24-3252

United States Court of Appeals for the Second Circuit

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Plaintiffs-Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANTS' CORRECTED REPLY BRIEF

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Plaintiffs-Appellants,

v.

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, ASHWIN VASAN, COMMISSIONER OF THE DEPARTMENT OF HEALTH AND MENTAL, NEW YORK CITY DEPARTMENT OF EDUCATION, DOES 1-20, ERIC L. ADAMS,

Defendants-Appellees.

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PRELIMINARY STATEMENT

While this appeal presents novel but historic constitutional questions concerning the inalienable right to bodily autonomy and statutory right Congress enacted in §20(a)(5) to refuse medical treatment contrary to federal law, it also presents a second, equally grave issue: the integrity of the federal judiciary itself. This case exposes unprecedented extra-judicial judicial misconduct and litigation misconduct that strikes at the core of public trust in Article III courts.

The City's Opposition minimizes this conflict by focusing on a later stock holding while ignoring the judge's pre-judicial concealment of his Moderna work alone required automatic recusal under 28 U.S.C. §455(b)(2). For five months the judge withheld a ruling on Appellants' recusal motion while issuing dispositive orders on March 25, 2025. This alone requires reversal.

The City's brief rests on brazen fabrications of law, including a knowingly false interpretation of this Court's published decisions in *Donovan v. OSHRC*, 713 F.2d 918 (2d Cir. 1983). It also fabricates a mootness doctrine, asserts that OSHA rights do not exist, and relies heavily

on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) "police power" precedent—even though Congress overruled *Jacobson* decades ago by federalizing communicable-disease authority and, by enacting § 669 Sec. 20(a)(5) of the OSH Act, which made the Constitutional right to refuse public health mandated medical treatment statutorily inalienable. The City's constitutional arguments collapse because they apply the wrong standard of review; the governing test is the statutory necessity standard chosen by Congress.

The City's assertion that Appellants abandoned Title VII or NYCHRL claims is false. Appellants argued these claims repeatedly below and in their Opening Brief. Its argument that the case is moot is contradicted by the Supreme Court holding in *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115 (1974) and Second Circuit precedent. Its assertion that it is not a "covered employer" under New York OSHA State Plan is demonstrably untrue.

The City's mandate was preempted because OSHA provides detailed federal standards for managing airborne hazards and because Congress expressly forbade compelled medical treatment absent statutory necessity; vaccines have never been determined "necessary" to mitigate any

environmental risk. New York's OSHA State Plan binds the City, and the mandate violated OSHA's uniform minimum requirements. Those facts must be accepted as true, especially supported by expert opinion and OSHA directives. A-1655-57, 1668-73, A-97,100-103, A-124-128-130, SPA-158

Appellants seek what federal law guarantees: resolution of the merits, correction of the unprecedented misconduct below, declaration of their statutory and constitutional rights, class-wide relief, sanctions for the City's repeated misrepresentations, and referral of Judge Eric Komitee for mandatory Judicial Conference investigation.

This Reply exposes those misrepresentations and restores statutory and constitutional framework that governs this case.

ISSUES PRESENTED

1. Whether Judge Komitee's pre-judicial concealment of his legal work for Moderna, his five-month delay in ruling on recusal, and his continued participation in dispositive rulings required mandatory recusal under 28 U.S.C. §455(b)(2).
2. Whether the OSH Act preempts public and private sector employer vaccine medical treatment mandates requiring employees to violate federal law warrants judgment as a matter of law and remand solely for damages.
3. Whether the OSH Act § 669 Sec. 20(a)(5) creates enforceable statutory rights that prohibit compelled immunization, medical treatment or examinations in violation of individual constitutional substantive liberty and First Amendment Free Exercise rights.
4. Whether declaratory relief remains justiciable where the City defends legality of its mandate and may reinstate mandates.
5. Whether class certification is required for uniform declaratory relief.

STANDARD OF REVIEW

All legal issues—statutory interpretation, preemption, constitutional claims, Rule 23 class certification and Rule 11 sanctions30 U.S. denial based on legal error and Rule 12(b)(6) dismissal—are reviewed **de novo**. *Hartford Underwriters*, 530 U.S. 1, 6–7 (2000), and *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992).

Recusal issues under 28 U.S.C. §455(a) are reviewed under the Second Circuit's objective appearance-of-impropriety standard:

> "What matters is not the reality of bias or prejudice but its appearance." *United States v. Thompson*, 76 F.3d 442, 451 (2d Cir. 1996) (citing *Liteky v. United States*, 510 U.S. 540, 548 (1994)).

Rule 38 sanctions for frivolous appellate conduct are reviewed for abuse of discretion.

ARGUMENTS

I. THE CITY'S JURISDICTIONAL AND PROCEDURAL OBJECTIONS ARE MERITLESS

The City attempts to avoid appellate review through jurisdictional maneuvers, fabrications about the record, and misstatements of basic appellate rules. The City's jurisdictional objections collapse under Second Circuit and Supreme Court precedent.

