SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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STEPHANIE DICAPUA, et al,

Petitioners,

Index No.: 85035/2023

Hon. Ralph J. Porzio

-against-

CITY OF NEW YORK, et al.

Respondents.

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PETITIONERS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR PETITION FOR ARTICLE 78 RELIEF

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PRELIMINARY STATEMENT

Respondents fail to address the following key points, which must be deemed conceded:

- The undue hardship determinations applied the wrong legal standard and are unsupported by the record.
- The religious accommodation determinations were based on unconstitutional standards, and all denials are infected with the same discrimination.
- As recognized by over forty different New York State Supreme Court decisions, the conclusory denials at each level were too vague and generic to merit a finding of rationality under CPLR 7803.

Based on these errors of law alone, the Court must grant this motion. Respondents assert defenses that are largely waived, as they should have been raised in the motion to dismiss but were not. And these defenses rely on misstatements of law and fact and lack merit in any event. Petitioners' claims are not mooted by the rescission of the Mandate. This lawsuit isn't about the Mandate; it is about the religious accommodation policies applied under it. Petitioners are not made whole by the rescission of the Mandate, they require an order declaring that the denials of religious accommodation were null and void, *nunc pro tunc*, so that they can be reinstated with no break in services and receive their back pay and other ancillary damages. Respondents' standing and exhaustion arguments fare no better. The Second Circuit already held that Petitioners have standing to challenge the discriminatory Stricken Standards (*Kane v. De Blasio*, 19 F.4th 152, 167, fn 15 (2d

Cir. 2021) and it is well-settled law that a plaintiff need not exhaust unconstitutional or futile policies.

Respondents also improperly assert new arguments about class certification in their answer when the separate class certification motion was fully briefed over a month ago. These arguments should not be considered, but even if they were, they do not defeat class-wide relief in any event. The doctrine invoked by respondents requires a showing that *stare decisis* would afford relief to the whole class, and the government has acted in good faith to make it so. The opposite has proven true here. This counsels in favor of class certification. For these reasons and more, Petitioners respectfully ask this Court to grant their Petition for relief under CPLR 7803, extend it to all DOE employees who were subjected to the same facially defective policies if class certification is granted, and for such further relief as this Court deems just.

FACTS

A comprehensive recitation of the relevant facts is contained within the Verified First Amended Petition ["Petition" NYSCEF No. 40], along with the evidence and exhibits submitted therewith, all incorporated by reference.[1] [*See,* NYSCEF Nos 2-36; 48-70; 74-81]. The brief in support of this Petition contains a summary of some

[1] As set forth in the notice of motion [NYSCEF No. 41], the Article 78 relief proceeds on the Verified First Amended Petition, filed February 14, 2023 [NYSCEF No. 40]. Respondents were served with the amended version of the Petition on February 22, 2023, and again in hard copy on February 28, 2023. A review of their answer and citations to the Petition reveals that despite waiting six months to answer this urgent special proceeding, they did not likely respond to the Amended Petition. Respondents carelessly drawn answer (which denies even the most basic verifiable facts) does not provide much relevant information in any event.

of the key facts relevant to this motion. ["Pet. MOL" NYSCEF No. 7]. Where relevant, additional facts will be highlighted in this reply.

ARGUMENT

POINT I
THE MANDATE'S VALIDITY IS IRRELEVANT

A. Respondents' strawman arguments about the validity of the mandate are irrelevant.

Out of the gate, Respondents attempt to distract the court with a strawman – pretending that this case challenges the vaccine mandate itself and arguing at length that the Mandate was a lawful condition of employment. [NYSCEF No. 100 "Resp. MOL" at 5-8]. This issue is not before the Court. As the Petition clearly sets forth, the issue here is whether the religious accommodation policies were lawful, facially, and as applied to Petitioners and their similarly situated colleagues.

B. Petitioner's claims are not moot.

The Respondents argument that the repeal of the Mandate moots claims for relief is also misplaced. [Resp. MOL 16-21]. Because of the unlawful religious accommodation policies, Petitioners were harmed and suffered damages; a case is not moot where damages claims are asserted. *Warren v. Delaney,* 98 A.D. 799, 800 (1983). Petitioners also seek other relief that can only be achieved if the denials of accommodation are declared null and void *nunc pro tunc.* For example, seniority, pension credits and the right to reinstatement depend on such a ruling. The cases cited by Respondents solely involve claims for declaratory judgment as to past violations, in situations where petitioners were already made whole for any money or other damages incurred. [Resp. MOL at 19; *see, e.g., Marciano v. Adams,* No. 22-570-

CV, 2023 WL 347719, at *2 (2d Cir. May 16, 2023) ("Defendants' repeal of the vaccination mandate has 'completely and irrevocably eradicated the effects of the alleged violation,' given that Marciano seeks only injunctive and declaratory relief.")[2]

POINT II
THE COURT SHOULD GRANT ARTICLE 78 RELIEF

Respondents devote only two and a half pages of their thirty-three-page brief to addressing the substance of Petitioners' Article 78 claims. They fail to address, and therefore, must be deemed to concede, most grounds for relief asserted in the underlying papers. On these uncontested grounds alone, this Court can and should issue relief. Respondents' attempt to rebut the cooperative dialogue claim also fails, for the reasons set forth below.

