Index No. 85035/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

STEPHANIE DICAPUA, MICHAEL KANE, WILLIAM CASTRO, MARGARET CHU, HEATHER CLARK, SASHA DELGADO, JOAN GIAMMARINO, ROBERT GLADDING, CAROLYN GRIMANDO, BENEDICT LOPARRINO, NWAKAEGO NWAIFEJOKWU, INGRID ROMERO, TRINIDAD SMITH, NATASHA SOLON, AMARYLLIS RUIZ-TORO, DENNIS STRK, and TEACHERS FOR CHOICE, individually and on behalf of its members,

Petitioners,

-against-

CITY OF NEW YORK and the NEW YORK CITY DEPARTMENT OF EDUCATION,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' VERIFIED ANSWER

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PRELIMINARY STATEMENT

On February 11, 2023, 16 individual Petitioners[1] and Teachers for Choice, a purported membership organization (collectively, "Petitioners"), filed a Verified Hybrid Petition ("Petition," or "Pet.") challenging (1) the Respondents' COVID-19 vaccine mandate applicable to Department of Education ("DOE") employees, (2) the Respondents' decisions to allegedly deny Petitioners' requests for reasonable accommodations to be exempt from the vaccine mandate, and (3) the alleged terminations of Petitioners' employment with the DOE due to the individual Petitioners' failures to comply with the COVID-19 vaccine mandate. As set forth more fully in the Petition, Petitioners allege that the denials of the individual Petitioners' religious accommodation requests ("RA Request" or "RA Requests") for exemptions to the COVID-19 vaccine mandate applicable to DOE employees ("Vaccine Mandate") and any alleged subsequent terminations[2] were arbitrary and capricious and a violation of the New York State Human Rights Law ("SHRL"), New York City Human Rights Law ("CHRL"), and New York State Constitution. Petitioners seek a judgment, *inter alia*, declaring that the Respondents' religious accommodation

[1] The individual Petitioners include Stephanie DiCapua, Michael Kane, William Castro, Margaret Chu, Heather Clark, Sasha Delgado, Joan Giammarino, Robert Gladding, Carolyn Grimando, Benedict Loparrino, Nwakawgo Nwaifejokwu, Ingrid Romero, Trinidad Smith, Natasha Solon, Amaryllis Ruiz-Toro, and Dennis Strk. See Pet.

[2] RA Requests submitted by Petitioners DiCapua, Kane, Chu, Clark, Delgado, Gladding, Nwaifejokqu, Romero, and Strk were denied, and those Petitioners were subsequently terminated from their employment in February of 2022 for failing to comply with the vaccine mandate. Pet. ¶¶ 30-31, 33-35, 37, 39-41, 44-45. Petitioner Giammarino did not file an RA Request with the DOE, and was terminated in August of 2022. Id. ¶36; see also id. at 72-74. Petitioner Smith did not file an RA Request with the DOE, and her employment was terminated on February 18, 2022. Id. ¶367 at 94, ¶371 at 95. Petitioner LoParrino did not file an RA Request with the DOE, and his employment was terminated on February 11, 2022. Id. ¶386 at 84. Petitioner Ruiz-Toro's RA Request was granted, thus she was never placed on leave without pay nor terminated. Id. ¶43. Petitioner Castro's RA Request was granted upon review by the Citywide Panel. Id. ¶32. Petitioner Grimando's RA Request was denied, at which time she chose to extend her leave without pay period by signing a waiver releasing Respondents from all claims related to the denial of her RA Request; at the end of the waiver period, Grimando chose to obtain COVID-19 vaccination, and was not terminated from her employment with the DOE. Id. at 79-83. Petitioner Solon's RA Request was denied by the DOE, and after she demonstrated proof of her COVID-19 vaccination to the DOE, she was restored to her employment with the DOE. Id. at 99-101.

policies with respect to the Vaccine Mandate as it applies to DOE employees violate the SHRL, CHRL, and New York State Constitution, declaring the DOE's denials of the individual Petitioners' reasonable accommodation requests for exemptions to the Vaccine Mandate null, void, and unenforceable, enjoining respondents from enforcing the vaccine mandate, and reinstating the Petitioners whose employment was terminated for failure to demonstrate proof of COVID-19 vaccination to their positions of employment with DOE, backpay, monetary and punitive damages, and attorneys' fees. Petitioners also seek certification of the instant matter as a class action, with the appointment of the individual Petitioners as class representatives.

Respondents now submit their Answer and memorandum of law in response to the Petition. As set forth in Respondents' Answer, the Affirmation of Eric Eichenholtz, the Affirmation of Kathleen M. Linnane and its supporting exhibits, and as demonstrated herein, the Petition must be denied for nine central reasons. *First*, it is well-settled law that the COVID-19 vaccine mandate applicable to DOE employees is a lawful condition of employment, and there was ample record support for the DOE's decision to deny individual Petitioners' RA Requests and the City Panel's decisions to affirm. *Second*, Petitioners lack standing to challenge DOE's Impact Arbitration Award. *Third*, Petitioners do not have a private right of action to bring claims against Respondents under the New York State Constitution. *Fourth*, Petitioners' demands for declaratory relief are moot, and the individual claims brought by two[3] Petitioners are moot. *Fifth,* five[4]

[3] Petitioner Ruiz-Toro's RA Request was granted by the DOE. Petitioner Castro's RA was granted by the Citywide Panel. See Pet. ¶¶43, 457 at 109; see also Linnane Aff., Exh. J at 7.

[4] Petitioners Giammarino, LoParrino, Smith did not submit RA Requests to the DOE, and have therefore failed to state a cause of action in the instant Petition. See Pet. ¶¶333 at 74, ¶371 at 95, 386 at 84. Petitioners Ruiz-Toro's and Castro's requests for religious accommodations were granted, and they have thus similarly failed to state a cause of action herein. See Pet. ¶¶43, 457 at 109; see also Linnane Aff., Exh. J at 7.

Petitioners have failed to state a cause of action for which relief may be granted. Sixth, four[5] Petitioners failed to exhaust their administrative remedies prior to commencing the instant matter, and their claims herein, are therefore barred. *Seventh*, one[6] Petitioner's claims are barred by waiver and relief. *Eighth*, class certification is improper in the instant proceeding. *Finally*, Petitioners are not entitled to an award of attorney's fees in this proceeding. Accordingly, the Petition must be denied in its entirety.

Indeed, the record establishes that the denials of Petitioners' RA requests were rationally based and in accordance with the law, and, as such, Respondents' decisions should be affirmed because they were "supported by a rational basis." Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009). As a matter of law, the Court "must sustain the determination[s]" even if "it would have reached a different result than the one[s] reached by the agency." Id. Accordingly, the Petition must be denied in its entirety.

STATEMENT OF FACTS

Respondents respectfully refer the Court to their Answer, verified on August 10, 2023, for a complete statement of pertinent and material facts.

[5] Petitioners Giammarino, LoParrino, and Smith did not submit RA Requests to the DOE, and Petitioner Grimando did not appeal the DOE's denial of her RA Requests to the Citywide Panel. See Pet. ¶¶333 at 74, 371 at 95, 386 at 84.

[6] Petitioner Grimando waived her rights to seek judicial action with respect to the denial of her request for a religious exemption to the now-amended COVID-19 vaccine mandate applicable to DOE employees when she signed a waiver releasing Respondents from all claims. See Pet. ¶310 at 82; see also Linnane Aff., Exh. G.