A. The Court Has Jurisdiction Under Plain Text of Federal Rule of Appellate Procedure 4(a)(2)

The City's assertion that jurisdiction is lacking because "no judgment was entered" is legally incorrect. Federal Rule of Appellate Procedure 4(a)(2) forecloses the City's argument.

B. Appellants filed their Notice of Appeal within 30 days of the order appealed from

FRAP 4(a)(1)(A) provides:

> "In a civil case…the notice of appeal…must be filed…within 30 days after entry of the judgment or **order** appealed from."

Judge Komitee issued the dismissal order on September 25, 2024, and Appellants timely filed their Notice of Appeal on October 25, 2024. This satisfies Rule 4(a)(1).

C. Rule 4(a)(2) Confirms the Notice Ripened Into an Appeal of All Final Orders

Because Appellants filed their notice timely, but before entry of the March 25, 2025 final judgment, FRAP 4(a)(2) causes the notice to ripen automatically upon entry of that judgment. *FirsTier Mortg. Co. v. Investors Mortg. Ins. Co.*, 498 U.S. 269, 274–76 (1991) *New York ex rel. Underwood v. City of New York*, 141 F.3d 49, 52 (2d Cir. 1998). The Court therefore has jurisdiction to review the recusal ruling.

D. The Notice of Appeal Encompasses the Recusal Order Under FRAP 3 and the Merger Doctrine

The City's jurisdictional objection ignores the March 25, 2025 recusal ruling and dismissal of Ms. Bryan's remaining claims constitute the final judgment, and all interlocutory and contemporaneous rulings—including the recusal order—merge into that judgment for purposes of appellate review. The Second Circuit "liberally construes notices of appeal" where the appellant's intent is evident from the record. *Ametex Fabrics, Inc. v. Just In Materials, Inc.*, 140 F.3d 101, 107–08 (2d Cir. 1998). Appellants' focus on the recusal misconduct throughout the appeal makes that intent unmistakable.

II. JUDGE KOMITEE'S EXTRAJUDICIAL DISQUALIFYING CONDUCT REQUIRES REFERRAL FOR IMPEACHMENT

Judge Komitee's conduct violated multiple provisions of 28 U.S.C. §455 and the Judicial Code. The misconduct was serious, concealed, and impacted the core legal determinations in this case.

A. Judge Komitee's Concealed Conflicts Required Mandatory Recusal

The City's Opposition marginalizes the most significant conflict in this case: Judge Komitee's pre-judicial concealment of his direct legal work for Moderna, the central manufacturer of the COVID-19 vaccine at issue. His Senate Questionnaire required disclosure of all "significant legal activities," yet he omitted his leading of Moderna's $500 Million acquisition transaction wherein he had privileged access to Moderna's pre-Emergency Use Authorization for the mRNA vaccine and regulatory data, completed between late 2017 and February 2018, while his judicial application was pending. Because refusal of Moderna mRNA vaccine was the subject of Appellants litigation before him in 2022, this omission created a mandatory recusal conflict under 28 U.S.C. § 455(b)(2) and Canon 3(C).

The City conceals this core problem that was not a "minor stock interest" protected by a safe harbor. Appellants' recusal motion was based on concealment of material pre-judicial legal**,** which activity was concealed from Appellants that was a disqualifying conflict regardless of financial holdings.

B. Concealing Personal Moderna-Linked Interests Violated 28 U.S.C. §455(b)(4)

Section 455(b)(4) mandates recusal when a judge has:

- a financial interest, however small,
- in a party or subject matter of the litigation.

Judge Komitee concealed both:

- the nature and amount of his Moderna-linked financial interests,
- his involvement in Moderna-related work,
- his interest in the subject matter.

He then ruled on dispositive motions affecting thousands of City employees who refused the Moderna vaccine.

C. The Five-Month Delay Violated Second Circuit Law and Corroborates Structural Bias

The City also ignores the second, independent recusal violation: Judge Komitee waited more than five months to rule on the recusal motion while continuing to preside over dispositive matters, culminating in the March 25, 2025 "decision" dismissing Ms. Bryant's Title VII and NYCHRL claims. See Sup SPA-1

This delay violated core Second Circuit law requiring prompt recusal rulings. See *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) ("Prompt disposition of recusal motions is essential.").
Worse, the judge bifurcated Ms. Bryant's Title VII and NYCHRL claims, recognizing her "sincerely held religious belief" while dismissing identical allegations from all other Plaintiffs—ignoring that under Rule 12(b)(6), all allegations must be liberally construed, and all Plaintiffs stated the same religious right to refuse immunization. Appendix 178-353

His separation of Bryant's Title VII claim created a conflict of interest among Plaintiffs that did not exist in the underlying pleadings. This result flowed directly from his failure to recuse.

