SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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STEPHANIE DICAPUA, et al,

Petitioners,

Index No.: 85035/2023

ORAL ARGUMENT REQUESTED

-against-

CITY OF NEW YORK, et al.

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION TO VACATE AND REARGUE

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PRELIMINARY STATEMENT

On September 7, 2023, this Court entered a Decision and Order ("*Decision*") granting Article 78 relief to ten of the fifteen individual Petitioners in this case but denying further relief sought in hybrid claims pursuant to the New York State Human Rights Law ("SHRL"), New York City Human Rights Law ("CHRL") and the Equal Protection Clause of the New York State Constitution (collectively, "hybrid claims"). Separate procedural rules govern these claims, and Petitioners respectfully ask this Court to vacate the portions of the decisions prematurely addressing their hybrid claims. Petitioners also seek leave to reargue their motion for class certification, or alternatively, leave to file a new motion seeking certification of a narrower class.

STATEMENT OF FACTS

A comprehensive recitation of the relevant facts contained within the amended verified hybrid Petition [NYSCEF No. 40 "Petition"] along with affirmations, argument and evidence submitted in connection with this matter, are incorporated by reference in this consolidated memorandum of law. The following summary encapsulates key facts relevant here.

Petitioners allege that Respondents New York City (the "City") and the NYC Department of Education (the "DOE") engaged in a systemic pattern of widespread discrimination against DOE employees seeking religious accommodation from the City's Covid-19 vaccine mandate (the "Mandate"). Initially, DOE declared they would not reasonably accommodate religious objections to the Mandate. Then, forced to

adopt a religious accommodation policy through lawsuits and labor disputes, it adopted a facially discriminatory policy. [NYSCEF No. 4, "Stricken Standards"]; [Petition at ¶¶ 82-96]. Under the Stricken Standards, Christian Scientists are singled out for favor, and accommodation requests must be denied to applicants who do not belong to "established" and "recognized" religious organizations whose leaders are unvaccinated. [Stricken Standards at 9].

In implementing the Stricken Standards, DOE engaged in further discrimination. For example, DOE representatives aggressively argued that Petitioner Kane, a Buddhist, should be denied accommodation because even though they found him sincere, his religious beliefs conflict with those held by Pope Francis. [Petition ¶ 234]. Out of 7,000 applicants, only 162 were accommodated under the Stricken Standards. [Petition ¶ 137]. Those denied received no explanation other than an "X" next to the word "denied." [Petition ¶ 131-132].

In November 2021, the Second Circuit declared the Stricken Standards unlawful, holding that denying a religious exemption "based on someone else's publicly expressed religious views —even the leader of her faith—runs afoul" of the constitution and "the government may not second guess religious adherents' "interpretations of [their] creeds." *Kane v. de Blasio*, 19 F.4th 152, 168 (2d Cir. 2021) (quoting *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989)). As a form of preliminary injunctive relief pending litigation, the Court ordered the City to provide "fresh consideration" through a new "Citywide Panel" ("Panel") and reinstate

Petitioners that qualified under the governing standards of Title VII, SHRL and CHRL.

The City promised to extend this review more widely than the named Petitioners. But according to Eric Eichenholtz ("Mr. Eichenholtz"), Managing Attorney for the New York City Law Department, and architect of the Citywide Panel, the City reviewed less than 600 of the 7,000 DOE employees denied religious accommodation under the Stricken Standards [NYSCEF No. 69, "Eichenholtz Deposition" at 331]. Only one DOE employee, Petitioner William Castro ("Mr. Castro") was ever granted reinstatement by the Citywide Panel. [Petition ¶ 304]. The rest were either summarily denied or never received any response at all.

This Court vacated the Citywide Panel determinations for all Petitioners who received a determination in this case, holding, as many other courts have, that the Panel's decisions were arbitrary and capricious. In addition to providing no reasoning beyond "does not meet criteria", the City admits they categorically denied all teachers based on assumed undue hardship. Mr. Eichenholtz admitted in his deposition that the undue hardship determinations were not supported by evidence or analysis of the statutory factors, and that the City used the unlawful "*de minimis*" standard to assume undue hardship, which is an error of law. [Petition ¶ 124, 202-203; Eichenholtz Deposition at 66-67]. By contrast, the Stricken Standards do not allow for denial based on undue hardship. Those who qualified under those discriminatory criteria "shall" remain on payroll. No explanation was afforded for why the DOE could allow 162 unvaccinated DOE employees to keep working after they were deemed

qualified under the Stricken Standards, while issuing blanket denials based on undue hardship to all teachers reviewed by the Citywide Panel process.