ARGUMENT

POINT I

PETITIONERS HAVE FAILED TO SHOW THAT THE COVID-19 VACCINE MANDATE AND THE RESPONDENTS' DENIALS OF PETITIONERS' REASONABLE ACCOMMODATION REQUESTS ARE ARBITRARY AND CAPRICIOUS OR OTHERWISE UNLAWFUL

Petitioners allege that the Respondents' denials of the individual Petitioners' RA Requests are arbitrary and capricious because "[t]he DOE/arbitrator denials are not supported by any reason or record," and "were infected by errors of law and are not supported by substantial evidence." See Pet. ¶486 at 114, ¶501 at 117.

Petitioners further contend that "by failing to provide reasonable religious accommodation to Petitioners […] the [Respondents] violated the [CHRL]," that "by failing to engage in good faith cooperative dialogue with DOE employees […] the DOE discriminated against Petitioners," appear to allege that Respondents violated the SHRL because Respondents "adopted a facially discriminatory religious accommodation policy" and "refused to engage in the interactive process," and claim that the DOE's religious accommodation policies "violate the equal protection clause" of the New York State Constitution. See Pet. ¶¶515 at 120, 536 at 124, 537 at 124, 546 at 126.

A. Standard of Review

In an Article 78 proceeding, the standard of review is "whether [the] determination was made in violation of lawful procedure, was affected by error of law, or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). Administrative action is arbitrary when it is taken "without sound basis in reason" and "without regard to the facts." Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Ward v. City of Long Beach, 20 N.Y.3d 1042, 1043 (2013). It is the

agency's duty to weigh the evidence. When "evidence is conflicting and room for choice exists," the court may not re-weigh the evidence and reject the agency's decision. Toys R Us v. Silva, 89 N.Y.2d 411, 424 (1996), quoting Stork Rest. Inc. v. Boland, 282 N.Y. 256, 267 (1940). Accordingly, if the agency's determination is "supported by a rational basis," the court "must sustain the determination" even if the "court concludes that it would have reached a different result than the one reached by the agency." Peckham, 12 N.Y.3d at 431. See also Sullivan Cty. Harness Racing Assn. v. Glasser, 30 N.Y.2d 269, 277 (1972) ("[t]he judicial function is exhausted when there is to be found a rational basis for the conclusions approved by the administrative body"); Matter of Vendome v. Lynch, 2001 NY Slip Op 30088(U), ¶8 (Sup Ct, N.Y. Co. 2001) (it is not court's role to "weigh the facts and merits de novo and substitute the court's judgment for that of the agency's determination").

B. The COVID-19 Vaccine Mandate Applicable to DOE Employees is a Lawful Condition of Employment

"The New York City Charter empowers the [DOHMH] with "jurisdiction to regulate all matters affecting health in the city of New York," including matters relating to "communicable and chronic diseases and conditions hazardous to life and health."" See Decision + Order in Masciarelli v. New York City Dep't of Educ., Index No. 726150/2022 (Sup. Ct. Queens Cty., May 30, 2023), annexed to the Affirmation of Kathleen M. Linnane ("Linnane Aff.") as Exhibit A. "It is well settled that the decisions of public health officials to declare mandatory vaccine requirements are not arbitrary, capricious or an abuse of discretion." See also Loiacono v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., No. 161076/2021, 2022 N.Y. Misc. LEXIS 1151, at *3 (Sup. Ct. 2022). The City, as a government employer, has a duty to maintain a safe workplace. See generally N.Y. Labor Law § 27-a. The obligation of how best to do so is within the discretion of the municipal employer. See New York State Inspection, Sec. & Law Enforcement Emples., Dist.

Council 82 v. Cuomo, 64 N.Y.2d 233, 237-40 (1984). This may include mandatory vaccine requirements, which New York public health officials are well within their right to declare. See, e.g., C.F. v. New York City Dept. of Health & Mental Hygiene, 191 A.D.3d 52, 64-65 (2d Dep't 2020) (holding that DOHMH's adoption of a mandatory vaccine requirement was not irrational, arbitrary, capricious or an abuse of discretion). "Public health agencies, in particular, are entitled to a high degree of judicial deference when acting in the area of their particular expertise." Id. at 64-65.

The Vaccine Mandate has withstood multiple legal challenges in New York. See Bath et al. v. FDNY et al., Index. No. 159689/2022 (Sup. Ct., N.Y. Cty, June 2, 2023); Masciarelli, Index No. 726150/2022 (Sup. Ct., Queens Cty., May 30, 2023); Broecker v. N.Y.C. Dep't of Educ., No. 21-CV-6387(KAM)(LRM), 2023 U.S. Dist. LEXIS 55541 (E.D.N.Y. Mar. 30, 2023); Garland v. City of N.Y., No. 21-cv-6586(KAM)(CLP), 2023 U.S. Dist. LEXIS 54100 (E.D.N.Y. Mar. 29, 2023); Police Benevolent Ass'n of the City of New York, Inc. v. de Blasio, No. 85229/20121 (Sup. Ct., Rich. Cty.); In the matter of the Application of Andrew Ansbro, as President of the Uniformed Firefighters Ass'n v. de Blasio, No. 159738/2021, (N.Y. Sup, N.Y. Cty); In the matter of the Application of Corr. Officers' Benevolent Ass'n, Inc. v. City of New York, No. 161034/2021 (Sup. Ct., N.Y. Cty.). Each court found the Vaccine Mandate legally sound and enforceable.

Moreover, the First Department recently upheld COVID-19 vaccination as a condition of employment for New York City Department of Education employees. See Matter of Clarke v. Bd. Of Educ. Of the City Sch., 2023 NY Slip Op 00945 (App. Div. 1st Dep't. 2023). Likewise, the United States Court of Appeals has determined that "[t]he Vaccine Mandate, in all its iterations, is neutral and generally applicable." See Kane v. De Blasio, 19 F.4th 152, 164 (2d

Cir. 2021). Furthermore, the Eastern District has explicitly held that the City's order "establishing the Vaccination Mandate has established a lawful, enforceable condition of employment […] which all NYC DOE employees must satisfy in order to remain employed by the NYC DOE." See Broecker v. N.Y.C. Dep't of Educ., 585 F.Supp. 3d 299, 315, (E.D.N.Y. 2022). The Eastern District has similarly found that the Vaccine Mandate created a "condition of employment" for City employees at FDNY. See Garland v. N.Y.C. Fire Dep't, 2021 U.S. Dist. LEXIS 233142 at *25 (E.D.N.Y. 2021). "Given the state of public health emergency that our nation finds itself in due to the Coronavirus, the more transmissible Delta and Omicron variants, and the nature of Plaintiffs' job as firefighters and EMT employees, interacting with members of the public on an emergency basis, and living in close quarters during their shifts, the [DOHMH] Commissioner was within his powers to require COVID-19 vaccination as a qualification of employment for FDNY employees." Id. at *14. Vaccination is "one of the most highly regarded" tools available to "reduce viral transmission." Maniscalco, No. 21-CV-5055 (BMC) at *4. With over one million deaths in the United States due to COVID-19 since its emergence, and the presence of evolving variants, the decision to create a condition of employment that DOE employees be vaccinated against COVID-19 was entirely rational and was not arbitrary, capricious, or lacking a rational basis. See *COVID-19 Mortality Overview*, CDC, https://www.cdc.gov/nchs/covid19/mortality-overview.htm (last visited July 13, 2022). Indeed, in a recent challenge to the mandate brought by the union representing FDNY firefighters, Justice Abadi in Kings County Supreme Court upheld the Vaccine Mandate as a lawful condition of employment. See Ansbro v. Nigro, 2022 N.Y. Misc. LEXIS 11391 (Sup. Ct. Kings Cty., Sep. 21, 2022.)