D. Refusal to Investigate Rule 11 Fraud Violated Judicial Canon 3B(6)

Canon 3B(6) requires judges to take appropriate action when confronted with credible allegations of fraud. Plaintiffs presented 200 case summaries to prove the City's presentation of *Donovan* was fraudulent. Judge Komitee:

- ordered no hearing,
- demanded no briefing,
- conducted no inquiry,
- and adopted the City's false interpretation wholesale.

Judge Komitee's concealed conflict infected multiple rulings—the Rule 11 denial, dismissal of the complaint, refusal to grant class certification, and refusal to enforce OSHA statutory rights. This satisfies the "inextricably intertwined" test for recusal.

A dismissal with no opinion could have been issued, the claims needed review from a higher court.

E. 28 U.S.C. §353(a)(3) and §354(b)(2)(A) Require Referral To Judicial Conference For Possible Impeachment

These provisions require referral when conduct:

- may constitute grounds for impeachment, or
- cannot be remedied by corrective action.

Judge Komitee's misconduct fits both criteria.

III. THE CITY'S CONTINUED FRAUD ON APPEAL CONFIRMS THE NEED FOR REVERSAL

The City's Opposition repeats its pattern of fabricating doctrines, selectively quoting cases, and omitting statutory language central to this appeal, warranting a merits decision by this Court.

A. The City Fabricates a Mootness Doctrine Contradicted by Supreme Court & Second Circuit Law

The City asserts that declaratory relief is moot simply because the active emergency has ended. No authority supports this proposition. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122–25 (1974), held, in summary, that even when the challenged policy is no longer being enforced, declaratory relief remains appropriate when the government defends the

legality of a policy and declares an intention to reinstate it, the dispute remains live. Appendix 901-904

Similarly, the Supreme Court held in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000), in summary, that a case is not moot when collateral consequences continue to flow from the challenged action and "'there is no reason-able expectation that the wrong will be repeated…"

The City has repeatedly stated it will reinstate vaccine mandates "if necessary." See A-109 The legality of the mandate—and the ongoing refusal to reinstate terminated employees—remains an active controversy.

B. The City Falsely Claims Appellants Abandoned Claims

Appellants repeatedly raised Title VII, fraud, and NYCHRL statutory rights in the district court and reserved those claims in their Opening Brief on Page 10 that "Appellants' alternative Title VII, NYCHRA and common law fraud claims …. remain available if no federal claims prevail." Appellants also argue on Page 58 of the Opening Brief that "a violation of a federal civil rights statute is per se a violation of the NYCHRL". The Supreme Court held that waiver or forfeiture exists only where a party intentionally relinquishes or fails to argue a claim. *United States v. Olano*,

507 U.S. 725, 733 (1993).

C. The City Misrepresents Donovan for the Second Time

The City again claims *Donovan v. OSHRC*, 713 F.2d 918 (2d Cir. 1983), held that employees have "no private right" under OSHA. In reality, *Donovan* addressed only whether employees may prosecute a citation once OSHA withdraws it. The opinion expressly limits itself to "enforcement proceedings." Id. at 926–28. The other cases sited never addressed nor raised OSHA preemption or claims under OSHA Sec. 11(c)(1) & 20(a)(5).

The City extracts an isolated sentence and presents it as if it applies to § 669 Sec. 20(a)(5) rights—which they do not. This was fraud in the district court and is fraud here.

IV. JACOBSON'S POLICE-POWER FRAMEWORK HAS BEEN OVERRULED AND CANNOT SUPPORT CITY'S MANDATE

A. Jacobson Applied Only in Absence of Federal Statutes

Appellants' core claims arise from a recognized First Amendment Free Exercise right to refuse medical treatment, acknowledged by the Supreme Court in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and later made inalienable in the workplace when Congress enacted the federal OSH Act. The City's Opposition nevertheless treats *Jacobson* and "neutral and

generally applicable" doctrine as if nothing has changed in the 120 years since a single state criminal statute was upheld under residual "police power."

Jacobson v. Massachusetts, 197 U.S. 11 (1905), upheld a $5 **criminal penalty** under the State's residual police power only because Congress had enacted no federal law regulating vaccination. *Jacobson* stated that "the legislature" must determine the limits of compulsory vaccination. Id. at 19. Congress has now done so. It is not a crime to refuse vaccination.

Jacobson held that compulsory vaccination "is within the police power of a State," in the absence of federal legislation. Id. at 25.

Congress has since legislated extensively in this exact domain, overruling Jacobson's default rule under *City of Milwaukee v. Illinois*, 451 U.S. 304, 312–13 (1981), which held that "federal common law in an area of national concern is resorted to in the absence of federal law. When Congress addresses a question previously governed by a decision rested on federal common law as was the holding in Jacobson, the need for such an unusual exercise of lawmaking by federal courts disappears." Id. at 305 (citing Illinois v. Milwaukee, 406 U.S. 91,107 (1972)

In "determining whether a federal statute has displaced a federal common law…., a court must consider whether the federal statute "[speaks] directly to [the] question" otherwise answered by federal common law.