A. The undue hardship denials were affected by errors of law.

All but one Petitioner seeking Article 78 relief who received a response to their request for religious accommodation was denied based on undue hardship. Respondents admit they applied the wrong legal standard, and the decisions are unsupported by the record.

1. The DOE's undue hardship denials were facially defective.

The DOE's autogenerated denials, sent to every single applicant, were facially defective, as a matter of law, for two reasons. First, the denials state that they used the *de minimis* burden test. This has never been the correct legal standard under the

[2] As set forth in the Pet. MOL, Petitioners Castro and Ruiz-Toro do not seek relief under Article 78. They represent a subclass of Petitioners who were initially denied and later "accommodated" albeit ineffectively. Their claims arise under the statutory and constitutional hybrid claims only.

NYSHRL and NYCHRL, each of which require individualized proof that accommodation would present a *significant* expense or difficulty. N.Y. Exec Law § 296(10(d); N.Y.C. Admin Code 8-107. The *de minimis* standard is not even lawful under Title VII, which requires an employer to prove a substantial hardship, as recently affirmed by the United States Supreme Court in *Groff v. DeJoy,* 600 U.S. ___, 2023 WL 4239256 (2023). Second, the denials wrongly assert that the Mandate does not allow DOE to accommodate any unvaccinated DOE employees in school buildings. But the Mandate clearly states that nothing therein prohibits reasonable accommodation, which, by law, includes allowing employees to work unvaccinated in school buildings unless they are a direct threat. [NYSCEF No. 3 ¶ 9]. Eric Eichenholtz ("Mr. Eichenholtz") Managing Attorney for Respondents' legal defense team, who had a significant role in determining the DOE and City's approach to the reasonable accommodation policies, admitted under oath that the Mandate does not preclude unvaccinated employees from working in person if granted a religious accommodation. [NYSCEF No. 21 ¶¶ 306; 310-311].

When determining whether an employee poses a "direct threat" that cannot be reasonably accommodated, "the employer must make an **individualized** assessment, based on reasonable judgment that relies on **current medical knowledge** or on the **best available objective information** to ascertain: the nature, duration and severity of the risk; the probability that the potential injury will actually occur, and whether reasonable accommodations, such as modification of

policies, practices or procedures, will mitigate the risk." *See* 9 CRR-NY 466.11 (emphasis added).

DOE failed to meet its burden on any of these factors, nor could it. The objective evidence at the time did not support the conclusion that unvaccinated religious employees posed a significant risk of substantial harm, as required. In fact, on August 5, 2021, two months *before* DOE issued the autogenerated undue hardship denials, then Director of the Centers for Disease Control and Prevention ("CDC") Rochelle Walensky ("Dr. Walensky") clarified on national television that Covid-19 vaccines could not stop infection or transmission. [Petition ¶ 68]. When the undue hardship denials were issued, Petitioners provided the DOE with expert affidavits from Dr. Jayanta Bhattacharya ("Dr. Bhattacharya") and Dr. Martin Makary ("Dr. Makary"), each widely cited and published experts in the field of public health (teaching at Stanford and Johns Hopkins). [NYSCEF Nos. 5-6]. Both professors stressed that the science overwhelmingly showed that natural immunity was superior to vaccine immunity, and that any employee with natural immunity could easily be accommodated. Each averred that the science did not show that allowing those without natural immunity to teach in person presented a direct threat either. [*Id*.] Though he emphasized that vaccinated teachers could just as easily get and pass on Covid-19, Dr. Bhattacharya proposed alternatives to remote teaching, including daily symptom checks and periodic rapid antigen tests. [NYSCEF No. 5 ¶ 13]. Dr. Makary stated that unvaccinated employees did not pose a significant risk to anyone and

stressed that children were at very low risk of harm from Covid-19. [NYSCEF No. 6 ¶¶ 8-12].

Notably, there was no vaccine requirement for the one million plus students who attended New York City schools. [NYSCEF No. 2 ¶ 12]. Students could catch and spread Covid-19 and the vaccination status of a few thousand teachers would have made little to no difference in the sea of unvaccinated masses, even if, against the scientific evidence, vaccination could have stopped transmission. [*Id.*] All other school districts in the state, including adjacent school districts with overlapping populations and employees, allowed unvaccinated teachers and school personnel to work in school buildings, subject to state testing requirements. [NYSCEF No. 2 ¶ 190]. There was no reason why DOE could not have offered the same accommodation, as it had been allowing for the past year and a half before the Mandate went into effect on October 4, 2021.

