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Via Electronic Filing
Catherine O'Hagan Wolfe, Clerk of Court
U.S. Court of Appeals for Second Circuit
40 Foley Square New York, NY 20007

RE: *New Yorkers for Religious Liberty v. The City of New York*
Case No. 22-1801

Dear Ms. O'Hagan Wolfe:

On September 6, the New York Supreme Court held that the Citywide Panel's denial of religious accommodation to ten of the Appellants in the *Kane/Keil* appeals was arbitrary and capricious, ordering immediate reinstatement and back pay. [Doc. No. 132 ("*DiCapua*")]. *DiCapua* does not moot any issues in this appeal, but it does highlight why the district court's orders were in error and should be reversed.

1. The *DiCapua* decision

This year, 16 of 21 *Kane/Keil* Appellants filed a hybrid Article 78 proceeding to enforce their state law claims after the district court declined supplemental jurisdiction.[1] Appellees moved to dismiss, asserting *res judicata* and *collateral estoppel,* in direct violation of their promise to this Court during oral arguments. Their motion was denied. Next, the court granted Article 78 relief, joining the vast majority of courts in holding that the Citywide Panel's decisions were arbitrary and capricious, and do not meet the basic statutory accommodation standards. *Id.* at 13, 17.[2]

[1] Only the named *DiCapua* plaintiffs removed their state claims to state court.

[2] *See, e.g., DeFonte, v New York City Fire Dep't.*, 2023 N.Y. Misc. LEXIS 4249, at *2 [Sup Ct, Richmond County Apr. 27, 2023, Index No. 85036/2023]; *Duarte v. NYPD & NYC*, Index No. 157213/2022, NYSCEF Doc. No. 52, 3/28/2023; *DePaola v. FDNY & NYC*, Index No. 85265/2022, NYSCEF Doc. No. 52, 3/27/23; *DiDonato v. City of New York, et. al.*, Index No. 722922/2022, NYSEF Doc. No. 46, 3/09/2023; *Sprague v. NYPD & NYC*, Index No. 718618/2022, NYSCEF Doc. No. 41, 3/09/23; *Agugliaro v. Eric Adams*, Index No. 156866/2022, NYSCEF Doc. No. 47, 2/14/23, p. 7; *McMichael v. NYPD & NYC*, Index No. 157939/2022, NYSCEF Doc. No. 37, 2/06/23; *Perez v. NYPD & NYC*, Index No. 718825/2022, NYSCEF Doc. No 38, 2/06/23, p.

The state court erred by deciding the remaining claims on a summary basis too, even though no summary judgment motion was noticed and those claims were not yet before the court. Four *DiCapua* plaintiffs were thus shut out of relief, since Article 78 only grants damages "incidental" to reinstatement,[3] on the grounds that "Petitioners cite no case law in support of their requests" for compensatory and other damages under the plenary claims (though briefing was not yet due). Two more were denied improperly based on factual disputes. The summary denial of the hybrid claims was improper. It is well-settled law that separate procedural rules apply to the hybrid claims, and that "[t]he Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment." *Matter of Rosenberg v. New York State Off. Of Parks, Recreation, & Historic Preserv.,* 94 A.D. 3d 1006 (2d Dep't 2012). Petitioners are moving to reargue/appeal any determinations on the plenary claims, which were not on the merits and should not be considered here. Nonetheless, the Article 78 relief, which was properly decided, is quite significant to this case.

5; *Grullon v. NYC, NYPD, and PBA*, Index No. 156934/2022, Doc. No. 53, 2/06/23; *Cepeda v. City of New York, et al.*, Index No. 157658/2022, NYSCEF Doc. No. 39, 2/03/23, p. 9; *Baratta v. N.Y.C. Police Dep't, et. al.,* Index No. 85223/2022, NYSCEF Doc. No. 31, 2/01/23; *Maxwell v. NYPD & NYC*, Index. No 719355/2022, NYSCEF Doc. No. 336, 1/30/23, p. 6; *Moscatelli v. NYPD & NYC*, Index No. 157990/2022, NYSCEF Doc. No. 35, 12/23/2022, at p. 7-8; *Banome v. FDNY & NYC*, Index No. 159686/2022, Doc. No. 24, 12/06/22, at p. 2; *Finley v. NYC & FDNY, Index No. 717617/2022, 11/17/2022; Curatolo v. FDNY & NYC*, Index No. 85219/2022, Doc. No. 38, 12/13/22; *Soto v. NYPD, et. al.*, Index No. 157784/2022, NYSCEF Doc No. 40, 11/14/2022; *Stewart v. NYPD & NYC*, Index No. 157928/2022, Doc. No. 25, 11/9/22, p. 5; *Brousseau v. NYPD & NYC*, Index No. 157739/2022, Doc. No. 34, 11/1/22, p. 5-6; *Sutliff v. Eric Adams, et. al.*, Index No. 156891/2022, Doc. No. 27, 10/24/2022, p 5; *Anderson v. Eric Adams, et. al.*, Index No. 156824/2022, Doc. No. No. 23, 9/13/2022. 32, 10/21/22; *Rivicci* v *New York City Fire Dept.,*2022 NY Slip Op 34070[U] (Sup Ct, Richmond County 2022, Index No. 85131/2022); *Deletto v. Eric Adams, et. al.*, Index No. 156459/2022.