The DOE, consistent with its obligation to provide a safe workplace, and in compliance with the lawful Vaccine Mandate, could not permit unvaccinated employees, absent

exemption or accommodation required by law, to perform work for the DOE. See Broecker, 585 F.Supp. 3d 299, 316. In the event a DOE employee violated a lawful condition of their employment, they became ineligible for employment with the DOE. See Garland, 2021 U.S. Dist. LEXIS 233142 at *14 (holding that unvaccinated FDNY employees who failed to receive the COVID-19 vaccine violated a condition of their employment); Ansbro, supra. Therefore, any decision by Respondents here to terminate Petitioners for failing to demonstrate proof of the COVID-19 vaccine was neither arbitrary and capricious nor unlawful in any respect, and all such claims must be dismissed**.**

C. The Denials of Petitioners' Accommodation Requests were Not Affected by an Error of Law Because Respondents Engaged in the Requisite Cooperative Dialogue with Petitioners

Petitioners allege Respondents failed to engage in the interactive reasonable accommodation process[7] required by the SHRL and CHRL. See Pet. ¶¶317 at 70, 504 at 118, 525 at 122, 537 at 124. However, Petitioners' claims are wholly unsupported by the facts and are undermined by the Petition itself.

As an initial matter, following the August 24, 2021 issuance of the Vaccine Mandate applicable to DOE employees, on September 1, 2021, the United Federation of Teachers ("UFT") filed a Declaration of Impasse with the Public Employment Relations Board ("PERB") over the impact of the Vaccine Mandate. See UFT Declaration of Impasse annexed to the Linnane Aff. as Exh. B. PERB then appointed an arbitrator, and on September 10, 2021, the arbitrator issued a decision ("Arbitration Award") which established: (1) a process for Vaccine Mandate exemptions and accommodation requests for DOE employees; (2) options for DOE employees to

[7] Petitioners refer to the "interactive process" and "cooperative dialogue" interchangeably throughout the Petition. See Pet. ¶¶317 at 70, 504 at 118, 513-514 at 120, 525 at 122, 537 at 124.

voluntarily separate from service with certain benefits or extend Leave Without Pay ("LWOP") available for employees who did not comply with the Vaccine Mandate; and, (3) that DOE could "unilaterally separate employees" who had not complied with the Vaccine Mandate or did not have an approved exemption or accommodation or had not either opted for separation or to extend their LWOP pursuant to the provisions set forth in the Arbitration Award. The Arbitration Award further set forth the requirement that all accommodation requests to be considered as part of the process established therein for religious and medical exemptions had to be submitted no later than 5:00 p.m. on September 20, 2021. See Scheinman Arbitration Award annexed to the Linnane Aff. as Exh. C.

The process established by the Arbitration Award applied to medical and religious exemptions as well as to accommodations for DOE employees who, having received a full course of vaccination, remained unable to mount an immune response. Id. It also set forth that employees who had not requested an exemption, or whose request has been denied, would be placed on LWOP by DOE starting September 28, 2021. Id. at 13. The City's Office of Labor Relations engaged in impact bargaining with the remaining unions representing DOE employees.

The NYC Commission on Human Rights ("NYCCHR") provided guidance in response to the unprecedented demand for vaccine exemptions faced by City agencies: "[b]earing in mind that employers' obligation to engage employees in a cooperative dialogue about potential accommodations related to COVID-19 may extend to a large number of people, **employers may satisfy their obligation to initiate the cooperative dialogue by reminding all staff of the employer's policies regarding reasonable accommodations and the process for applying for such accommodations**." See COVID-19 & Employment Protections, NYC COMMISSION ON

HUMAN RIGHTS https://www1.nyc.gov/site/cchr/community/covid-employment.page (last updated Nov. 1, 2021) (emphasis added).

Indeed, in a recent decision where the petitioner alleged his employer failed to engage in a cooperative dialogue with respect to his reasonable accommodation request, the First Department held **that the "[p]etitioner has not established that […] the [C]HRL required a more robust or individualized dialogue than the process he received**," where "the City publicly offered public information on its process for reviewing accommodation requests related to the vaccine mandate, and informed employees about how to apply to their agency's Equal Employment Opportunity office and how to appeal denials," and where "the parties further engaged during the administrative appeals process." See Matter of Marsteller v. City of N.Y., 2023 NY Slip Op 03308 (App. Div. 1st Dep't., Jun. 20, 2023) (emphasis added), annexed to the Linnane Aff., Exh. D.

Moreover, pursuant to the Second Circuit's determination in Kane v. De Blasio that the Plaintiffs were to be "afforded an opportunity to have their accommodation requests promptly reconsidered," Petitioners were invited to submit additional information to the Citywide Panel for a "fresh look" at their RA Requests. See Kane, 19 F.4th 152, 164.

Here, Respondents have clearly met their obligation to engage Petitioners in the requisite interactive dialogue, specifically (1) advising Petitioners of the reasonable accommodation application and appeal processes, processes of which the Petitioners availed themselves; (2) the DOE's reasonable accommodation process; and, (3) engaging Petitioners in a "fresh look" with the Citywide Panel whereby their RA Requests were reconsidered. Accordingly, Petitioners' claims that Respondents failed to engage in an cooperative dialogue are entirely without merit, and must be dismissed.

D. Executive Order No. 62 is Irrelevant to Respondents' Determinations of Petitioners' Vaccine Exemption Request

Petitioners' contention that Mayor Eric Adams' issuance of Executive Order No. 62 ("Order 62") on March 24, 2022, which provided exemptions from the City's private employers vaccine mandate for, among others, athletes and performers, has any bearing on the instant matter is preposterous. As it pertains to Order 62, Petitioners appear to contend that the Vaccine Mandate is unlawful because "adult entertainers and their entourages were exempt from COVID-19 vaccine mandates for the economic benefit of the City and the Mayors [sic] large donors while most other private and public sector employees, even those who had far less contact with the public or colleagues than strippers and make-up artists, had to continue to be vaccinated to maintain employment." See Pet. ¶61.

This exact argument was recently made by the Municipal Labor Committee[8] in its third unsuccessful lawsuit challenging the City's vaccine mandate. See Decision + Order on Motion in MLC v. Adams, et al., Index No. 158863/2022 (Sup. Ct. NY Co.) (Jan 13, 2023), NYSCEF Dkt. No. 21 ("MLC III"), at 2-3 ("At the crux of petitioners' argument is that public employees are now being treated differently [from private employees] for arbitrary reasons…"). The Court squarely rejected petitioners' argument that the lifting of the private mandate somehow rendered the public mandate arbitrary and capricious, holding:

> Moreover, as previously stated, it is clear within the context of an emergency that respondents have both a rational basis and compelling governmental interest to treat public employees different than private employees to ensure the continuity of government operations in order to perform essential services for New Yorkers.

[8] The Municipal Labor Committee ("MLC") is the statutory umbrella organization of the City's 102 public sector unions.

Id. at 4-5.