B. Congress Overruled Jacobson Through Three Statutory Enactments (1944–1970)

1. The 1944 Public Health Service Act ("PHSA") replaced police-power assumptions

Congress began limiting public-health powers long before *Jacobson*. In 1901, it enacted legislation authorizing the Surgeon General of the Marine Hospital Service—later the Public Health Service (PHS)—to quarantine sick or exposed seamen, creating the first federal communicable-disease framework focused exclusively on quarantine, not vaccination.. See A-791-793

Congress reaffirmed this model in 1944 enacting the Public Health Service Act ("PHSA"), codified at 42 U.S.C. §264(a) See A-795-824 It provides that:

> "The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as… necessary to prevent the… spread of communicable diseases… [and] may provide for… inspection, fumigation, disinfection… and other measures…."

Critically, the "other measures" referenced in §264(a) are defined in §§264(b)–(d) and in §§265–271, all of which address quarantine, detention, and related physical-containment methods—not compulsory vaccination. (Appendix #5(a), 5(b)). Congress has never granted the Surgeon General, HHS, or any federal agency authority to criminalize or terminate jobs for vaccination refusal. Instead, the only criminal sanctions authorized in the PHSA concern violations of quarantine regulations. See 42 U.S.C. §271 (authorizing up to one year in prison or a fine for violating quarantine rules). The fact that Congress criminalized only quarantine violations, and not vaccine refusal, strongly confirms that the 1944 PHSA overruled the broad "police-power" assumptions underlying Jacobson.

Federal courts recognize this limitation. In *State v. Becerra*, 544 F. Supp. 3d 1241, 1258 (M.D. Fla. 2021), the court explained that the PHS's primary statutory tools for controlling communicable diseases are quarantine-based, not vaccination mandates. Likewise, *Simpson v. Shepard*, 230 U.S. 352, 406 (1913), confirmed that states may adopt quarantine regulations so long as they do not conflict with federal law. Congress has never authorized states to enforce compulsory vaccination under federal authority.

New York law follows the same model. New York Public Health Law §1449 authorizes only quarantine and isolation as disease-control powers—reflecting that compulsory vaccination has never been codified as a lawful enforcement method.

These federal and state frameworks demonstrate that neither Congress nor New York has enacted a statute authorizing mandatory vaccination. The exclusive enforcement mechanism remains quarantine, not compelled immunization.

Although *Biden v. Missouri*, 595 U.S. ___ (2022), held that 42 U.S.C. §1302—allowing the Secretary to "promulgate regulations as may be necessary to the efficient administration of the functions with which [he] is charged"—permitted HHS to require healthcare-facility vaccination, that decision did not address employees' right to refuse medical treatment under Sec. 20(a)(5) and Sec. 11(c)(1) of the OSH Act or whether "vaccines were necessary" under the OSHA respiratory standards. Biden does not apply. *Mourning v. Family Publications Service*, 411 U.S. 356, 369 (1973), held that an agency may act only when a regulation is "reasonably related to the purposes of the enabling legislation." The PHSA authorizes only quarantine

measures and voluntary-immunization programs; it contains no authority for compulsory vaccination mandates or sanctions.

2. The 1972 immunization program adopted voluntary vaccination

42 U.S.C. § 247b created federal immunization programs built on voluntary access to vaccines, not criminal compulsion not addressed in the Biden case.

3. The 1970 OSH Act created an inalienable federal right to refuse medical treatment

Congress enacted § 669 Sec. 20(a)(5) of the OSH Act, forbidding any employer—including municipal employers under state OSHA Plans—from compelling vaccination, medical examination, or treatment for workers who object on religious grounds, unless such is "necessary for the protection of the health or safety of others…." which vaccines are never necessary because they are incapable of shielding individuals from any airborne hazard.

Congress thereby replaced *Jacobson's* "reasonable relation" test with a "necessity standard."

C. Smith and Lukumi Apply Only to State Criminal Laws

The City relies squarely on the holdings of *Employment Division v. Smith*, 494 U.S. 872 (1990), and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) as if they control this case. Both cases involve state criminal-law police power, not federally preemptive statutory rights.

Smith involved criminal prosecution for peyote possession; *Lukumi* involved municipal criminal ordinances punishable by fines and imprisonment. 508 U.S. at 527–28. These decisions simply allocate levels of scrutiny when assessing state criminal laws in the absence of countervailing federal statutes.

By contrast, when Congress supplies a statutory test, courts must apply that test—not judicially invented tiers of scrutiny. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("It is a fundamental canon of statutory construction that the starting point must be the statutory text."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) ("The Court is not free to substitute its own interpretation for the precise standard enacted by Congress.").

Thus, *Smith* and *Lukumi* are irrelevant to the statutory question of whether the City satisfied the "necessary" requirement in § 669 Sec. 20(a)(5) of the OSH Act.