[3] Ruiz-Torres was accommodated under the Stricken Standards, Castro was accommodated by the Citywide panel, and Solon and Giammarino had to get vaccinated to avoid ruin. LoParrino and Grimando's claims were improperly denied based on factual disputes.

2. Merits Impact

A. Impact on Free Exercise Claims

DiCapua confirms that the Citywide Panel did not comply with statutory religious accommodation requirements, as ordered by this Court, which refutes Appellees' argument that the Citywide Panel review can somehow "cure" the constitutional violations this Court already recognized in *Kane v. De Blasio,* 19 F.4th 152 (2d Cir. 2021) (per curiam).

In *Kane*, this Court held that Appellants are likely to succeed in their Free Exercise challenge, because the DOE adopted and enforced a facially discriminatory religious accommodation policy ("Accommodation Standards"). *Id.* at 167-69. The Court held that strict scrutiny applies, finding the Accommodation Standards were "not neutral" because the policy discriminates against unorthodox religious beliefs [*Id.* at 168] and "were not generally applicable" because the arbitrators "had substantial discretion over whether to grant those requests." *Id.* at 169. As a form of preliminary injunctive relief, the Court ordered the City to provide fresh review of the accommodation requests through a newly proposed "Citywide Panel" ("Panel") and to reinstate with back pay any plaintiff who qualified under the federal, state and local religious accommodation standards.

Appellees contend that the Panel's "fresh review" somehow allows dismissal of the claims, without judicial review on the merits, because Appellees claim they followed this Court's order to comply with the statutory standards in affirming denial of relief. This argument never made sense. Even if the City had met the statutory requirements in the Panel reviews, neutrality was already defeated through Appellees' initial endorsement of the *facially discriminatory* Accommodation Standards policy, and strict scrutiny does not go away just because there is a subsequent mid-litigation review affirming the original denial. Rather, even a subtle departure from neutrality, once recognized, triggers strict scrutiny of every level of review to ensure that the subsequent denials

are not pretextual or infected with the same errors, as alleged here. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S.Ct. 1719, 1731 (2018).

But even if Appellees could erase the acknowledged constitutional violations mid-litigation by having their defense attorneys (who lead the Panel) provide a "fresh review" that appears to comply with statutory standards, *DiCapua* unravels this argument. *DiCapua* explained that under New York's statutory standards, the City must reasonably accommodate an employee's sincere religious beliefs, unless they can show that it would cause a "significant interference with the safe or efficient operation of the workplace." *DiCapua*, at 13. The court found that the Panel's denials "are so lacking in reason" to support this burden that they are deficient as a matter of law, holding "as many Courts across New York City have, that simply providing 'does not meet criteria' without a timely individualized analysis is arbitrary and capricious.'" *Id.* at 17-18 (citing cases).

The court rejected the argument that the "Concocted Summaries" were part of the record, pointing out that they were provided by counsel *after* the compliance date on the "final determinations." Appellees themselves admitted in their briefing that these summaries were only provided to the original *Kane/Keil* plaintiffs because the matter was "sub-judice" and no such summary was ever sent to any other DOE employees reviewed by the Panel. The court held, though, that "even were this Court to review and consider the summaries provided by the Citywide Panel, they still would not rehabilitate the arbitrary and capricious nature of Panel's denials..." For example, "the decision to summarily deny the classroom teachers amongst the Panel Petitioners based on an undue hardship, without any further evidence of an individualized analysis, is arbitrary capricious and unreasonable." Pursuant to New York's statutory standards, the burden of proof is on the employer to prove that accommodation is not feasible. *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 Memorial Sloan-Kettering Cancer Ctr.*, 186 AD3d 58, 63-65 (1st Dept 2020). *DiCapua* affirms Appellants' argument that the Panel failed to meet statutory standards.