The Court's reasoning in MLC III is sound, and should be adopted here. The vaccine mandate for private employers and the vaccine mandate for public-sector employers were created and issued separately and existed independently of each other. Moreover, the partial lift of the private employer mandate is irrelevant: an individual chooses whether to attend a sporting event, eat at a restaurant, participate in adult entertainment, or see a Broadway show, based on their level of comfort of potential exposure to COVID-19. That was not the case for any individual interacting with a DOE employee. Individuals living and/or working in New York City were entitled to the assurance that their interactions with members of the City's workforce, including members of, among others, the DOE, NYPD, FDNY, H&H, etc., will not increase their risk of contracting COVID-19. Indeed, the court in Deletto v. Adams found that "Public employees, because they work for the public, are subjected to many more restrictions than employees for private companies, "and that "differences between how private and public employees are treated is not a basis to vacate the vaccine mandate." Deletto v. Adams, 2022 NYLJ LEXIS 1306 at *12 (N.Y. Sup. Ct. N.Y. Cty. 2022). As Justice Latin aptly noted in MLC III, "here, it is clear that within the context of an emergency, the respondents would have a rational basis and a compelling governmental interest to continue vaccination requirements for public employees in order to ensure the continuity of government operations and that the workforce is able to perform essential services for New Yorkers." Accordingly, Executive Order No. 62, and any claim asserted about the nature of that Order, is wholly irrelevant to the analysis of whether denying Petitioners an exemption to the DOE vaccine mandate, which Petitioners acknowledge applied to them, was arbitrary and capricious.

POINT II

PETITIONERS LACK STANDING TO CHALLENGE THE IMPACT ARBITRATION AWARD

In the Petition, Petitioners challenge their placement on LWOP, the termination of their positions of employment with the DOE, and the terms of the Arbitration Award itself, asserting that "the DOE adopted a facially unconstitutional and discriminatory religious accommodation policy." See Pet. ¶¶5, 74-77, 165-166, 518 at 121, 536 at 124.

However, Petitioners do not have standing to challenge the terms of the Arbitration Award, because Petitioners' union negotiated on their behalf with the DOE, and the Arbitration Award was a result of those negotiations. See Masciarelli, Index No. 726150/2022 (Sup. Ct., Queens Cty., May 30, 2023) ("individual members of the teacher's union lack standing to maintain […] a lawsuit since a union member has no individual rights under a collective bargaining agreement."); see also Matter of Donas v. N.Y. City Dep't of Envtl. Protection, 60 Misc 3d 1221(A), 2018 N.Y. Slip. Op. 51192(U), *12 (Sup. Ct., New York Co. 2018); Fleischer v. Barnard Coll., 2021 U.S. App. LEXIS 34226 *11 n. 1 (2d Cir. Nov. 18, 2021). New York courts have routinely held that a union-represented employee cannot challenge an arbitration award rendered in proceedings between the employee's union and their employer. Maniscalco v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y., 2022 NY Slip Op 30893(U), ¶ 3 (Sup. Ct. N.Y. Cty. Mar. 15, 2022). Furthermore, DOE's terminations of some of the individual Petitioners' positions of employment was an employment decision that directly resulted from the Arbitration Award, which was incorporated into Petitioners' collective bargaining agreement ("CBA"), Therefore, Petitioners' challenges to those determinations fail. See Broecker, 2021 U.S. Dist. LEXIS 226848, at *17 (E.D.N.Y. Nov. 24, 2021).

Accordingly, as was held in Broecker, Petitioners were "placed on LWOP consistent with [their] CBA[] and the incorporated arbitration award[]." Id. Because none of the Petitioners here was a party to the arbitration that resulted in the Arbitration Award, Petitioners entirely lack standing to challenge that award. Therefore, their challenge to the arbitration award must be denied.

POINT III

PETITIONERS CANNOT BRING A CLAIM FOR EMPLOYMENT DISCRIMINATION UNDER THE NEW YORK STATE CONSTITUTION

It is a general rule that New York plaintiffs lack private rights of action under the State Constitution. See Brown v. State, 89 N.Y.2d 172, 186 (1996). Article I, § 11 of the New York State Constitution provides that:

> No person shall be denied the equal protection of the law of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by an firm, corporation or institution, or by the state or any agency or subdivision of the state.

NY Const. Art I, § 11. Under Article 1, § 11, the "Civil Rights Clause contained in the second sentence prohibits private as well as State discrimination as to 'civil rights.'" People v. Kern, 75 N.Y.2d 638, 651 (1990). "The Civil Rights Clause is not self-executing, however, and prohibits discrimination only as to civil rights which are 'elsewhere declared' by Constitution, statue or common law." See Kern, 75 N.Y.2d at 651.

The SHRL and CHRL provide avenues of redress for claims of alleged employment discrimination, including discrimination on the basis of religion. Therefore, Petitioners "cannot assert a private cause of action for violation of said section of the NY Constitution for [respondents'] alleged acts of discrimination." See Robbins, 2017 N.Y. Misc. LEXIS 4415, at *6;

see also Brown, 89 N.Y.2d at 183 ("rights guaranteed [by Article I, § 11]…may be enforced in Supreme Court to recover damages for private acts of discrimination **although enabling legislation was required before the action could be maintained because the provision was not self-executing**.") (emphasis added).

Here, Petitioners' assertions that the DOE's religious accommodation policies violate their Equal Protection rights under the New York State Constitution Clause is, nonetheless, merely a thinly-veiled employment discrimination claim that is cognizable under the SHRL and CHRL. See Pet. ¶¶544-549 (at 126-127). Accordingly, Petitioners' allegations that Respondents discriminated against them in violation of Article I, § 11 of the New York State Constitution must, as a matter of law, be dismissed.

Petitioners also fail to state a claim for violation of the New York State Constitution's Equal Protection Clause. A law that is facially neutral and generally applicable is subject to rational basis review even if it incidentally burdens a particular religious practice. See We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 280 (2d Cir. 2021); C.F. v. New York City Dept. of Health & Mental Hygiene, 191 A.D.3d 52, 78 (2d Dep't 2020); Ferrelli v. State, No. 031506/2022, 2022 N.Y. Misc. LEXIS 7339, at *16 (Sup. Ct. Rockland Co., Aug. 2, 2022). The vaccination mandate is generally applicable because it applies to all City employees and is facially neutral because "its restrictions apply equally to those who choose to remain unvaccinated for any reason." not just for religious reasons." Kane v. DeBlasio, 19 F.4th 152, 164 (2d Cir. 2021). Thus, the vaccination mandate is subject to rational basis review.

Plainly, the Vaccine Mandate survives rational basis review. Administrative action is rational if it has a sound basis in reason. C.F., 191 A.D.3d at 69; see also Farrelli, 2020 N.Y. Misc. LEXIS 7339, at *21-22 (alteration in original) (quoting Kane, 19 F.4th at 166) ("Rational

basis review requires [the policymaker] to have chosen a means for addressing a legitimate goal that is rationally related to achieving that goal."). The Vaccine Mandate is "a reasonable exercise of the [City's] power to act to protect the public health" during the COVID-19 pandemic. Kane, 19 F.4th at 166; see Deletto v. Adams, No. 156459/2022, 2022 NYLJ LEXIS 1306, at *11 (Sup. Ct. N.Y. Co., Sept. 26, 2022) (holding that "a vaccine mandate does not violate the free exercise clause under the New York State Constitution"); Brousseau, 2022 N.Y. Misc. LEXIS 6653, at *10 (Sup. Ct. N.Y. Co., Nov. 1, 2022) ("[T]here is no basis to find that the [COVID-19] vaccine mandate violates petitioner's constitutional rights."). Accordingly, the Vaccine Mandate does not violate the State Constitution's Equal Protection Clause, and this claim must be dismissed.

POINT IV

PETITIONERS' DEMANDS FOR DECLARATORY RELIEF AND THE INDIVIDUAL CLAIMS BROUGHT BY PETITIONER CASTRO ARE MOOT

"It is a fundamental principle . . . that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal." Hearst Corp. v. Clyne, 50 N.Y.2d 707, 713 (1980). This principle "forbids courts" from passing on "academic, hypothetical, moot, or otherwise abstract questions…" Id. In other words, the subject matter jurisdiction of a New York State court extends only to "live controversies." Saratoga Cnty. Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 810 (2003).