D. The Applicable Standard Is the Statutory "Necessary" Requirement In the OSHA Act 29 U.S.C. § 669 Sec. 20(a)(5)

Under FDA v. *Brown & Williamson*, 529 U.S. 120, 132 (2000), the analysis of the validity of the City's Covid-19 Vaccine Mandate begins with statutory text. The City ignores precedent by arguing "reasonableness" or "rational basis" to justify the City's mandate. Those standards died when Congress legislated the "necessary" exception in Sec. 20(a)(5) and Appellants have provided ample evidence from medical experts and from the OSHA solicitor that vaccines are not necessary, which should have been reviewed and accepted as true by the district judge. See A-100-103, A-1668-1670 and Fed. R. Civ. P. 10(c); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) ("the complaint is deemed to include any written instrument attached to it");

V. FEDERAL OSHA LAW PREEMPTS THE CITY'S IMMUNIZATION MANDATE

The City's preemption arguments conceals the fact that the NY State OSHA Plan **adopted for state and local governments includes all OSHA existing respiratory standard methods** the City is mandated to comply with. See A-530

A. OSHA's Preemptive Framework Controls All Minimum Safety Standards

The OSH Act sets national minimum standards for workplace safety. States may supplement these standards only through an approved OSHA "State Plan," and only if the State Plan is "at least as effective" as the federal OSHA standards in providing safe workplaces. 29 U.S.C. § 667(c)(2). Municipalities are not free to create their own alternate workplace-safety regimes that conflicts with approved "methods".

The Supreme Court has repeatedly held that OSHA preempts competing State or municipal regulations that "directly, clearly, and substantially regulate occupational safety and health standards." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96–100 (1992). The City's vaccine mandate was adopted as a workplace-safety method for which a

standard already applies for "respiratory hazards." Therefore, OSHA preemption applies.

B. The NYS OSHA State Plan Covers Public Employers, Including the City

New York operates an OSHA State Plan covering all "public employers," which includes "the State, **any political subdivision** thereof, and any public authority." 71 Fed. Reg. 47084 (Aug. 16, 2006). The City of New York **is a "political subdivision**" under N.Y. Gen. Constr. Law § 66(2), based on case law in *City of New York v. State of New York*, 86 N.Y.2d 286, 290 (1995) and *Matter of Kelley v. McGee*, 57 N.Y.2d 522, 538 (1982) and therefore fully subject to OSHA-equivalent minimum standards.

The City's argument—that municipal employers are somehow exempt—is fabricated. State Plan coverage is explicit, and the City is directly bound to use only OSHA's approved methods, not vaccines. See A-530, A-128-129, SPA-139

C. OSHA's Framework Does Not Permit Vaccination as a Substitute for Federally Required Hazard Controls

The New York OSHA State plan cannot nullify employee federal statutory rights. Section 652(5) excludes public employers only from federal "enforcement," not from employees' rights under Sections 11(c) and 20(a)(5). New York's plan cannot authorize the City to extinguish or conflict with those protections.

While Sec. 20(a)(1) of the OSHA Act permits the Secretary of Health and Human Services to collaborate with the OSHA Secretary to conduct "experiments" relating to innovative methods like the Covid-19 mRNA vaccine for dealing with occupation health problems, which the Covid-19 airborne hazards is an occupational health problem, See A-1655, SPA-139 Sec. 20(a)(5) allows employees to refuse any experimental method. See A-100-103, A-1668-1670

D. State Statutes Of Limitations Are Also Preempted

Under conflict preemption principles, where Congress has not supplied a statute of limitations in the OSH Act, courts borrow the most analogous federal limitations period where applying a state limitations period would conflict with federal objectives. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991). Claims under Section 11(c)(1) of the OSH Act for violations of Section 20(a)(5) are intentional torts, akin to 42 U.S.C. § 1981, which carries a four-year federal statute of limitations. Like Section 1981, Section 11(c)(1) targets deliberate deprivations of protected federal rights—as here, the right to refuse medical treatment and exams.

By contrast, state laws, including New York Human Rights Law often impose shorter periods based on generalized, negligence-based discrimination frameworks and allow agency discretion or exhaustion preconditions not found in the OSH Act. Borrowing such state limitations would conflict with the OSH Act's purpose, undermine uniform enforcement of federal rights, and penalize plaintiffs asserting rights preserved in Section 20(a)(5), but not disclosed by employers who can retaliate against an employee in a clandestine manor for exercising that right protected under

Section 11(c)(1). Accordingly, the federal four-year period under 28 U.S.C. § 1658, applied to § 1981 claims, is the appropriate analog.

E. Vaccine Refusal Is A Safety Activity

The City's assertion that OSHA "does not apply" because immunization refusal is "not a workplace safety activity" is legally baseless and directly contradicts fifty years of OSHA jurisprudence for several reasons. Employees have a duty to refuse unauthorized safety methods or standards.

Section 5(b) of the OSH Act, details the safety duties of employees stating:

> "Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act **which are applicable to his own actions and conduct**." (Emphasis added)

Employees have a duty to only comply with OSHA approved standards, orders and rules that govern their "work activity." The Supreme Court made clear in *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 9, 13 FN 3 (1980) that the right to abstaining from an unapproved employer mandated

medical treatment is a "safety activity" compliant with the employee's "general duty" as a protected right.