The Court declined to grant relief to the four Petitioners who the Panel did not review, expressing confusion about why they were not reviewed. Though Petitioners do not seek to reargue the Article 78 claims, it is worth pointing out that this determination rested on misapprehension of the facts. The Petition states, and Respondents do not contest, that the Panel was not available to most DOE employees, including these four Petitioners, because Respondents did not allow review for anyone who did not apply and appeal under the Stricken Standards in September 2021. [AC ¶ 160]. According to Mr. Eichenholtz, DOE automatically sent the Panel the applications of the applications that DOE deemed to have met the winnowing criteria. [NYSCEF No. 69 at 46-48]. Those who had objected to the Stricken Standards as futile, or those who were not allowed to apply for religious accommodation in September because they had medical exemptions in place, were categorically excluded from any opportunity to get the supposedly nondiscriminatory consideration of their religious accommodation requests from the Panel. And those whose applications were automatically forwarded to the Panel for "fresh review" often received no determination anyway. This was the case for Petitioner Solon, who was notified in December 2021 that her application was being reviewed by the Panel, but never received a decision and was thus forced to get vaccinated to keep her job and avoid becoming homeless in February 2022.

ARGUMENT

POINT I
THE COURT SHOULD VACATE DENIAL OF THE HYBRID CLAIMS

The Court should vacate the parts of the decision denying relief under the hybrid claims pursuant to CPLR 5015(a)(4), as it lacked jurisdiction to summarily dismiss these claims at this stage. It is black letter law that: "In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand. The 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).

Especially, "where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action." *Matter of Kelly v. Farmingdale State Coll., State Univ. of N.Y.*, 215 A.D.3d 748, 751 (2d Dep't 2023) (reversing lower court's denial of hybrid causes of action and remanding for further proceedings); *see, also, Greenberg v. Assessor of Town of Scarsdale*, 121 A.D.3d 986, 989–90 (2d Dep't 2014); *Matter of Alltow, Inc. v. Village of Wappinger Falls*, 94 A.D. 3d 879, 882-83 (2d Dep't 2012); *Matter of Bonacker Prop., LLC v. Village of E. Hampton Bd. Of Trustees,* 168 A.D. 3d 928, 932-933 (2d Dep't 2019) (each vacating and remanding denial of hybrid claims).

It was an error to summarily dispose of the hybrid claims at the same time as the Article 78 claim. The Court already denied Respondents' motion to dismiss the hybrid claims on July 19, 2023 [NYSCEF No. 96]. No party moved for summary judgment. And it would be improper for this Court to consider a summary judgment motion *sua sponte,* as no notice was given. *Matter of G&C Transp., Inc. v. McGrane*, 72 A.D. 3d 819, 821 (2d Dep't 2010) ("The record contains no indication that the Supreme Court gave notice to the parties that it was contemplating the summary dismissal of the declaratory judgment causes of action at issue. Furthermore, the respondents/defendants made no application for that relief. Under these circumstances, the Supreme Court erred in directing the dismissal of those causes of action.") Petitioners humbly request that the Court vacate those portions of the decision and schedule further proceedings on the hybrid claims.

POINT II
ALTERNATIVELY, THE COURT SHOULD GRANT LEAVE TO REARGUE THE HYBRID CLAIMS

Petitioners reserve the right to respond formally if any summary judgment motion is noticed, and this section is not a substitute for that more fulsome response. However, to the extent the Court does not vacate the denial of the hybrid claims, Petitioners seek leave to reargue them pursuant to CPLR 2221(d). Motions for reargument are addressed to the sound discretion of the court which decided the prior motion, and which is bestowed with broad authority to vacate its prior orders. *See Viola v. City of New York*, 13 A.D.3d 439, 440 (2d Dep't 2004). Such a motion "…shall

be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion…"

A. These claims cannot be summarily dismissed even with notice.

Respectfully, the Court applied the wrong burdens in dismissing the statutory and constitutional claims. Petitioners bore the burden on the Article 78 claims. But to prevail on a summary judgment motion on the hybrid claims, Respondents bore the burden of establishing that there are no material issues of fact in dispute, and that they are entitled to judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Dallas-Stephenson v. Waisman,* 39 A.D.3d 303, 306 (1st Dept. 2007); The movant's burden is "heavy," and the facts and inferences "must be viewed in the light most favorable to the nonmoving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 47 (2013). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v. Griffin*, 71 A.D.3d 1112, 1115 (2d Dept. 2010). *See also*, *Walker v. Ryder Truck Rental & Leasing*, 206 A.D.3d 1036, 1037-38 (2d Dept. 2022). "If the moving party meets this burden, the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action.'" *Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014) (internal citations and quotations omitted). Respondent did not meet their burden.