The doctrine of mootness is typically invoked when a "change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy." Dreikausen v. Zoning Bd. of Appeals, 98 N.Y.2d 165, 172 (2002). An action will be considered moot "unless the rights of the parties will be directly affected by the determination of the [action]

and the interest of the parties is an immediate consequence of the judgment." Hearst Corp., 50 N.Y.2d at 714. Stated differently, a matter is moot when "petitioners cannot receive the relief requested in the petition." Matter of Police Benevolent Assn. of N. Y., Inc. v. State of New York, 161 A.D.3d 1430, 1431 (3d Dept. 2018).

Here, Petitioners seek an order 1) declaring the denials of Petitioners' RA Requests for religious reasonable accommodations to the COVID-19 vaccine mandate null, void, and unenforceable; 2) declaring that the DOE's religious accommodation policies and practices violate the laws of the City and State of New York; 3) declaring that the DOE's religious accommodation policies and practices violate the New York State Constitution; and, 4) "[d]eclaratory [j]udgment that the DOE and Citywide Panel's denials of reasonable accommodation to the COVID-19 vaccine are null, void, and unenforceable. See Pet. at 127. In addition, Petitioner Castro, whose RA Request for a religious exemption to the DOE's COVID-19 vaccine mandate was ultimately was granted, and who was never terminated from his employment, nevertheless purports here to seek reinstatement with backpay. Petitioner Ruiz-Toro questionably too seeks the same relief as the other Petitioners, yet was granted an exemption to the Vaccine Mandate by the DOE.

It is undisputed that the BOH Order, dated February 9, 2023, lifted the requirement that a DOE employee be excluded from their workplace because they did not provide proof of vaccination against COVID-19. See Detectives Endowment Association et al., v. The City of New York et al., Index No. 154609/2022 (Sup. Ct. N.Y. Cty. May 17, 2023); see also the Order of the Board of Health Amending COVID-19 Vaccination Requirements for Department of Education Employees, Contractors, Visitors and Others, annexed to the Linnane Aff. as Exh. F. As stated by the Mayor of the City New York, the repeal of this requirement made "vaccination optional for

current and prospective" employees of DOE. Accordingly, Petitioners' demands for declaratory relief and the individual claims asserted by Petitioner Castro are moot and must be dismissed.

Indeed, the Second Circuit, in dismissing claims brought by a former New York City Police Department detective, who had contended that the COVID-19 vaccine mandate applicable to City employees was preempted by state and federal law and a violation of the United States constitution, itself declined to award declaratory relief because "the Defendants have repealed that [vaccine] mandate," and that "declaratory relief, […] requires an ongoing, "real and substantial" underlying dispute to confer subject matter jurisdiction." Marciano v. Adams, No. 22-570-cv, 2023 U.S. App. LEXIS 11915, at *2-3 (2d Cir. May 16, 2023), citing California v. Texas, 141 S. Ct. 2104, 2115-16, 210 L. Ed. 2d 230 (2021) (quotation marks omitted); see also Exxon Mobil, 28 F.4th at 394-95 ("a request for a declaratory judgment as to a past violation cannot itself establish a case or controversy to avoid mootness.")

An exception to the mootness doctrine arises when the "issue involved is likely to recur, typically evades review, and raises a substantial and novel question." Pataki, 100 N.Y.2d at 811; see also Hearst Corp., 50 N.Y.2d at 714-15. This exception is inapplicable to the instant proceeding.

First, there are no facts or circumstances that indicate or even suggest that the City, DOE, or Board of Health will again require its employees to demonstrate that they have been fully vaccinated against COVID-19. In its February 9, 2023, Order, the BOH indicated that it was repealing the requirement to show proof of vaccination because 99% of DOE employees and 90% of adults residing in New York City were fully vaccinated, and this "high rate of vaccination . . . has proven effective in lessening the burden of COVID-19 on the City's healthcare system." Here, there can be no reasonable expectation that the need to require COVID-19 vaccination will recur,

given that there is no reason to believe that the high rates of vaccination across New York City and among DOE workers that the mandates helped achieve will somehow decrease. See Reale v. Lamont, No. 20-3707-cv, 2022 U.S. App. LEXIS 1607, at *2 (2d Cir. Jan. 20, 2022) (summary order) (finding restrictions unlikely to recur and dismissing appeal from denial of preliminary injunction against defunct COVID-19 restrictions); see also Dark Storm Indus. LLC v. Hochul, No. 20-2725-cv, 2021 U.S. App. LEXIS 29863, at *3-4 (2d Cir. Oct. 5, 2021) (summary order) (dismissing appeal challenging COVID-19 restrictions as moot). As such, any concern that the City, DOE, or BOH will reinstate the requirement to show proof of vaccination is speculative, if not unfounded.

Because, as set forth above, there is no reason to believe that the City, DOE, or BOH will reinstate the vaccination requirement, there is no actual or concrete concern that DOE employees will ever have to show proof of vaccination against COVID-19 in the future. Stated differently, there is no reason to believe that the requirement to show proof of vaccination against COVID-19 is likely to recur. See Matter of Lasko v. Bd. of Educ. of the Watkins Glen Cent. Sch. Dist., 200 A.D. 3d 1260, 1262 (3d Dept. 2021) (finding Article 78 seeking to compel school district to consider telework as an accommodation moot when obligation to consider accommodation requests arose out of executive orders that were no longer in effect and unlikely to be restored); and Matter of Sportsmen's Tavern Llc v. N.Y. State Liquor Auth., 195 A.D. 3d 1557, 1558 (4th Dept. 2021) (appeal of Article 78 finding New York State Liquor Authorities' guidance unconstitutional moot where the pandemic-related prohibitions were no longer in effect and the issue was not likely to recur).

Second, the availability of judicial review can hardly be more evident. As of the filing of this memorandum, there are numerous pending Article 78 petitions challenging the denial

of accommodation requests to the Vaccine Mandate. Judicial review is, has been, and will be readily available for any person claiming to be aggrieved by any future vaccination requirement. See Matter of Sportsmen's Tavern, 195 A.D. 3d at 1558 (challenge to guidance would not evade review when other courts had already reviewed similar challenges). See also Vignali v. City of N.Y., Index No. 151552/2023 ("While no one can predict the future with certainty, even if the pandemic became severe again or the City were to experience some other health crisis that would raise the issue of mandatory vaccinations, any ruling on the petition before this court would not entitle Petitioner to a future exemption from a new requirement.")

Third, the denial of Petitioners' requests for accommodations to the Vaccine Mandate is not novel. Challenges to the denial of such requests, in the context of COVID-19, have been raised nearly 100 times in the past year. Further, the broader issue of determining whether an agency's decision was arbitrary or capricious is a routine issue raised in every Article 78. Indeed, similar to Justice Sabrina Kraus' analysis in Vignali v. The City of New York, et al., "[t]here is no basis in the record before this court to find that the requirement to show proof of vaccination against COVID-19 is likely to recur," "[n]or is the issue raised herein either one which typically evades review, or a novel and significant question not previously passed on." See Vignali v. The City of New York, at al., 2023 N.Y. Misc. LEXIS 2008, at *6-7 (Sup. Ct. N.Y. Cty., Apr. 25, 2023).