The burden of proof is on the employer to prove that requested accommodations are not reasonable. *See, e.g.,* NYC Admin. Code § 8-102(18). "In light of the New York City Council's legislative policy choice to deem all accommodations reasonable except for those a defendant proves constitute an undue hardship" it must be presumed that the requested accommodation can be made absent proof in the record that it cannot." *Hosking v. Mem'l Sloan-Kettering Cancer Ctr.,* 186 A.D.3d 58, 83 (First Dep't 2020). To meet the burden, employers must show proof pursuant to enumerated statutory factors on economic and safety burdens. *See, e.g.,* NYC Administrative Code 8-102.

Respondents did not even pretend to make a good-faith effort to individually review whether accommodation was possible. They even sent the same autogenerated denial to employees who already worked remotely, or in administrative buildings. Take, for example, Petitioner Clark, an administrator who did not work in person with students and was already working remotely when she received the autogenerated denial claiming that it would be an undue hardship to accommodate her. [Petition ¶ 120]. It is hard to imagine anything more arbitrary and capricious.

This Court already found that the DOE's conclusory "undue hardship" denials are arbitrary and capricious, holding that: "Citing an "undue hardship" is not a sufficient explanation for the denial of reasonable accommodation. This generic denial continues to appear in various cases across the City regarding reasonable accommodation requests, with no explanations or reasoning being provided by City agencies to the Petitioners in these cases as to what the potential undue burden or undue hardship their individual reasonable accommodations would present…Therefore, this Court cannot, and will not, speculate as to whether NYC Administrative Code 8-107(ii) was even considered by the DOE when making their decision on the Petitioner's request." *LaBarbera v. N. Y.C. Dep't of Ed.,* Index No. 85001/2023 * 9-10 (Sup. Ct. Richmond Cty, Apr. 4, 2023). There is no reason why all the other DOE employees who got the same autogenerated email should not get the same relief.

2. The Citywide Panel undue hardship determinations were also defective.

The City asserts that all Petitioners, except one, were denied by the Citywide Panel on the basis of "undue hardship" regardless of their religious beliefs, because "classroom teachers" "could not physically be in the classroom while unvaccinated without presenting a risk to the vulnerable and still primarily unvaccinated student populations." [*See,* NYSCEF No. 86 at 7; NYSCEF No. 121 ¶ 29]. Though they bear the burden of proof, Respondents provide no evidence for this speculative and controversial conclusion which has long since been discredited.

In depositions, Mr. Eichenholtz admitted that the Citywide Panel used the *de minimis* standard to determine whether to uphold undue hardship determinations. [NYSCEF No. 21 at 65-69; 290-292]. Mr. Eichenholtz also prepared multiple affidavits for various litigations, all stating that the City followed the EEOC guidance, and applied a *de minimis* standard in judging undue hardship. [*See, e.g.,* NYSCEF No. 49 ¶ 33]. In a clever attempt to try to get around these fatal admissions in prior sworn testimony and evidence, Mr. Eichenholtz updated his affidavit for this litigation, reiterating that the Panel relied on EEOC guidance to apply the *de minimis* standard, but tacking on the following sentence (for the first time): "At all relevant times, under the New York City Human Rights Law, undue hardship required demonstrating significant expense or difficulty." [NYSCEF No. 101 ¶ 21]. Of course, and of note, his slippery addition does not assert that the Citywide Panel applied these heightened standards. It is clear from Mr. Eichenholtz's prior statements that though it is certainly true that the law required this showing, the Citywide Panel never applied this heightened undue hardship standard.

Though he now asserts that all teachers were denied based on undue hardship [NYSCEF No. 101 ¶ 29], in his deposition closer in time to the denials, Mr. Eichenholtz asserted repeatedly that the Citywide Panel did not assess any evidence of undue hardship for any applicant unless it was included in their individual appeal file. [*Id.* at 239-241]. He said this was particularly true for DOE appeals, as he and other Citywide Panel members were aware that DOE had accommodated multiple teachers granted religious accommodation pursuant to the Stricken Standards. [NYSCEF No. 21 at 264-267]. Mr. Eichenholtz asserted that any teachers denied based on undue hardship were therefore only denied after the Citywide Panel received documentation from the DOE explaining why they could not be accommodated, even though the DOE had accommodated other teachers, and that if this inquiry took place, the DOE's analysis would be in each employee's individual file. [*Id.*] But, in opposition to this Petition, Respondents submitted what they allege to be the complete record on appeal for each Petitioner. None contains a single document from the DOE supporting an undue hardship analysis, or any explanation why these teachers are distinguishable from the 162 that were accommodated under the Stricken Standards. [NYSCEF Nos. 110-123]. This alone establishes that the denials were arbitrary and capricious. *See, e.g., Schiefer v. Bd. of Educ. Of the City of New York, et al*, Index No. 155983/2022 *5 (Sup. Ct. New York Cty, Oct. 4, 2022) [NYSCEF No. 36].