1. Summary dismissal of the discrimination claims was improper.

Petitioners adequately plead multiple discrimination claims. It was not necessary for Petitioners to prove that the denials were pretextual at this stage, or at any stage for some of the claims, and it was error to place that burden on them or resolve the question against them.

Failure to Accommodate claim.

First, Petitioners adequately plead "failure to accommodate" claims under the SHRL and CHRL. These alone constitute discrimination claims. The SHRL and CHRL each define the failure to reasonably accommodate religious beliefs as an unlawful discriminatory practice, regardless of intent. SHRL § 296(10)(a); CHRL § 8-107(3). This Court already held that Respondents' denials of religious accommodation were unreasonable, even under the far more deferential standards of Article 78. For example, the *Decision* points out that under the New York's statutory standards, the City must reasonably accommodate an employee's sincere religious beliefs, unless they can *prove* that it would cause a "significant interference with the safe or efficient operation of the workplace." *Decision* at 13. Assessing the denials under Article 78 review, which does not necessarily place the burden of proof on the employer in the same way, this Court found that the Panel's denials "are so lacking in reason" that they are arbitrary and capricious. *Id.* at 17-18. If Petitioners met their burden to prevail under Article 78, they certainly met their lower burden of pleading a failure to accommodate claim under the statutory standards.

This is important, because unlike Article 78 claims, which can only yield damages "incidental" to relief available in the special proceeding, on their plenary

statutory claims, Petitioners (including those that do not seek reinstatement) are entitled to the full range of compensatory damages. S*ee, e.g.*, *Diggs v. Oscar De La Renta, LLC*, 169 A.D.3d 1003, 1004 (2019) (sustaining jury verdict for compensatory damages on CHRL). This Court held that "Petitioners cite to no case law in support of their request" for damages not incidental to Article 78 relief. [*Decision* at 21]. But this is because briefing has not occurred on the statutory claims yet, pursuant to the separate procedural rules governing the two actions.

First direct evidence discrimination claim.

Second, Petitioners plead a prima facie "direct evidence" discrimination claim because their employer adopted a facially discriminatory religious accommodation policy that conditioned access to accommodation on membership in a preferred religious organization. Most discrimination claims are based on circumstantial evidence (i.e., disparate impact). However, in the rare case, like this one, where a written policy is adopted that makes classifications based on a protected category, the Petitioner has plead a direct evidence claim of discrimination, which cannot be dismissed through summary judgment. Express classifications based on any protected class are subject to strict scrutiny and are rarely, if ever, constitutional. Express classifications based on religion are *per se* unconstitutional by a government employer, under multiple clauses of the constitution. *See generally* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 Mich. L. Rev. 245, 262 (1997).

The Second Circuit already held that these policies are unconstitutional: "The City concedes that the Arbitration Award…'may' have been 'constitutionally suspect,' [] and its defense of that process is half-hearted at best. Indeed, it offers no real defense of the Accommodation Standards at all." *Kane v. de Blasio,* 19 F.4th 152, 167 (2d Cir. 2021). "We confirm the City's 'susp[icion]' …" *Id.* First, the Court held that the written policy is not neutral, because on its face, it singles out unorthodox beliefs and faiths for disparate and unequal treatment: "We conclude, first, that the procedures specified in the Arbitration Award and applied to Plaintiffs are not neutral. The Supreme Court has explained that 'the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.' *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* ---U.S.---, 138 S. Ct. 1719, 1731 (2018)." *Id.* at 168. Next, the Court also acknowledged additional direct evidence of discrimination in the application of DOE's facially unlawful standards, for example, through DOE's pattern of recharacterizing people's beliefs as personal rather than religious. "Denying 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 of faith, *or the validity of particular litigants' interpretation of those creeds." Id.* at 168-169 (emphasis in original).