Finally, in light of the Citywide Panel's determination to grant Petitioner Castro's RA Request, the February 9, 2023 BOH Order, and the Citywide Panel's determination to grant Castro's and Ruiz-Toro's RA Requests, all of claims asserted herein by Petitioners Castro and Ruiz-Toro are moot. Castro is no longer required to show proof of vaccination against COVID-19. Likewise, and with similar effect, Ruiz-Toro's RA Request was granted. Castro and Ruiz-Toro do not and cannot dispute that foregoing obviated any requirement on them to become

vaccinated against COVID-19 in order to remain employed with the DOE. Castro does not and cannot dispute that at no time was he displaced from his employment with the DOE. Castro and Ruiz-Toro do not and cannot dispute that they no longer face the possibility of being placed on LWOP or being terminated because of their refusal to get vaccinated against COVID-19. Neither Castro nor Ruiz-Toro has suffered any pecuniary harm due to their status of being unvaccinated. There is simply no harm that can be further remedied by this Court.

Based on the foregoing, the City and BOH's decision to make vaccination against COVID-19 optional for DOE employees renders Petitioners' demands for declaratory relief and Castro's and Ruiz-Toro's individual demands moot. The narrow exception to mootness does not apply because the issue is unlikely to recur, judicial review is readily available, and the issue is neither new nor novel. Accordingly, all of Petitioners' demands for declaratory relief, and all of the additional claims asserted herein by Petitioners Castro and Ruiz-Toro, must be denied.

POINT V

FIVE PETITIONERS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

In the instant matter, the individual Petitioners allege that the denials of their RA Requests for exemptions to the COVID-19 Vaccine Mandate were arbitrary and capricious and violate the SHRL, CHRL, and New York State Constitution, and seek a judgment, inter alia, declaring that the Respondents' religious accommodation policies with respect to the Vaccine Mandate is unlawful, declaring the denials of their RA Requests null, void, and unenforceable, enjoining respondents from enforcing the vaccine mandate, and reinstating Petitioners' employment.

Petitioners Giammarino, LoParrino, and Smith, however, did not submit RA Requests to the DOE for religious exemptions to the Vaccine Mandate. See Pet. ¶¶333 at 74, 371

at 95, 386 at 84. As attested to in the Petition, the DOE offered a process by which employees could submit a request for a religious accommodation, and Giammarino, LoParrino, and Smith chose not to avail themselves of that process because they "objected" to it. See Pet. ¶¶163, 371 at 95. Simply because Giammarino, LoParrino, and Smith refused to submit a request for a religious exemption to the DOE pursuant to an established process does not render that policy arbitrary and capricious, and does not entitle them to relief here. "Whether or not Plaintiffs found the process available to their liking has no bearing on whether that process is constitutionally sound." Garland v. N.Y. City Fire Dep't., 574 F. Supp. 3d 120, 130; see also Engstrom v. Kinney Sys., 241 A.D.2d 420, 423-424 (N.Y. App. Div. 1st Dep't, 1997) (where an accommodation is sought, "[a]n employee's failure to inform his employer of his religious needs and to assist in the accommodation process may be fatal to the right of the employee to have his beliefs accommodated.").

Critical here, however, is that the Court simply cannot offer the relief requested by Giammarino, LoParrino, or Smith, nor that of Petitioners Ruiz-Toro and Castro, whose RA Requests were granted by Respondents, because the Court cannot void or annul an alleged denial that does not now, nor ever did, exist. Because Petitioners Giammarino, LoParrino, Smith, Ruiz-Toro, and Castro have failed to state a claim, their claims must be accordingly dismissed.

POINT VI

FOUR PETITIONERS FAILED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES PRIOR TO SEEKING JUDICIAL INTERVENTION

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57, 385 NE2d 560, 412 NYS2d 821

[1978]; see also Matter of Laureiro v. New York City Dep't. of Consumer Affairs, 41 AD3d 717, 837 NYS2d 746 [2007]; Matter of Dorme v Slingerland, 41 AD3d 596 838 NYS2d 159 [2007]).

As demonstrated in Point V above, Petitioners Giammarino, LoParrino, and Smith did not even submit RA Requests for exemptions to the Vaccine Mandate. They, therefore, are barred from seeking judicial intervention here.

In addition, after the DOE denied her RA Request, Petitioner Grimando did not appeal that denial. See Pet. ¶307 at 82. The Arbitration Award explicitly provides that, "If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE within one (1) school day of the DOE's issuance of the initial eligibility determination. The request for appeal shall include the reason for the appeal and any additional documentation." See Linnane Aff., Exh. B at 10. Despite this, no such appeal was ever requested by Grimando. Because Giammarino, LoParrino, and Smith did not even attempt to seek religious exemptions pursuant to the DOE policy, and because Grimando failed to appeal the DOE's denial of her RA Request at issue herein, they failed to exhaust their administrative remedies prior to filing suit, and their claims must, therefore, be dismissed.

POINT VII

PETITIONER GRIMANDO WAIVED HER ABILITY TO CHALLENGE THE DENIALS OF HER ACCOMMODATION REQUESTS AND TERMINATIONS

Petitioner Grimando entered into an agreement with the Department of Education, whereby she released all claims against Respondents when she signed an attestation extending her unpaid leave with health benefits ("Waiver"). See Waiver annexed to the Linnane Aff. as Exh. G. As such, all claims asserted here by Petitioner Grimando must be dismissed.

Pursuant to the Waiver, Grimando agreed to the following:

> "I […] opt to extend my leave without pay due to vaccination status through September 6, 2022. I understand that by selecting to extend such leave, I will be eligible to maintain health insurance through September 6, 2022. **I understand that if I have not returned by September 6, 2022, I shall be deemed to have voluntarily resigned and knowingly waive my rights to challenge such resignation**, including, but not limited to, through a contractual or statutory disciplinary process. I understand that upon the effective cate of such resignation, as it relates to the DOE, I lose all entitlements to reversion, retention, and tenure." (emphasis added.)

See Linnane Aff., Exh. G at 2.

Grimando further agreed to the following:

> "I understand that I have the right to return to employment at any time prior to September 6, 2022, if I provide to the DOE documentation that I have complied with the Commissioner of Health's order regarding vaccination of NYC Department of Education employees and inform the DOE that I seek to return before September 6, 2022. **In exchange for the right to return and extended health benefits as set forth herein, I agree to waive and release the DOE and any of its present or former employees or agents (collectively the "Released Parties"), from any and all claims, liabilities, or causes of action which were or could have been asserted by me against any of the Released Parties based upon anything that has happened up to now and including the date of the execution of this Attestation, including, but not limited to, any right or claim that may exist or arise** up to and including the date that this Attestation is signed." (emphasis added.)

Id.

The State of New York has a "public policy favoring enforcement of settlements." Booth v. 3669 Delaware, Inc., 92 N.Y.2d 934, 935 (N.Y. 1998). "Where, as here, the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties." Id; see also Ivasyuk v. Raglan, 197 A.D.3d 635, 636-37 (2d Dep't Aug. 18, 2021) (quoting Booth, 92 N.Y.2d at 935).

It is well settled that in New York, "a release is a contract, and its construction is governed by contract law" Carew v. Baker, 175 A.D.3d 1379, 1380 (2d Dep't 2019) (quoting Kaminsky v. Gamache, 298 A.D.2d 361, 361 (2d Dep't 2002)); see also Mangini v. McClurg, 24 N.Y.2d 556, 562 (1969) (a "general release is governed by principles of contract law"); accord Gyabaah v. Rivlab Transp. Corp., 102 A.D.3d 451, 451-52 (1st Dep't 2013). Furthermore, "a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release" although "a release may be invalidated, however, for any of the traditional bases for setting aside written agreements, namely, duress, fraud, or mutual mistake." Carew, 175 A.D.3d. 1379 at 1381. However, it is the burden of "the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release." Id. The 18 Petitioners have not, and will not be able, to meet that burden here.