VI. THE CITY MISSTATES OSHA, THE OSH ACT'S STATUTORY RIGHTS, AND APPELLANTS' FREE-EXERCISE RIGHTS

The City's Opposition mischaracterizes the OSH Act, Appellants' statutory rights, and the nature of their Free Exercise claims in several ways.

A. OSHA Protects Historic Constitutional Rights

The OSH Act protects distinct historic individual constitutional rights to refuse immunization, medical treatment or medical exams on religious grounds under § 669 Sec. 20(a)(5). This right exists independently of any other constitutional or discrimination-based protection but first recognized in *Jacobson*, and reaffirmed as bodily-integrity rights in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), and *Washington v. Harper*, 494 U.S. 210 (1990).

The City's argument—that OSHA does not confer individual rights or that employees must rely solely on the Secretary of Labor—is contradicted by the statute's plain text. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 4, 11

(1980) When Congress enacts a right, courts must enforce it. *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6–7 (2000).

B. Appellants' Free-Exercise Rights Reinforce Their OSHA Rights

The City seeks to avoid liability by mischaracterizing the nature of Appellants' religious objections. The Supreme Court is clear: courts may not question the logic, centrality, or doctrinal basis of a religious belief. *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981). The City may not impose its own theological litmus test.

Even apart from the OSH Act, Appellants' refusal of compulsory immunization is protected under longstanding Free Exercise principles. And Congress expressly codified that protection for the workplace and public places.

C. The City Misapplies the Sincerity Requirement

Appellants uniformly asserted their sincerely held religious belief in refusing vaccination. The district court's selective acceptance of Ms. Bryant's Title VII claim, while rejecting identical religious objections from other Plaintiffs, violated Rule 12(b)(6), which requires liberal construction of the complaint.

The City wants this Court to uphold Judge Komitees prejudicial ruling that Appellants "failed to explain" their religious beliefs as dispositive for dismissal. But the statute requires only a religious objection—not doctrinal elaboration. Congress did not impose denominational requirements as explained below.

D. OSHA Rights Remain Enforceable and Not Moot

The City's assertion that OSHA rights are "nonexistent" or "moot" is false. The mandate has continuing effects: employees have been terminated, remain unreinstated, and the City has stated it may impose future mandates. Under *Super Tire*, 416 U.S. at 122–25, these controversies are not moot. See A-901-904

OSHA rights **cannot** be mooted by a defendant who remains bound by federal law. The injury is ongoing, and the declaratory relief sought remains essential to determine the parties' rights in future emergencies.

VII. THE CITY CANNOT AVOID LIABILITY BY MISCHARACTERIZING RELIGIOUS BELIEFS OR OSHA RIGHTS

The City's final argument attempts to deflect from its violations of the Constitution and OSH Act by attacking the legitimacy of Appellants' religious beliefs and by redefining their statutory rights.

A. The City Cannot Redefine Appellants' Religious Convictions

The City seeks to uphold the district court's ruling that Appellants' beliefs were "not sufficiently explained," "not doctrinally required," or not "logical." But the Supreme Court forbids this inquiry. *Burwell v. Hobby Lobby*, 573 U.S. 682, 725 (2014) ("It is not for us to say that [petitioners'] beliefs are flawed or unreasonable."). Appellants' religious objection is the same liberty recognized in *Jacobson*, reaffirmed in *Cruzan*, and codified in § 669 Sec. 20(a)(5).

B. OSHA Rights Are Not Vague

City's claim the rights protected in §20(a)(5) are "vague," not "rights creating" and applicable only to federal agencies is patently false. Nothing in the statute says the right to refuse medical treatment only applies to

federal agencies, and §20(a)(5) protects the historic Constitution Free Exercise right to refuse medical treatment.

C. The Fundamental Right to Choose One's Medical Treatment Includes the Religious Right to Choose Plant-Based Lifestyle Medicine

The City fabricates yet another argument—that employees of faith have no right to "choose their medical treatment" unless "verified by the government." That argument has no basis in constitutional or statutory law, and is doctrinally outrageous. For more than a century, the Supreme Court has held that medical self-determination lies at the core of constitutional liberty and not relinquished for "research purposes."

1. Supreme Court precedent establishes an inalienable right to choose one's own medical treatment.

In *Jacobson*, even while analyzing a 1905 statute, the Court acknowledged:

> "the inherent right of every freeman to care for his own body and health in such a way as to him seems best." 197 U.S. 11, 26 (1905).

Washington v. Harper reaffirmed:

> "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."494 U.S. 210, 229 (1990).

Planned Parenthood v. Casey, the Court held:

> "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." 505 U.S. 833, 851 (1992).

This principle squarely protects Ms. Bryant's religious medical practice, rooted in Scripture and supported by evidence-based therapeutic outcomes

2. Ms. Bryant's practice of Plant-Based Lifestyle Medicine is a protected religious medical doctrine rooted in Genesis 1:29.