Respondents contend that the Panel's mid-litigation "fresh review," which was ordered as a form of preliminary injunctive relief, somehow allows dismissal of the direct evidence discrimination claims without judicial review on the merits. This argument never made sense. Ignoring for a moment those, like Grimando, Giammarino, LoParrino and Solon, who were never even given a fresh review by the Panel, and assuming *arguendo* the City had met the statutory requirements in the Panel reviews, neutrality was already defeated through Appellees' initial endorsement of the *facially discriminatory* Stricken Standards policy. It is well-settled law that strict scrutiny does not go away just because an employer articulates a new reason for denial after they are forced to admit the original denial was discriminatory. 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. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993); *Masterpiece Cakeshop*, 138 S.Ct. at 1731.

Petitioners assert the Panel's denials are pretextual. Courts cannot resolve the question of pretext against employees on summary judgment. *Lefort v. Kingsbrook Jewish Med. Ctr.*, 203 A.D. 3d 708 (2d Dep't 2022). This is true in any case, but in the rare cases where a government entity is so brazen as to adopt or enforce a policy which sets up a suspect classification, the employees are actually entitled, as a matter of law, to summary judgment themselves absent an affirmative defense, since the employer cannot "rebut" the claim by providing a valid non-discriminatory reason as they can attempt to do in cases of circumstantial evidence pursuant to the *McDonnell Douglas*

burden shifting framework. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). In *Trans World Airlines*, the U.S. Supreme Court reversed the district court's grant of summary judgment in favor of the employer based on the employees' alleged failure to present a prima facie case of discrimination under *McDonnell Douglas* test. *Id.* The Court held that the employer's adoption of a policy that made express classifications based on age, (a protected characteristic) constituted direct evidence of discrimination, which was sufficient as a matter of law to state a claim. *Id.* In so holding, the Supreme Court explained that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Id.* at 121 (referencing *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)). Use of such classifications demonstrates a discriminatory purpose as a matter of law, without regard to the decision-makers' animus or subjective intent. *See Miller v. Johnson*, 515 U.S. 900, 904–05 (1995); *see also Hassan v. City of New York*, 804 F.3d. 277, 295 (3d Cir. 2015) ("Put another way, direct evidence of intent is 'supplied by the policy itself.'").

The Petitioners' case here is even stronger than *TWA*, because unlike the age discrimination statutes, there is no affirmative defense to a policy that discriminates between orthodox and unorthodox religious beliefs. The government may not target religious minorities for disparate treatment, no matter how well-intentioned the subject regulation may be. *Med. Pros. for Informed Consent v. Bassett*, 78 Misc. 3d 482, 486-87 (N.Y. Sup. Ct. Onondaga Cty 2023) (citing *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). Under the constitutional or statutory claims, it would be entirely

inappropriate to summarily dismiss claims based on a policy constituting direct evidence of discrimination even if there were an affirmative defense available. "Summary judgment dismissing a claim under the CHRL should be granted only if no jury could find defendant liable under any of the evidentiary routes—*McDonnell Douglas,* mixed motive, 'direct' evidence, or some combination thereof." *Melman v. Montefiore Med. Ctr.*, 98 A.D.3d 107, 113 (2012) (citing *Bennett v. Health Mgt. Sys., Inc.,* 92 A.D.3d 29, 41 (2011)).

Second direct evidence claim.

But that's not all. Respondents created a second direct evidence claim by adopting a blanket policy that all teachers applying to the Citywide Panel must be denied based on undue hardship. [*See,* NYSCEF No. 86 at 7; No. 101 ¶ 29; No. 121 ¶ 29]. By contrast, the DOE's prior Accommodation Standards, though facially discriminatory towards minority religions, had no undue hardship barrier for those who met the preferred criteria. 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**." [NYSCEF No. 4 "Stricken Standards" § I(k) at 12]. Mr. Eichenholtz admitted in depositions that the adoption of this double standard resulted in disparate impact–admitting that all DOE employees save one were denied based on "undue hardship" by the Citywide Panel, whereas at least 162 were accommodated under the Stricken Standards, including many teachers. [AC ¶ 168].