As a preliminary matter, it should be noted that the contents of the Waiver were set out by the Impact Arbitration Award; therefore Grimando lacks standing to challenge the Waiver. See Linnane Aff., Exh. C, at 17. Specifically, the Arbitration Award held that:

> During the period of November 1, 2021, through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternatively opt to extend the leave through September 5, 2022. In order to extend this leave pursuant to this Section, and continue to receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. Employees who select this option shall continue to be eligible for health insurance through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the DOE before September 5, 2022, shall have a right to return to same school as soon as is practicable but in no case more than two (2) weeks following notice to the DOE. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned.

Id.

Here, though the Petitioners have not brought a CPLR 7511 proceeding to vacate the decision, as they were not a party to the arbitration that resulted in that award, they may not challenge it. See O'Reilly v. Board of Education et al., No. 2022-00684, Decision and Order, NYSCEF Dkt. No. 15 at 7 (1st Dep't Feb. 21, 2023) (holding that Petitioner lacked standing to challenge the impact arbitration award as "[w]hen a union represents employees during arbitration, only that union – not individual employees – may seek to vacate the resulting award"); Salas v. Board of Education et al., No. 2022-01699, Decision and Order, NYSCEF Dkt. No. 18 at 3 (1st Dep't Feb. 21, 2023) ("petitioners, who were not parties to the arbitration, cannot challenge the Impact Award…"). Therefore, it follows that, as Grimando cannot challenge the award itself, she cannot challenge the particulars of the Waiver which were set by the terms of the award.

Here, to the extent that Grimando may attempt to claim that her agreement to the Waiver was the product of coercion and/or duress, or that an email Grimando purportedly sent to "various" unspecified parties on November 30, 2021, invalidates the Waiver because she "explained that she was *not* waiving any rights," these claims are wholly without merit. See Pet. ¶¶309-313 at 82-83

Though Grimando alleges that she sent an email on November 30, 2021, without specifying to whom it was sent, in which she claimed she would not be waiving her rights, any such email has absolutely no bearing on the validity of the Waiver. Even if such an email *were* sent, Grimando has neither alleged, nor shown, either any new writing memorializing a new agreement was signed by the parties, or that there was new consideration. See NY General Obligation Law § 5-1103 ("an agreement […] to change or modify, or to discharge in whole or in part, any contract […] shall not be invalid because of the absence of consideration, provided that

the agreement […] changing, modifying, or discharging […] shall be writing and signed by the party against whom it is sought to enforce the change."); see also Ryan v. Kellogg Partners Institutional Servs., 19 N.Y.3d 1, 14 (2012) ("certain kinds of agreements must be expressed in a signed writing in order to bring the party against whom enforcement is sought" including "agreements made without consideration to change, modify, or discharge an existing contract or obligation").

Grimando has asserted that she "signed the waiver under duress." See Pet. ¶310 at 82. However, this claim amounts to nothing more than an admission that when Grimando negotiated with the DOE, she was in a poor bargaining position. Economic duress "is demonstrated by proof that one party to a contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand." 805 Third Ave. Co. v. M.W. Realty Assoc., 58 N.Y.2d 447, 451 (1983). Grimando, of course, has made no such showing. Furthermore, the fact that Grimando was allegedly dealing with alleged financial pressure from lack of income is not, of itself, sufficient to show duress, as "financial pressures, even when coupled with inequality in bargaining position, do not, without more, constitute duress." See Gubitz v. Security Mut. Life Ins. Co., 262 A.D.2d 451, 452 (2d Dep't 1999); see also Bruno v. Poughkeepsie, 121 A.D.2d 629, 629 (2d Dep't 1986) ("Financial pressures, even in the context of unequal bargaining power, do not constitute economic duress.") (quoting Grubel v. Union Mut. Life Ins. Co., 54 A.D.2d 686, 686 (2d Dep't 1976)).

Finally, as aptly noted by the Appellate Division in Nelson v. Lattner Enters. Of N.Y., 108 A.D.3d 970 (3d Dep't 2013), "contracts executed under duress are, at most, voidable and not void and, by accepting and retaining the benefits of the second agreement for almost two years and not timely repudiating it, plaintiff affirmed or ratified that agreement, which is binding

and no longer voidable on the grounds of duress, which objections are waived." Nelson, 108 A.D.3d at 972-73 (emphasis added). The Second Department has similarly adopted the view that ratification waives any challenge a party may have to the validity of an agreement. See, e.g., Forman v. Forman, 211 A.D.3d 698, 700 (2d Dep't Dec. 7, 2022) ("A party who 'accepts the benefits provided under a[n] agreement for any considerable period of time' is deemed to have ratified the agreement and thus, 'relinquishes the right to challenge the agreement'") (quoting Rio v. Rio, 110 A.D.3d 1051,1054 (2d Dep't 2013)); 110 Sand Co. v. Nassau Land Improvement Co., 7 A.D.3d 497, 497 (2d Dep't 2004) ("the appellant waived any claim of economic duress by its failure to promptly repudiate its waiver"); Sheindlin v. Sheindlin, 88 A.D.2d 930, 931 (2d Dep't 1983) ("[a] party who executes a contract under duress and then acquiesces in the contract for any considerable length of time, ratifies the contract […] Defendant is barred from suddenly raising issues of coercion, duress, inexperience and incapacity after his prior course of conduct.")

Here, Petitioner Grimando signed the Waiver on November 30, 2021. In exchange for obtaining a release of all legal claims and promise not to commence legal proceedings against the DOE or the released parties,[9] the DOE provided Grimando good and valuable consideration to. Pursuant to the Waiver, the DOE (1) extended Petitioners' LWOP period through September 6, 2022, giving Grimando additional time to comply with the Vaccine Mandate and, (2) continued to provide health benefits to Grimando for a periods of time of up to more than nine months, through September 6, 2022. See Linnane Aff., Exh. G at 2. Grimando availed herself of this consideration until the end of the contract period, *i.e.,* September 6, 2022. See Pet. ¶315 at 83. The Second Department has adopted the view that ratification waives any challenge a party may

[9] "Released parties" include the DOE and "any of its present or former employees or agents." See Linnane Aff., Exh. G at 2.

have to the validity of an agreement. See, e.g., Forman v. Forman, 211 A.D.3d 698, 700 (2d Dep't Dec. 7, 2022) ("[a] party who 'accepts the benefits provided under a[n] agreement for any considerable period of time' is deemed to have ratified the agreement and thus, 'relinquishes the right to challenge the agreement'") (quoting Rio v. Rio, 110 A.D.3d 1051,1054 (2d Dep't 2013)). By accepting the benefits of the agreements, Grimando ratified those agreements, and fully released Respondents from the meritless claims she has asserted in the instant matter, commenced many months after Grimando received the benefit of the bargain. Petitioner Grimando's claims must therefore be denied.

POINT VIII

CLASS CERTIFICATION IS IMPROPER

Petitioners seek an order "certifying this matter as a class action," where "[t]he class that Petitioners seek to represent consists of all current or former DOE employees or contractors who applied for religious accommodation from the COVID-19 vaccine mandate." See Pet. at 110, 127. Petitioners allege that the question of whether "conclusory, unsupported denials violate the NYSHRL and NYCHRL is a question common to all class members," and that "Petitioners' claims are […] typical of the claims of the class as a whole because all Petitioners are similarly affected by Respondents' discrimination and failure to ensure compliance with the NYSHRL and NYCHRL religious accommodation requirements." Id. ¶¶470-471.