For Ms. Bryant, this is not diet. It is not preference. It is covenantal obedience:

> *"Behold, I have given you every herb bearing seed… and every tree… to you it shall be for food."* Genesis 1:29.

This verse is not metaphorical in her faith tradition. It is a divine prescription of medicine, dictating what constitutes permissible healing. Ms. Bryant's affidavit outlines the scripture that further commands:

- "The leaf thereof shall be for medicine." *Ezekiel 47:12*
- "Herbs for the service of man." *Psalm 104:14*

This is a religious medical system—a complete and coherent set of doctrines about healing, purity, diet, and bodily sanctity. The City's illegal coercion was an attempt to force her to violate a sacred, scriptural health practice. See Sup A-12-17

3. Scientific evidence confirms the medical efficacy of plant-based healing—further strengthening its constitutional protection.

Ms. Bryant's affidavit outlines THE TEN LAWS of her religious plant based lifestyle medicine with included scientific evidence- a few as follows:

- **Law of Plant-Based Diet:** Plant-based diets reduce COVID-19 infection risk by **73%**. (BMJ Nutrition 2021)
- **Law of Exercise:** Exercise reduces COVID mortality by reducing cytokines. (Nutrients 2021)
- **Law of Sunshine:** Sunshine and Vitamin D reduce COVID morbidity. (Front. Cardiovasc. Med. 2020)
- **Law of Temperance:** Intermittent fasting counters obesity-linked COVID severity.
- **Law of Hygiene:** Cleanliness reduces pathogen exposure.

- **Law of Trust/Faith:** Religious faith improves mental and physical health outcomes (ISRN Psychiatry 2012). See Sup A-14-16

These studies show that Ms. Bryant's religious-medical system is sincerely held and clinically effective, making the City's insistence that she abandon it constitutionally indefensible. See Sup A-17-19

4. The right to choose religious healing necessarily includes the right to reject inconsistent medical treatment.

Under *Thomas v. Review Board*:

> "It is not for us to say that the line [of religious belief] he drew was an unreasonable one." 450 U.S. 707, 715 (1981).

Under *Holt v. Hobbs*, 574 U.S. 352, 63 (2015), Courts may not "question the centrality of a religious practice." The City cannot declare secular pharmaceutical treatment "superior" to scriptural plant-based medicine.

5. The First Amendment protects not only refusal of treatment but affirmative religious healing choices.

Compelling Ms. Bryant to accept a vaccine in violation of Scripture while denying her the ability to follow the Creator's medical plan violates both Free Exercise, Substantive Due Process, and OSH Act §20(a)(5)'s statutory right to refuse medical treatment. This Court must recognize what

the City refused to acknowledge: choosing plant-based healing is a religious medical act—and forcing abandonment of that practice, when vaccination is not necessary nor lawful, is a constitutional sin and statutory violation.

D. The Fabricated "Historical Practice" Argument Cannot Override Statutorily Protected Constitutional Rights

The City supports Judge Komitee's claim that Appellants did not establish a right deeply rooted in "history and tradition" justifying compulsory vaccination without religious exemptions was a fabricated argument unsupported by any doctrinal authority. SPA – 39, 55

This argument is not only legally irrelevant—it contradicts Supreme Court precedent. The reliance on a pre-constitutional "tradition" is nothing more than a post-hoc gloss created to avoid applying the binding religious-liberty framework adopted in *Roman Catholic Diocese*, *Fulton*, and *Tandon*.

The Supreme Court rejected "historical practice" as a basis for undermining religious liberty where statutes or constitutional doctrine impose stricter standards. In *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) the Supreme Court held:

> "Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." Fulton, 593 U.S. 522, 539 (2021).

The historical argument is nothing more than a thinly disguised neutrality defense that *Fulton* rejects.

More decisively, Jacobson-era public health cases have no bearing when a federal statute protects individual rights. As the Supreme Court stated in *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 18 (2020).:

> "Even in a pandemic, the Constitution cannot be put away and forgotten."

This kills the City's reliance on 1905-era doctrine.

Where Congress speaks, judicial "historical practice" is irrelevant. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283 (2002) states:

> "Where the text and structure of a statute provide clear rights-creating language, the inquiry is at an end."

The governing law is the statute—not pre-1970 state public-health tradition.

Under *Tandon v. Newsom*, 593 U.S. 659, 660 (2021)., the Supreme Court held:

> "Government regulations trigger strict scrutiny whenever they treat any comparable secular activity more favorably than religious exercise."

Under this standard, "historical practice" does nothing to shield discriminatory or inconsistent vaccine mandates.

Finally, the Supreme Court long rejected the idea that "tradition" can justify overriding religious liberty. *Thomas v. Review Bd.,* 450 U.S. 707, 714 (1981) states:

> "It is not within the judicial function to sit in judgment on the reasonableness of religious beliefs."