Instead of curing the discrimination in the original Stricken Standards (which it could not do in any event), the Citywide Panel created a new constitutional and statutory violation, imposing an easier undue hardship standard on 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, which was the only provided example of a religion that met the "specific criteria identified" according to the Stricken Standards, she would be working today, like 162 others accommodated under the old policy. But her religion was categorically excluded under the Stricken Standards. Then, though the Panel found her beliefs qualified as religious and sincere, she was categorically excluded under that policy again anyway because of the Panel's blanket undue hardship policy for teachers [A-142].

In sum, Petitioners met their burden of pleading that their denials occurred under circumstances giving rise to an inference of discrimination. An inference of discrimination "is a 'flexible [standard] that can be satisfied differently in differing factual scenarios." *Sethi v. Narod,* 12 F. Supp. 3d 505, 536 (E.D.N.Y. 2014). "No one particular type of proof is required to show that Plaintiff's termination occurred under circumstances giving rise to an inference of discrimination." *Id.* "An inference of discrimination can be drawn from circumstances such as "the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the

plaintiff's [adverse employment action].” *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir. 2001). Here, not only have multiple inferences been pled, but Respondents themselves admitted multiple ways that their religious accommodation policies are systematically discriminatory. Summary judgment would be inappropriate, at least against the employees.

2. Factual disputes preclude summary judgment.

It was also improper to dismiss the hybrid claims because Respondents' argument for dismissal rests on disputed facts. “Summary judgment is a drastic remedy and should not be granted when there is any doubt as to the existence of a triable issue of fact.” *Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Pub. Accts., LLP*, 164 A.D.3d 864 (2d Dep't 2018). “Notwithstanding the differing burdens of proof at trial under the State HRL and the City HRL, an employer moving for summary judgment with respect to an employee's claims under both statutes still has the burden of showing that the employee's evidence and allegations present no triable material issue of fact. *Jacobson*, 22 N.Y.3d at 833 (quoting *Ferrante v. American Lung Assn.,* 90 N.Y.2d 623, 630 (1997)).

Here, the Court appears to have dismissed the hybrid claims *because* of factual disputes. For example, Petitioners Giammarino, Grimando, LoParrino, and Solon because of a factual dispute about whether they were eligible to apply to the Citywide Panel and nonetheless failed to do so, which the Court improperly resolved in Respondents' favor. *See, e.g.,* Decision at 20-21: “Although the Petitioners overall position is that the Citywide Panel did not provide relief to the vast majority of initial DOE applicants, and specifically that these Petitioners did seek that Citywide Panel

review, the record before this Court is insufficient to make any determination as to those claims." *Decision* at 20.

This does not suffice to dismiss the hybrid claims. "The function of the Court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist." *Charles v. American Dream Coaches*, 210 A.D.3d 948, 949 (2d Dep't 2022). As this Court acknowledged, Each Petitioner plead that they did apply. *See, e.g.,* Amended Petition, NYSCEF No. 40 ("AC") (Giammarino ¶¶ 39,161, 410-413); (Grimando ¶¶ 41, 162, 440-462) (LoParrino ¶¶ 48, 161, 481-485); (Solon ¶¶ 575-589). To the extent Respondents dispute this, it should be resolved at trial. At this stage, the Court must credit all allegations and favorable inferences to the Petitioners and deny any motion where factual disputes are material. *Lefort v. Kingsbrook Jewish Med. Ctr.*, 203 A.D.3d 708 (2d Dep't 2022) (denying summary judgment where triable issues of fact about whether proffered reasons for termination were pretextual).

POINT III
THE COURT SHOULD GRANT LEAVE TO REARGUE CLASS CERTIFICATION

Petitioners also respectfully ask for leave to reargue their request for class certification, or in the alternative, leave to file a new motion for certification of a narrower class.

A. Petitioners' discrimination claims exceed the threshold showing of "not a sham."

The primary reason provided for denying the class certification motion was dismissal of the hybrid claims: "Petitioners cite to *Hill v. City of New York* to support

their argument that in a 'pattern and practice' discrimination claim, class action commonality analysis, and the initial stage of litigation, focus on whether plaintiffs 'sufficiently alleged class-wide discriminatory policies, rather than allegations of individual discrimination.' As this Court is ruling against the Petitioner's constitutional claims, no such 'class-wide discriminatory policies remain for reviewal, and the only relief to be reviewed is individual relief relevant to each petitioner." *Decision* at 16.