As an initial matter, of the sixteen Petitioners named herein as potential class representatives, claims asserted by **seven** of those Petitioners fail, for reasons including, as previously discussed herein, failure to state a claim (where one named Petitioner's RA Request was granted and three named Petitioners did not even file RA Requests with the DOE), one named Petitioner waived her right to adjudicate the denial of her RA Request, one named Petitioner's claim is moot because his RA Request was granted and he was reinstated with backpay, and failure

by several named Petitioners to exhaust their administrative remedies prior to commencing legal action. Petitioners' claim that there are "questions common to all class members," and furthermore that "all Petitioners are similarly affected," which statement is demonstrably false, when the Petitioners have failed to establish, in this proceeding, questions common to a mere SIXTEEN proposed class members, is simply preposterous.

Nevertheless, the Second Department long ago determined that the principle of *stare decisis* "precludes class action certification in CPLR article 78 proceedings." Matter of Leone v. Blum, 73 A.D.2d 252, 274 (N.Y. App. Div 2d Dep't. 1980). Class action certification is inappropriate in Article 78 proceedings, especially when, as is the case here, government operations are involved. See Matter of Jones v. Berman, 37 NY2d 42, 57 (1975) ("where governmental operations are involved, and where subsequent petitioners will be adequately protected under the principles of stare decisis, class action relief is not necessary"; see also Conrad v. Regan, 155 A.D.2d 931, 932 (N.Y. App. Div. 4th Dep't. 1989) (where employees sued on behalf of a class of persons and challenged an administrative determination impacting [a proposed] class, class certification was denied); Coller v. State University of New York, 80 A.D.2d 166, 167-168 (where class certification was denied in an Article 78 proceeding when governmental operations were involved).

Fatal to Petitioners' request for class certification is that "class actions are not appropriate where **questions involving individual members of the putative class predominate** as a matter of fact and law." See Jones v. Christian, 120 A.D.2d 367, 369 (App. Div. 1st Dep't.) (emphasis added). Indeed, despite Petitioners' contention that "proposed class members share a well-defined community of interest with respect to both questions of law and fact involved because they are all being discriminated against by being denied equal access to […] reasonable

accommodation," the allegations set forth by the individual Petitioners serve to demonstrate that there are consequential questions of fact involving the individual members of the proposed class here. By way of example, the Petition alleges that Ruiz-Toro's RA Request was granted (*i.e.*, Ruiz-Toro was not denied reasonable accommodation), while Strk's RA Request was not granted, and that Kane submitted an RA Request to the DOE, while Smith did not submit an RA Request to the DOE. See Pet. ¶¶227 at 44, 371 at 95, 424 at 103, 458 at 109. Similarly, there are critical questions of law involving the individual members of the proposed class, for example, if the individual Petitioners, and any others within the proposed class who failed to exhaust their administrative remedies are, in fact entitled to the relief sought herein. See Leone v. Blum, 73 A.D.2d 252, 254 ("[p]otential class members should be first required to exhaust administrative remedies and cannot, absent special circumstances, circumvent this requirement through the mechanism of class action certification.")

It need only be added that this Court, in its review of Article 78 proceedings challenging the denials of reasonable accommodation requests for exemptions to the COVID-19 vaccine mandate, has consistently taken the view that "this Court's role is to […] ensure **each** of these [RA Request] decisions are reasonable and rational," and that "[i]n reviewing alleged arbitrary and capricious administrative determinations, a reviewing court's function is limited to "whether the record contains sufficient evidence to support the rationality of the...determination." See LaBarbera v. New York City Dep't of Educ., Index No. 85001/2023 (Sup. Ct. Richmond Cty., Apr. 4, 2023)(emphasis added.); see also Rivicci v. New York City Fire Dept., 2022 N.Y. Misc. LEXIS 9115, *6 (Sup. Ct. Rich. Cty., Oct. 5, 2022) (quoting Atlas Henrietta LLC v. Town of Henrietta Zoning Bd. Of Appeals, 46 Misc. 3d 325, 332, 995 N.Y.S.2d 659 [Sup. Ct. 2013] aff'd, 120 A.D.3d 1606, 992 N.Y.S.2d 667 (2014)). No less than the same reasoning should apply here,

and militates strongly against the propriety of certifying a class. The Court therefore should deny class certification in favor of its distinct function of reviewing an individual record to review and resolve individual Article 78 proceedings.

For the reasons stated above, Petitioners' class claims should be dismissed, and class certification accordingly denied.

POINT IX

PETITIONERS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES

It is well settled that in New York a prevailing party may not recover attorneys' fees in an Article 78 proceeding unless authorized by a statute, agreement, or court rule. See U.S. Underwriters Ins. v. City Club Hotel, LLC, 3 N.Y.3d 592, 597 (2004); see also Apple Towing Co. v. N.Y.C. Dep't of Consumer & Worker Prot., 2021 NY Slip Op 31191(U) at **6 (Sup. Ct., Kings Cty. 2021) ("[t]he general rule is that in Article 78 proceedings the prevailing party may not collect attorneys' fees from the loser"); McCrudden v. Putnam Val. Cent. Sch. Dist., 930 N.Y.S.2d 879, 879 (2d Dep't 2011) (reversing award of attorneys' fees in an Article 78 proceeding, as such an award is not authorized by any statute). Section 7806 of the CPLR provides that, "[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by petitioner." See N.Y. CPLR § 7806 (2015). Indeed, CPLR § 7806 provides **no** independent basis for an award of attorneys' fees. See Shields v. Blum, 436 N.Y.S.2d 393, 394 (3d Dep't 1981) ("There is no state statute permitting an award of [a]ttorneys' fees in an Article 78 proceeding." (internal quotation omitted)); Landmark West! v. Tierney, 806 N.Y.S.2d 445, 445 (Sup. Ct., N.Y. Cty. 2005) ("in the absence of a controlling statute authorizing a claim for attorneys' fees, each party bears its own."); Berkowitz v. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, 2014 N.Y. Misc. LEXIS 3934, *6 (Sup Ct., N.Y. Cty 2014) (attorneys' fees denied

where plaintiffs "failed to provide a basis (such as statute, court, rule, contract, or egregious conduct) for the recovery of attorneys' fees"); Badame v. Berger, 390 N.Y.S.2d 642, 643 (2d Dep't 1977) (In an Article 78 proceeding, the Court "find[s] no authority for awarding the petitioner attorneys' fees."). A petitioner in an Article 78 proceeding may be entitled to attorneys' fees under 42 USC (§) 1988 where [the petitioner] asserts a substantial federal constitutional claim. See Matter of Dechbery v. Cassano, 157 A.D.3d 499, 500, 69 N.Y.S.3d 22, 23 (App. Div. 1st Dep't. 2018); see also Walker v. City of N.Y., 262 A.D.2d 151, 152 (App. Div. 1st Dep't. 1999) (unanimously affirming the lower court's denial of attorneys' fees where "petitioner presented no bona fide civil rights claim that would warrant an award of attorneys' fees and costs.") Here, however, Petitioners fail to reference any statute or court rule, or provide any constitutional basis for an award of attorneys' fees. Accordingly, Petitioners' request for attorneys' fees must be denied in its entirety.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Verified Petition be dismissed, with prejudice, and the claims for relief denied in their entirety, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
August 10, 2023

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and County Court, the enclosed memorandum of law is produced using 12-point Times New Roman type and including footnotes and excluding the cover page, captions, table of authorities, and table of contents, contains approximately 9,937 words, which is less than the total words permitted by the Court pursuant to Respondent's request to exceed the word and page limit. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: New York, New York
August 10, 2023

s/ Kathleen M. Linnane
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