Nor is there any evidence that Respondents engaged in good faith individualized analysis to determine hardship. Take for example, Petitioner Delgado,

who already worked remotely, but was allegedly denied based on "undue hardship" by the Citywide Panel on the grounds that she could not work safely in person. [Petition ¶ 398]. Again, the outcome could hardly be more arbitrary and capricious.

Like the DOE's determinations, nothing supports these conclusory findings. Mr. Eichenholtz admitted, under penalty of perjury, that no agency provided information to the Citywide Panel "as to the number of employees it could afford to employ without causing undue hardship." [NYSCEF No. 21 at 257]. He also affirmed that the "inability to pay employees" who were not able to work in person "has not come up." [*Id.* at 259-260], nor had any agency submitted any information about increased costs that could present an undue hardship if employees were accommodated. [*Id.* at 260-261]. Mr. Eichenholtz said the Citywide Panel did not ask the DOE to explain whether the remote worksites it set up were at capacity (they were not). [*Id.* at 267-270]. He also said that he was not aware of any direct threat analysis conducted for any employee [*Id.* at 273]. Mr. Eichenholtz could not recall any panel member assessing whether Covid-19 vaccination could limit the spread of Covid-19. [*Id.* at 275-266].

He finally conceded there is "no evidentiary requirement" from any agency on the undue hardship issue. [*Id.* at 287]. When pressed, Mr. Eichenholtz stated that he did not think analysis of those factors was necessary for an appellate body like the Citywide Panel, and there was no requirement that the agency "provide that kind of data." [296-302]. Bizarrely, Mr. Eichenholtz admitted that neither he nor the panel ever relied on any evidence or data to conclude that unvaccinated employees might

pose a substantial risk of significant harm if allowed to work in person unvaccinated. [*Id.* at 315-19]. He confirmed that the Citywide Panel did not assess the duration of any risk or any of the other statutory factors on direct threat either. [*Id.*]

From this testimony alone, it is patently clear that the Citywide Panel failed to meet its burden of proof on undue hardship. Outrageously, throughout the winter of 2021-2022, when the Citywide Panel was making its undue hardship decisions, the DOE was sending *actively infected and infectious* vaccinated teachers with Covid-19 back into the classrooms. [NYSCEF No. 2 ¶ 816]. Meanwhile, thousands of uninfected teachers with natural immunity were kept on leave without pay, and even terminated after the Panel decided it would be an "undue hardship" to allow them to be unvaccinated around the students.

Clearly, the Citywide Panel's denial of accommodation to all teachers must be reversed, *nunc pro tunc*, as these determinations failed to apply the correct legal standard or provide any support as required under the NYCHRL. *See, e.g.*, *Loiacono v. Bd. of Educ. of the City of New York, et al.,* Index No. 154875/2022 (Sup. Ct. New York Cty, Jul. 11, 2022) (Citywide Panel's conclusory undue hardship assertion, without sufficient support or individualized explanation was arbitrary and capricious).

B. The religious accommodation policies were discriminatory and affected by errors of law.

Respondents did not rebut, and thus also conceded, that all of the denials under the Stricken Standards are affected by errors of law. This isn't rebuttable. The Second Circuit already held that the policies were unconstitutional. *Kane,* 19 F.4th at 168.

Even the DOE admitted in Court that they are "constitutionally suspect." Yet, as set forth in the Petition and moving papers, DOE not only ratified these discriminatory policies, but zealously discriminated even further against religious minorities, arguing, for example, that Petitioner Kane, a non-denominational Buddhist, should be denied accommodation, because his religious beliefs, while unquestionably sincere, were not shared by Pope Francis. [Petition ¶ 8].

The Second Circuit chastised Respondents, reminding them that: "[D]enying an individual a religious accommodation based on someone else's publicly expressed religious views — even the leader of her faith —runs afoul of the Supreme Court's teaching that '[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, *or the validity of particular litigants' interpretations of those creeds*.'" *Id.* (Citing *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). The Court *italicized* the holding that it is unlawful for Respondents to question the validity of a particular applicant's interpretation of their creed. Yet, Mr. Eichenholtz admits that the Citywide Panel continues to question the validity of each applicant's interpretation of her creed, unlawfully substituting its own judgment for whether the sincerely held religious beliefs "actually prohibit" vaccination the way the employee believes they do. [NYSCEF No. 101 ¶ 20].

The only Petitioner that the Citywide Panel denied on a basis other than undue hardship was Heather Clark. Petitioner Clark is a devout Christian, who practices faith-based healing and has received guidance from prayer to avoid vaccines. She also believes in the sanctity of life, and objects to the use of aborted fetal cells in testing

or development of the vaccines. The Citywide Panel found that her religious beliefs are sincere, but substituted their judgment about whether they are "religious in nature."[3] This intrusive inquiry is precisely what the Second Circuit cautioned against. It is not for the government to decide if a religious employee is correct about what her faith requires. All that matters is "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in [her] own scheme of things, religious." *United States v. Seeger,* 380 U.S. 163, 185 (1965). Rather than rebut the claim that the Citywide Panel continued to be affected by errors of law about the appropriate criteria to judge religious accommodation applications, the affidavit and Concocted Summary affirms that the errors continue.