As discussed above, the discrimination claims should not have been dismissed. Moreover, the "inquiry on a motion for class action certification vis-a-vis the merits is limited to a determination as to whether on the surface there appears to be a cause of action which is not a sham." *Brandon v. Chafetz*, 106 A.D. 2d 162, 168 (1985). In other words, to certify a class, Petitioners need not prove their claims, but only must assert that there is commonality of claims that are not, on their face, an obvious sham.

Petitioners claims are not a "sham" under any analysis. At the very least, this Court already acknowledged, as most other reviewing courts have, that the Panel's conclusory denials, which state only "does not meet criteria" fail to meet statutory standards. *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. 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.

This widespread problem alone establishes commonality, which predominates over individual facts on the statutory claims of all DOE employees who went before

the Citywide Panel. This Court's Article 78 ruling reflects that. The Court did not need to engage in excessive individualized analysis of the ten denials. This is because instead of individually reviewing each application in good faith, as required, the Panel applied a categorical bar to all teachers, and the few times they did make a distinction between employees, it made no sense. *Decision,* at 17-19. If the denials cannot even meet the more deferential standards of Article 78, they are certainly sufficient to make prima facie claims under the statutes.

Those who were not allowed even the possibility of review by the Panel have even more straightforward claims. The only option afforded to them was reviewal under a facially discriminatory policy that even Respondents admit is unconstitutional. In sum, as discussed more fully *infra* § II, all Petitioners adequately pleaded discrimination six ways from Sunday under the statutory and constitutional standards, and if the claims are reinstated, class certification should be granted to resolve those common issues.

B. Need for individualized review does not preclude class certification.

Class certification should not be denied based on purported individual differences among Petitioners and proposed class members. Recently, the Court of Appeals cautioned that "the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action; rather, it is predominance, not identity or unanimity, that is the linchpin of commonality." *City of New York v. Maul*, 14 N.Y. 3d 499, 505 (2010).

In *Maul*, the Court affirmed certification of a class of disabled foster-children asserting that various defects in the City's policies prevented them from accessing

the least restrictive placement. The individual facts in that case were far more predominant than in this one. The Second Department "acknowledged that each named plaintiff sought to challenge a different aspect of the child welfare system." *Id.* at 511. And the Court of Appeals acknowledged that "a determination regarding appropriate placements will require a particularized inquiry of each plaintiffs' requirements." Nonetheless, both courts affirmed that class certification was appropriate, pointing out that plaintiffs alleged that their injuries derived from at least four alleged systematic defects in the City's placement policies, which, if true, would tend to establish a *de facto* policy that if proven, impacted all the cases. *Id.* at 512-513. The Court held that this is enough, stressing that "Courts have recognized that the criteria set forth in CPLR 901(a) "should be broadly construed not only because of the general command for liberal construction of all CPLR sections (*see* CPLR 104), but also because it is apparent that the Legislature intended article 9 to be a liberal substitute for the narrow class action legislation which preceded it." *Id.* at 509 (citing *Friar v. Vanguard Holding Corp.,* 78 A.D.2d 83, 91 (2d Dept.1980).

Here, individual differences are far less significant. Petitioners all assert that they were harmed by religious accommodation policies that failed to meet statutory and constitutional standards, and that Respondents acted with a lack of neutrality to religious opposition to vaccination generally, and unorthodox religious opposition particularly. This is reflected in every level of the individual and general policy choices in the religious accommodation process. Whether the putative class members were denied under the Stricken Standards or by the Citywide Panel or given no

answer at all to their written request for accommodation (thus effectively denied), the assertion is that their denials were all impacted by the systematic problems infecting the religious accommodation policies adopted by their employer.

1. The putative class is not "overbroad" and Petitioners meet the typicality requirement.

Similarly, the proposed class is not overbroad. This Court's holding, that "[o]f 16 named plaintiffs, not all Petitioners would qualify under this standard as some did not submit any accommodation requests, while others did not seek relief from the Citywide Panel" is based on a misapprehension of the facts.

There was no dispute that these Petitioners each applied for religious accommodation. Respondents themselves acknowledged this and uploaded the received applications (and certified mailing receipts in some cases) to the pleadings. *See, e.g., Linnane Aff.* ¶¶ 9, 16, 18, 22; *see also* NYSCEF No. 109 (Grimando application received); NYSCEF No. 116 (Giammarino application received); NYSCEF No. 118 (LoParrino application received); NYSCEF No. 122 (Solon application received). The Court erred by placing the burden on the Petitioners to show why Respondents nonetheless failed to provide them with any determination or accommodate them.

