "favoritism among sects." *Larson v. Valente*, 456 U.S. 228, 244–46 (1982). And it requires impermissible entanglement with religious questions. *Cantwell v.*

Connecticut, 310 U.S. 296, 310 (1940). That the Panel continued to selectively punish disfavored religion after this Court required a fresh look is strong evidence of its hostility. But it is also per se unconstitutional to maintain a written government policy that openly favors majority denominations over personally held and unorthodox religious beliefs.

Despite this Court's prior ruling, the City again attempts to defend the Stricken Standards. In its view, the Court should disregard these well-pled allegations of denominational favoritism because the complaint shows that Appellant Ruiz-Toro slipped through the cracks and received accommodation as a "minority church" member. City.Br.48–49, ECF No. 125. That's rubbish. Say the Citywide Panel had a written policy that allowed all Christians a religious accommodation but discouraged granting accommodation to all other people of faith. Then one day it gave a Muslim worker a religious accommodation too. Would that defeat all Establishment Clause claims based on denominational favoritism? Of course not—especially at the motion-to dismiss stage.

And there's more to Ruiz-Toro's story. She initially applied for a religious accommodation but was denied because her Christian beliefs

conflicted with those of Pope Francis. But Ruiz-Toro is not Catholic. On appeal, that decision was reversed—while one arbitrator let the cat out of the bag. He said that many colleagues were following the DOE's advice and denying people who belong to minority churches, but he, as a Southerner, appreciated there were independent churches whose members deserve a fair shot too. So he granted the exemption. [A154 ¶¶ 482–87.] Not all were so fortunate to appear before this arbitrator. And while Ruiz-Toro remains on payroll, the complaint alleges that she still suffers ongoing discrimination, harassment, and retaliation *even after she received the religious accommodation*. [A154–55 ¶¶ 490–94.]

Finally, citing no authority, the City suggests in a footnote that Appellants' claims should be resolved through "individual employment discrimination or CPLR Article 78 claims." City.Br.51 n.19, ECF No. 125. While that is the City's preferred course, the availability of other claims and state or administrative alternatives do not bar Appellants from asserting constitutional claims under Section 1983. *E.g.*, *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) (Plaintiffs "need not exhaust their administrative remedies" before suing under Section 1983.) Appellants have plausibly alleged violations of their constitutional rights.

CONCLUSION

Plaintiffs-Appellants ask this Court to reverse the decisions below and remand, instructing the lower court to issue a preliminary injunction that allows Appellants to retake their prior posts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Local Rule 32.1(a)(4)(A) because, excluding the portions exempted by Fed. R. App. R. 32(f), this brief contains 6,985 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, this brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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Dated: December 5, 2022