C. Respondents misstate the law and facts on cooperative dialogue.

The only substantive ground for relief that Respondents address is whether they met their obligation to engage in a cooperative dialogue. Respondents assert that they met their burden of engaging in individualized cooperative dialogue with each Petitioner by: (a) alerting employees that they can apply under the facially discriminatory Stricken Standards; (b) immediately sending every applicant an identical, generic and non-individualized email denial based on "undue hardship; and (c) providing "fresh review" (reluctantly and in bad faith in response to court orders)

[3] Respondents bear the burden to provide the full administrative record for each Petitioner and failed to do so. For example, Respondents do not even have Petitioner Clark's submission to the Citywide Panel in the "record", which might explain why Petitioner Clark suspected that the City did not even read her application. A declaration filed with Petitioner Clark's actual submissions is filed at NYSCEF No. 128. All of Respondent's files are similarly deficient, none even containing the "final denials" of relief they sent to each Petitioner.

to a tiny fraction of those denied through the Citywide Panel process. [Resp. MOL at 8-9]. These actions do not constitute cooperative dialogue.

Upon receiving an employee's request for an accommodation, the employer is required "to engage in a cooperative dialogue" with the employee, N.Y.C. Admin. Code § 8-107(28)(a)(2), that includes discussion of the employee's "accommodation needs; potential accommodations that may address [his or her] accommodation need ... and the difficulties that such potential accommodation may pose" for the employer," *Id.* at § 8-102. The dialogue "may involve a 'meeting with the employee who requests an accommodation, requesting information about the condition and what limitations the employee has, asking the employee what he or she specifically wants, showing some sign of having considered the employees request, and offering and discussing available alternatives when the request is too burdensome." *Vangas v. Montefiore Med. Cent.*, 6 F. Supp. 3d 400, 420 (S.D.N.Y. 2014) (quoting *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 218–19 (2d Cir. 2001))."Upon reaching a final determination at the conclusion of a cooperative dialogue ... the covered entity shall provide any person requesting an accommodation who participated in the cooperative dialogue with a written final determination identifying any accommodation granted or denied." N.Y.C. Admin. Code § 8-107(28)(d).

The failure to engage in a cooperative dialogue is independently actionable under the NYCHRL. In response to the holding in *Jacobson v. New York City Health & Hospitals Corporation*, 22 N.Y.3d 824 (2014), in which the Court of Appeals held that cooperative dialogue is not "an independent element" of discrimination claims

under the NYSHRL or NYCHRL, in and of itself compelling summary judgment, the New York City Council amended the NYCHRL to "legislatively modify [the *Jacobson*] holding." *Hosking*, 186 A.D.3d at 64 (quoting Report of the Governmental Affairs Division, Committee on Civil Rights, December 18, 2017, p.4). As revised, the NYCHRL provides that: "It shall be an unlawful discriminatory practice for an employer, labor organization, or employment agency or an employee or agent thereof to refuse or otherwise fail to engage in a cooperative dialogue within a reasonable time." N.Y.C. Admin. Code § 8-107(28)(a). The statute further provides that: "A covered entity's compliance with this subdivision is not a defense to a claim of not providing a reasonable accommodation." *Id.* at § 8-107(28)(f).

The Court of Appeals has long held that, even before it was amended to become an independent ground for summary judgment, "cooperative dialogue," at minimum, must be individualized, conducted in good faith, and show that the employer assessed all possible accommodations. *See, e.g., N.Y.C. Transit Auth. V. Exec. Dept., Div. of Human Rights,* 89 NY2d 79, 90 (1996) (employer failed to accommodate employee where the record did not show that "a genuine search for reasonable alternatives was undertaken."). Nothing in the record shows that Respondents engaged in this type of individualized, good faith analysis with any employee, nor did they provide any written summaries of the accommodations considered and rejected or show any proof of sincere effort to assess all possible accommodations. Instead, the DOE sent generic autogenerated undue hardship denials to every single applicant, regardless of whether they worked in person or remotely, and the Citywide Panel sent

autogenerated generic emails to each applicant stating only "Does not Meet Criteria" as a "reason" for denial. [NYSCEF No. 129]. The same "reason" ("Does not Meet Criteria") was provided to Petitioner Castro, as a basis for his accommodation.