It is not Petitioner Solon's burden to explain why the Panel never gave her a decision, though it notified her in December 2021 that her application was under review [AC ¶ 578]. Mrs. Solon waited for months for a decision, and finally, on the verge of homelessness, and still without a decision, she had to violate her beliefs to return to work because it was clear no decision would be forthcoming, and she was

told she had to get vaccinated or be terminated. [*Id.* ¶¶ 579-590].

Nor is it LoParrino, Giammarino or Grimando's burden to explain why the Panel did not review them. The record shows that their applications were received by Respondents. This is enough to trigger the employer's obligation to attempt in good faith to accommodate. To the extent that Respondents refused to do so, the burden is on them to justify why. "An employer has an affirmative duty to make reasonable attempts to accommodate [the known religious beliefs of] its employees or to prove that such efforts would be unavailing. "N. *Shore Univ. Hosp. v. State Hum. Rts. Appeal Bd*., 82 A.D.2d 799, 800 (1981).

It should be noted that to the extent class certification is denied on this basis, the Court's decision especially requires revisiting because it conflicts with Your Honor's own decision a few months ago in *LaBarbera*. *LaBarbera v. New York City Department of Education*, Index #: 85001 /2023 (Sup. Ct. Richmond County, April 2023) (copy filed at NYSCEF No. 52). Grimando and LaBarbera pleaded identical facts. Like LaBarbera, Grimando had Covid-19 when the Mandate went into effect, and because this qualified her for temporary medical exemption, under DOE's policies, this meant she was ineligible to apply for religious accommodation until it expired. [AC ¶ 445]. When her medical exemption expired in October 2021, Grimando was allowed to submit her religious accommodation request, and was summarily denied with the same autogenerated email this Court held is arbitrary and capricious in *LaBarbera*. [AC ¶ 450; NYSCEF No. 26]. Then the DOE would not allow her to appeal or receive fresh review by the Citywide Panel because they only offered that

option to those who'd been offered an appellate process in September. [AC ¶ 450, 461-469]. In *LaBarbara,* on the same facts, this Court held "that in not providing the Petitioner an appellate process for her religious exemption request…the denial of that request is presumptively arbitrary and capricious." *Id.* at 9. Here, the Court denied relief to Grimando, placing the burden on her to explain the Panel's arbitrary refusal to consider her application.

Especially since this Court already held that this case meets the exceptions to the exhaustion doctrine, it makes no sense to have to distinguish putative class members based on the mechanisms they utilized to secure their rights to religious exemptions. Such distinctions are irrelevant to "the questions common to the class," that is, that Respondents adopted and enforced discriminatory religious accommodation policies that were designed to, and did, result in the failure to accommodate nearly all employees without sufficient support or good faith individualized review to meet statutory standards, and which, on their face, as well as in practice, discriminated against unorthodox religious beliefs. It would violate the precepts of the liberal pleading standards of Article 9 to require that separate class action lawsuits be filed for DOE employees who received autogenerated responses, another class of people who received no response to their requests, another that engaged with the Citywide process, etc. *ad infinitum.* The bottom line is that the issues were systemic, and every avenue available to Petitioner, whether utilization of the Citywide Panel or other means, were infected by the same discriminatory errors and the autogenerated, vague, and conclusory denials are all arbitrary and capricious

under the governing standards, whether issued by DOE or the Panel.

For similar reasons, it was error to deny certification just because ten of the sixteen were original Petitioners in the *Kane/Keil* federal litigation and received Concocted Summaries after their conclusory denials from the Panel. This is especially true since this Court recognized that the summaries were not part of the record and did not rehabilitate the conclusory denials.[1] *Decision* at 17-18.