DiCapua also confirms that the Citywide Panel review was not generally applicable. In *Kane*, this Court held that where arbitrators exercised discretion to grant or deny applications, denials could not be deemed generally applicable. 19, F4th at 169. In *DiCapua*, the state court took issue with how arbitrary these discretionary decisions were. For example, Panelists found DOE could accommodate William Castro, an administrator who worked in schools, without undue hardship, but denied accommodation of Heather Clark, an administrator who never worked in school buildings, in part based on alleged hardship. *DiCapua,* at 18. The discretion and animus each trigger strict scrutiny of the Free Exercise claims. But, as the *DiCapua* decision highlights, these denials are arbitrary and capricious and cannot even survive a rational basis review.

B. Impact on Equal Protection and Establishment Clause Claims.

DiCapua underscores why this Court must reinstate the discrimination claims too. In *DiCapua*, Appellees admitted that the Panel denied *all* teachers based on a categorical assumption that it would be an undue hardship to accommodate them. By contrast, the DOE's prior Accommodation Standards, which this Court recognized as facially discriminatory, had no undue hardship barrier. Instead, that policy provided that "An employee who is granted a [] religious exemption []under this process and within the specific criteria identified above **shall be permitted the opportunity to remain on payroll**." [A-97 ¶70(i)]. Under that policy, 165 unvaccinated teachers remained accommodated through the repeal of the Mandate [A-108]. But the Panel

categorically denied all teachers based on alleged "undue hardship." Instead of curing the discrimination in the original Accommodation Standards, the Citywide Panel created a new constitutional violation, creating a different undue hardship standard for those favored by the discriminatory policy (e.g. Christian Scientists) than those who were discriminated against and sought fresh review. Take for example, Appellant Nwaifejokwu. Had Mrs. Nwaifejokwu been a Christian Scientist, she would be working today, like 165 others accommodated under the old policy. But her religion was categorically excluded under the Accommodation Standards. Then, though the Panel found her sincere, she was categorically excluded under that policy again anyway because of the Panel's blanket undue hardship policy for teachers [A-142].

This double standard on undue hardship violates the Establishment Clause, which commands that the government may "effect no favoritism among sects." *Larson v. Valente,* 456 U.S. 228, 246 (1982). It also violates the Equal Protection Clause. Appellants established their discrimination claims in multiple ways. Foremost, the DOE adopted a *facially discriminatory* policy that "expressly classifies" eligibility for accommodation based on which religion one belongs to. In such claims, the employer cannot "rebut" such a claim with evidence of a non-discriminatory reason, and plaintiffs are entitled to summary judgment unless defendants can prove an affirmative defense. *Trans World Airlines v. Thurston,* 469 U.S. 111, 121 (1985).

But the double standard on undue hardship also establishes a disparate impact claim, another basis for finding discrimination. Additionally, not only does the blanket policy on teacher accommodation (absent any support in the record) show that the Panel's reviews were likely pretextual, it also eviscerates any "dual motivation" defense, since "an employer may not...prevail in a mixed motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it *at the time of* the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252

(1989). The Accommodation Standards had no mechanism for undue hardship, and the Panel's mid-litigation proffer that all the teachers would have to be denied anyway due to undue hardship cannot cure the original discriminatory denials under any discrimination analysis framework.

3. Mootness

Appellees themselves acknowledged that "the impact of the state ruling depends" on whether they filed an appeal or not. [CMECF No. 204 at 2]. They did file, and automatically stay the relief, so the appeal is not moot. Moreover, all the *Kane/Keil* and *NYFRL* plaintiffs still seek compensatory, nominal, and other damages that Article 78 cannot supply, including the small subset who sought and were awarded summary relief (now stayed) in state court. Availability of these further damages in the Constitutional claims, even nominal damages alone, allows a court to award plaintiffs with "effectual relief," which means the claims are not moot. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796-802 (2021).

In sum, this Court's urgent relief is still needed. In fact, despite the repeal of the Mandate last February, to date, Appellants continue to face irreparable harm and retaliation. *None* of the *Kane/Keil* litigants have been allowed to return to work post repeal – not one! - even though they are well-qualified, and applied for positions the DOE is still desperately trying to fill. Instead, when principals try to hire them, they are told "legal" will not allow it. Additionally, both DOE and the rest of the City agencies are imposing a requirement that anyone they do hire back has to waive their right to continue this litigation, which is unconscionable and should not be tolerated. State court avenues of relief will be tied up for years on appeal.[4] Appellants desperately need this Court to intervene.

Respectfully Submitted,
/s/ Sujata S. Gibson

[4] *See, e.g.,* https://www.nycourts.gov/courts/ad2/PJ_Scheinkman_Initiatives.shtml

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cc: All counsel via ECF