Petitioners do not concede that the "Concocted Summaries" [NYSCEF No. 10] are part of the administrative record. The Concocted Summaries, which are not dated or signed, were emailed between counsel in anticipation of litigation, long after each Petitioner received their conclusory "does not meet criteria" denial, each of which state, on their face, that "this determination represents the final determination with respect to your reasonable accommodation request." [NYSCEF No 129]. But even if the Concocted Summaries are considered, they are vague and generic too, stating, in conclusory fashion, that teachers cannot work in person, and thus no teachers (even fully remote teachers, like Petitioner Delgado, apparently) can be accommodated.

Mr. Eichenholtz' deposition testimony (and a review of the "administrative record" for each Petitioner) establishes that none of these determinations were individualized, and that neither the DOE nor the Citywide Panel investigated any proposed accommodations with any data or deliberation. To the extent that the First Department's decision in *Matter of Marstellar v. City of New York*, 2023 NY Slip Op 03308 (First Dep't, Jun. 20, 2023) is held forth as overruling the long-recognized individualized review required to establish a cooperative dialogue under state and local law, this Court cannot follow that non-binding precedent. The Court of Appeals has repeatedly held that individualized review is a core legislative intent of the human rights laws, which cannot be overruled by judicial activism. *See, e.g.,*

Jacobson, 22 N.Y. 3d at 835-36. "When it amended the state HRL in 1979…the legislature sought to create an "individualized standard" for determining whether an employee could perform the essential functions of his or her job with reasonable accommodations. The legislature enacted this more tailored approach in response to judicial decisions which had insulated employers from liability based on the mere possibility, however speculative, that someone with the claimant's condition might become unable to perform certain job functions." *Id.* (internal citations omitted).

POINT III
PETITIONERS HAVE STANDING TO BRING THEIR CLAIMS

A. The fair representation doctrine does not apply.

Respondents argue that Petitioners lack standing to challenge the discriminatory criteria in the arbitration award. But the Second Circuit already rejected this argument when Respondents tried to use it in *Kane*. "Defendants suggest that Plaintiffs 'do not have standing to launch a direct attack on the terms of awards arising out of arbitrations initiated by their own unions without first alleging breach of the duty of fair representation'…but Defendants have not identified any provision in the relevant collective bargaining agreements that 'clearly and unmistakably' requires union members, including Plaintiffs, to arbitrate their constitutional claims." *Kane,* 19 F. 4th at 167, fn 15 (citing cases, including *14 Penn Plaza, LLC v. Pyett,* 556 U.S. 247, 260 (2009)).

It is well-settled that arbitration awards cannot bar employees from challenging any employment discrimination claims in court absent an express waiver in a collective bargaining agreement ("CBA") that clearly and unmistakably requires

members to arbitrate such claims. *Pyett,* 556 U.S. at 260. No such waiver provision exists in the governing CBAs, and Respondents, who bear the burden on this point, have not provided any evidence to the contrary.

Tellingly, the cases Respondents cite are breach of contract claims. [Resp. MOL at 13-14]. But Respondents omit key language from their quotations, in a blatant attempt to obfuscate the fact that the doctrine *is limited to* contract claims. For example, Respondents cite *Masciarelli v. New York City Dep't of Educ.*, Index No. 726150/2022 (Sup. Ct., Queens Cty. May 30, 2023) for the proposition that "individual members of the teacher's union lack standing to maintain […] a lawsuit." But the court actually states: "individual members of the teacher's union lack standing to maintain a **breach of contract** lawsuit…" *Id.* [NYSCEF No. 60 at *5] [Resp. MOL at 13].

B. Petitioners were not required to directly challenge the award.

It is also irrelevant whether Petitioners had standing to challenge the arbitrator's award. Petitioners have standing under the federal and state constitutions to challenge the DOE's ratification of the award, since State actors are prohibited from making or enforcing any unconstitutional law or policy. U.S. Const. amend. XIV; N.Y. Const. art. 1 § 11. Respondents are independently liable whether they wrote the discriminatory policy, encouraged, and endorsed the policy, participated in implementing the policy, enforced the policy after the fact, or, as here, all the above.

Second, pursuant to CPLR § 7803, Petitioners have standing to show that a final agency decision is arbitrary, capricious, contrary to law or an abuse of discretion. *Matter of Pell v. Board of Educ. Of Union Free School Dist.,* 34 N.Y.2d 222, 231 (1974). This is true even where the decision is based upon a collective bargaining agreement. *See, e.g., Metro. Movers Ass'n, Inc.*, 95 A.D.3d 596, 598-99 (First Dep't 2012) ("Comptroller's use of Local 814's collective bargaining agreement as the sole basis for determining the prevailing wage schedule was arbitrary and capricious" because it violated obligations set forth in the Labor Law). The government is obligated under the NYCHRL, NYSHRL, Title VII and the state and federal constitutions to refrain from discriminating against employees based on religion and to accommodate them unless they could prove that it would be an undue hardship. It is this obligation which respondents have repeatedly violated, and which is challenged here.