Ultimately, whatever mechanism a particular employee utilized, and whatever damages or relief may be available to him, dismissal of class certification at this stage is, at best, premature, and a concern about "mini trials" to ascertain their damages is not a sufficient reason to deny relief. In *Maddicks,* the Court of Appeals rejected concerns about minitrials, holding that "it is a long-held principle 'that the individualized proof required on issues such as damages . . . of each class member does not preclude a finding that common questions of law or fact predominate over individual questions.'" *Maddicks v Big City Props., LLC*, 34 N.Y.3d 116, 126-127 (2019) (citations omitted). Rather, the Court held that "it should be noted that the legislature enacted CPLR 901 (a) with a specific allowance for class actions in cases where damages differed among the plaintiffs. It is equally well-established "that such

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[1] Petitioners originally sought to add a subclass of those whose initial denials were overturned, such as Petitioner Amaryllis (initial denial reversed on appeal under the Stricken Standards) or Petitioner Castro (initial denials reversed on appeal to the Panel). These employees were also impacted by the discriminatory policies and subjected to adverse employment action, sustaining damages. However, to simplify, Petitioners respectfully ask leave to amend their proposed class to sever their claims. Petitioners Ruiz-Toro and Castro would still be plaintiffs, just not class representatives, and no certification would be sought for this class of employees.

issues may, if necessary, be tried separately." *Id.* (citing *Sanders v. Faraday Lab'ys, Inc.*, 82 F.R.D. 99, 101 (E.D.N.Y. 1979)).

In short, "the language of CPLR 901, which requires, as a prerequisite to a class action, that questions of law or fact common to the class must predominate over any questions affecting only individual members, clearly indicates an intent that the mere existence of individual questions should not defeat the granting of class status." *Strauss v Long Island Sports, Inc.*, 60 A.D.2d 501 (2d Dep't 1978). It was error to hold otherwise here.

C. The "government operations rule" does not apply.

Finally, the court's reliance on the judicially created "governmental operations rule" is misplaced. The "governmental operations rule" is only applicable where *stare decisis* will afford adequate protection to members of the class. There are many significant exceptions, nearly all of which apply here. For example, the rule does not typically apply where money damages are sought, particularly where the class is readily ascertainable. *Brodsky v. Selden Sanitary Corp.,* 85 A.D.2d 612, 613–14 (1981). Nor does it apply where the governmental entity has repeatedly failed to comply with court orders affecting the proposed class and fails to offer relief that protects the entire class. *New York City Coalition to End Lead Poisoning v Giuliani*, 245 A.D.2d 49 (1st Dep't 1997).

Moreover, as noted by the Court of Appeals, "[w]hen a class seeks to compel certain behavior on the part of an entity, whether it be a governmental agency or a private corporation, ... there is an interest in consolidating the action in a single forum

in order to avoid the possibility of conflicting judgments from different jurisdictions which would subject the defendants to varying and possibly inconsistent obligations." *Hurrell-Harring v. State*, 81 A.D.3d 69, 75–76 (3d Dep't 2011) (citing *Matter of Colt Indus. Shareholder Litig.,* 77 N.Y.2d 185, 195 (1991)). This has been an issue in these cases. *Contrast, LaBarbera*, Index #: 85001 /2023.

Another significant issue is the discovery burden imposed on an individual to prove systemic issues on a case-by-case basis. "We also find that proceeding in the absence of class action status would subject the prosecution of this case to significant discovery challenges. Plaintiffs claim that their constitutional right to counsel, as well as that of all other indigent criminal defendants in the counties, are being systemically denied due to deficiencies in the public defense system. It follows that, in order to prove their claim, plaintiffs will be saddled with the enormous task of establishing that deprivations of counsel to indigent defendants are not simply isolated occurrences in the case of these 20 plaintiffs, but are a common or routine happenstance in the counties. Supreme Court found that plaintiffs can call current indigent defendants as nonparty witnesses and rely on the histories of their criminal proceedings in order to prove their claim, yet, without class action certification, the hurdle of ascertaining the identity of those indigent defendants and/or accessing the histories of their criminal proceedings may prove insurmountable. Finally, and in our view not insignificantly, our research has failed to identify a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action." *Id* (citing cases). This case, like *Hurrell-*

Haring, and the many other cases it assessed, involves systemic deficiencies in the religious accommodation policies at DOE. It does not serve justice to require each individual to bring their own lawsuit, and stare decisis has not and cannot operate to protect each member of this class.

CONCLUSION

Wherefore, Petitioners respectfully request this Court grant the relief requested in this motion.

Respectfully Submitted,

/s/ Sujata S. Gibson

Dated: October 10, 2023,
Ithaca, New York

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CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Sujata Gibson, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth 22 NYCRR § 202.8-b, because it contains 6,974 words, excluding the parts exempted by § 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affidavit.

Dated: October 10, 2023,
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