POINT IV
EXHAUSTION WAS NOT REQUIRED

Respondents cite *Watergate II Apts. v Buffalo Sewer Auth* for the proposition that: "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." 46 NY2d 52, 57 (1978). Once again, Respondents argument is misleading and omits key language from cases they cite. Specifically, they fail to mention that the Court then stressed: "The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power…or when resort to an administrative remedy would be

futile." *Id.* All three prongs apply here. The three named plaintiffs cited by Respondents successfully challenged the agency actions as unconstitutional. Further, exhausting remedies "would be futile" as the Stricken Standards facially excluded these Petitioners from the possibility of accommodation, and government employers are clearly not allowed to adopt facially discriminatory policies.

Rather than apply under standards that facially excluded her, Petitioner Smith became a named plaintiff *Kane*, and filed for emergency relief (which she won). Petitioners Giammarino and LoParrino, devout Catholics who were facially precluded from accommodation under the Stricken Standards, supported the *Kane* lawsuit challenging the illegal standards, and Respondents acknowledge that they each applied for religious accommodation once the possibility of consideration under lawful, non-discriminatory standards was ordered by the Second Circuit. [NYSCEF Nos. 116 and 118]. Neither was yet terminated and nothing in the NYCHRL or the NYSHRL supports Respondents' arguments that accommodation was foreclosed because Petitioners sent requests in November or December rather than late September. For one thing, the Stricken Standards state that they are "an alternative to any reasonable accommodation process" [NYSCEF No. 4 at 6]. The Stricken Standards further state they constitute the "exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests" *only* "where the requested accommodation is the employee not appear at school." [*Id.* at * 13]. Petitioners Giammarino, Smith and LoParrino all sought an accommodation that

would allow them to remain at school. Thus, even under the Stricken Standards, they were not precluded from seeking accommodation at any time before they were terminated. Second, the plain language of the NYCHRL requires employers to engage in cooperative dialogue "within a reasonable time with a person who has requested accommodation" (or upon notice that they may need it). N.Y.C. Admin. Code § 8-107 (28)(a). As soon as they were alerted that Petitioners Giammarino and LoParrino requested religious accommodation, Respondents obligation was triggered. Their failure to provide any response at all, short of termination, entitles these Petitioners to an award of summary judgment under the NYCHRL, because Respondents acknowledge they failed to engage in cooperative dialogue with them. *Id*.

POINT V
THE WAIVERS WERE UNLAWFUL

Respondents assert that Petitioner Grimando signed a waiver to keep her health insurance benefits and is consequently ineligible for relief. Petitioner asserts that to the extent it could be construed that she signed the waiver, it was under duress, and that when she selected "remain on LWOP" in SOLAS, she alerted the DOE in writing that she was not willing to waive any rights, including the right to challenge the denial of religious accommodation. [Petitioner ¶¶ 464-466].

The waiver of statutory rights is permitted only "to the extent that it can be ascertained that the legislative purpose is not contravened." *Matter of American Broadcasting Cos. v. Roberts*, 61 N.Y.2d 244, 249 (1984). The waiver in this case clearly violates the statutory scheme and was unlawful. New York Education Law § 3108, states: "no teacher or other employee of any board of education shall be

requested or required to make, execute and deliver a general release or waiver as a condition prerequisite to the payment of any salary, compensation, or other emolument to which he is entitled; and no board of education shall deprive any such teacher or other employee of the whole or any part of such salary, compensation or other emolument for refusing to make, execute and deliver a general release."

Petitioner Grimando was entitled to her health insurance benefits, even under the Stricken Standards. The award provides that employees shall be allowed to appeal, and states: "While an appeal is pending, the exemption shall be granted, and the individual shall remain on payroll…" [NYSCEF No. 4 at 11]. The award further states "The process shall be complete and final upon the issuance of an appeal decision." [*Id.*] Thus, Petitioner Grimando was entitled to appeal, and to retain her benefits until her appeal was decided. But inexplicably, the DOE did not allow her an appeal, either through the Stricken Standards, or through the Citywide Panel process. [Petitioner ¶ 461].

In *LaBarbera*, this Court recently decided a nearly identical case of a DOE employee who was on medical leave in September 2021, and applied for religious accommodation after the medical leave ended. In that case, petitioner was issued a conclusory denial, and denied any option to appeal. This Court held that "in not presenting the Petitioner with any option to appeal, the DOE's denial of Petitioner's reasonable accommodation request is presumptively arbitrary and capricious." *LaBarbara*, Index No. 85001/2023 at * 8. The Court also held that the waiver only applied retroactively and could not operate to bar future denials of relief. *Id.*

What was not before the Court was that on November 30, 2023, when DOE alleges that Petitioner Grimando signed a waiver, the Second Circuit had already held that the Stricken Standards were facially unconstitutional. Petitioner Grimando, and everyone else denied under the Stricken Standards, were entitled by law to have their unlawful denials vacated and were thus entitled to their benefits. At the very least, Petitioner Grimando and others like her were entitled to fresh review by the Citywide Panel, the denial of which is a new failure to accommodate claim in and of itself. So, pursuant to Education Law § 3108, the waiver requirement was unlawful and must be declared null, void, and unenforceable for all parties who signed after November 28, 2021. *See, e.g., Lambert v. Bd. of Educ. of the Middle Country Cent. Sch. Dist.*, 174 Misc. 2d 487, 489 (Sup. Ct. Nassau Cty, 1997) (declaring null and void a contract requiring all new teacher hires to waive tenure as a condition of employment, as it creates a waiver by fiat and violates the spirit of the Education Law § 3102 and § 3013).

To the extent that the Court cannot find in Petitioner Grimando's favor on the papers, Petitioners respectfully ask that this Court define a subclass of DOE employees who signed waivers, and decide those claims separately, after a fact-finding on the validity of the waivers, so that relief for the remaining subclasses need not be delayed.

POINT VI
CLASS ACTION RELIEF IS APPROPRIATE

The motion for class certification was already fully briefed, and Respondents did not raise an objection based on the Article 78 relief requested. To the extent that

this Court considers Respondents' new argument now, Respondent's argument should not prevent relief.

Respondents invoke the "government operations" rule to propose that actions challenging governmental operations may not be well-suited for class-wide relief. The primary reason is that where *stare decisis* provides relief to the whole class, class-wide relief may not be necessary. *Leone v. Blum,* 73 A.D. 2d 252 (2d Dep't 1980).

"The governmental operations rule is no bar to class certification. The rule cautions against class certification [in cases where] any relief granted to the named plaintiffs would adequately flow to and protect others similarly situated under principles of *stare decisis.* There are exceptions to this rule, however, such as where the governmental entity has repeatedly failed to comply with court orders affecting the proposed class, rendering it doubtful that stare decisis will operate effectively; where the entity fails to propose any form of relief that purports to protect the plaintiffs; where the plaintiffs' ability to commence individual suits is highly compromised, due to indigency or otherwise; or where the condition sought to be remedied by the plaintiffs poses some immediate threat that cannot await individual determinations." *New York City Coalition to End Lead Poisoning v. Giuliani*, 245 A.D.2d 49, 51 (1st Dep't 1987) (internal citations omitted).

This case meets those criteria. It is not one in which *stare decisis* will or has operated to afford relief to all the putative class members. The Second Circuit held that the Stricken Standards were facially unconstitutional, and still, even the named Petitioners have not seen their determinations reversed. "The government operations

rule does not prohibit class certification where, as here, although given full opportunity, defendants have failed to propose any other form of relief that even purports to protect the right of [class members] to retroactive reimbursement of which they have been wrongfully deprived." *Seittelman v. Sabol,* 217 A.D.2d 523, 5236 (1st Dep't 1995). While Respondents no doubt sought to prevent the certification of a class through their "offer" to extend the "fresh consideration" to others than the named plaintiffs after their policies were held unlawful in 2021, Petitioners assert these efforts were in bad faith, and the Citywide Panel, overseen by Respondents' defense counsel, did not have any intention of providing relief. In fact, Petitioners are only aware of one DOE employee who the Citywide Panel *ever* accommodated, and ninety percent of the proposed class never received "fresh review" despite promises made in Court. DOE still shows animus, refusing to even remove the problem codes placed on class-members files, or hire them back, despite critical staffing shortages, and the repeal of the Mandate last February.

And though over forty courts have held that the various religious accommodation denials are unlawful, and should be struck down, this relief has not benefited any of the putative class members at all and the Respondents continue here to trot out the same arguments court have repeatedly rejected. This case is a text-book example of an appropriate class action lawsuit. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). [NYSCEF No. 47, 94].

POINT VII
PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES

Petitioners are entitled to attorney's fees as incidental relief to enforce statutory and constitutional rights through the hybrid Article 78 relief, and pursuant to the statutory causes of action, and most likely 42 U.S. § 1988, as one of the ways that the religious accommodation policies are affected by errors of law are that they are unconstitutional. *See, e.g., Latino Officers Ass'n v. City of New York,* 253 F. Fupp. 2d 771, 782 (S.D.N.Y. 2023). Petitioners respectfully ask this Court for leave to submit further briefing on attorney's fees if they are the prevailing party on the Article 78 Petition.

CONCLUSION

Based on the foregoing, and on all the papers and evidence submitted in this action to date, Petitioners respectfully request that this Court grant the Petition.

Respectfully Submitted,

Dated: August 12, 2023,
Ithaca, New York

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Sujata Gibson, counsel for petitioners and an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law contains 6,990 words, excluding the parts exempted by § 202.8-b(b) and that a letter motion seeking to enlarge the word limit set forth in 22 NYCRR § 202.8-b was filed and granted, allowing up to 7,000 words in this reply.

In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: August 12, 2023,
Ithaca, New York

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