The lower courts "historical" argument was fabricated, contradicted by modern Free Exercise doctrine, overridden by federal statute, and this Court should not support it.

VIII. RULE 11 SANCTIONS ARE WARRANTED

Rule 11 exists to prevent the exact conduct the City engaged in: misrepresenting controlling law, citing cases out of context, and asserting jurisdictional positions contradicted by official documents.

The City knowingly misrepresented:

- *Donovan*;
- its own legal status under the State Plan;
- the applicability of Jacobson-era cases;
- the record of Appellants' assertions – that Appellants "conceded" that no private right of action exists is false. Opp. Brief page 1

These violations required sanctions. The district court's failure to impose them flowed from the same structural bias caused by the recusal violation. This Court should impose sanctions to warn the legal community that such fabrication is not tolerated and so this Court is not complicit in the misconduct

IX. CLASS CERTIFICATION IS REQUIRED UNDER RULE 23(b)(2)

Class certification is required because the City adopted and enforced a single uniform immunization mandate, applied the same religious-exemption procedures, issued identical denials, and imposed identical consequences upon all class members. The Supreme Court has long held that Rule 23(b)(2) is "the classic vehicle" for challenges to a uniform governmental policy where declaratory or injunctive relief applies to all members "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011).

Rule 23(a) is satisfied. Commonality exists because the legality of the City's policy turns on the same legal questions for everyone: whether § 669 Sec. 20(a)(5) of the OSH Act protects an employee's right to refuse medical

treatment and whether the City's mandate is preempted. Typicality is met - Plaintiffs suffered the same injury—termination, discipline, or coerced compliance for refusing an unlawful mandate. Adequacy is met - Appellants vigorously litigate identical claims on behalf of all similarly situated workers. And Rule 23(b)(2) is satisfied because the City "acted or refused to act on grounds that apply generally to the class," making declaratory relief appropriate for the entire group.

Refusal to certify a Rule 23(b)(2) class is legal error. Courts routinely order certification where a defendant's uniform conduct creates a uniform injury. See *Baby Neal v. Casey*, 43 F.3d 48, 59 (3d Cir. 1994) (injunctive and declaratory relief for systemic violations "does not require individual determinations of liability").

The district court's failure to certify a class—after acknowledging that the City's policy was uniform and Plaintiffs sought declaratory relief—was contrary to the text of Rule 23 and precedent. Under 28 U.S.C. § 2106, this Court may certify the class directly to ensure uniform relief and prevent inconsistent judgments.

X. REQUESTED RELIEF

For all the reasons set forth above, and in Appellants' Opening Brief, Appellants respectfully request**:**

1. Reverse all rulings of the district court;
2. Hold that § 669 Sec. 20(a)(5) and § 11(c) of the OSH Act provides a private right of action or action under Sec. 1983;
3. Hold that the OSH Act preempts any public or private employer mandated medical treatment or exam;
4. Enter judgment for Appellants on liability under 28 U.S.C. § 2106;
5. Issue declaratory judgment providing that:
    - No federal, state, municipal, quasi-governmental entity, or private employer shall compel immunization, medical treatment, or medical examination of any person in violation of federal law;
    - All persons retain—under the Fourteenth Amendment Substantive Due Process Clause, the First Amendment Free Exercise Clause, and § 669 Sec. 20(a)(5) of the OSH Act—inalienable right to refuse government- or employer-mandated medical examination, immunization, or medical treatment unless such intervention is "necessary for the protection of the health or safety of others," and only where the OSHA General Duty Clause does not apply and no generally applicable OSHA standard exists capable of eliminating the environmental hazard that threatens serious harm or death;

- All persons retain—under the Fourteenth Amendment Substantive Due Process Clause, the First Amendment Free Exercise Clause, and § 669 Sec. 20(a)(5) of the OSH Act—the right to choose their medical treatment or medical examinations on religious grounds, including the right to choose plants or plant-based substances as medicine on religious grounds, provided that such religious medical practice is not a state or federal crime and the individual complies with applicable OSHA standards governing conduct in the workplace or public spaces;
- All waivers, attestations, accommodations, or agreements obtained from employees pursuant to an employer's unlawful mandate are void ab initio;

6. Grant class certification;
7. Remand for damages consistent with this Court's holdings;
8. Sanction the City for Rule 11 and frivolous appellate conduct under Fed. R. App. P. 38;
9. Refer Judge Komitee to a Special Committee and to the Judicial Conference for possible impeachment

November 26, 2025

Respectfully submitted,

/s/ Jo Saint-George

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements and Type-Style Requirements.

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this document contains 6,499 words.

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Dated: November 26, 2025

/s/ Jo Saint-George

Jo Saint-George

CERTIFICATE OF SERVICE

I, Jo Saint-George, hereby certify that on the 28st day of November, 2025 a copy of CORRECTED REPLY BRIEF FOR -APPELLANTS and SUPPLEMENTAL APPENDIX in Remo Dello Ioio, et al. v. City of New York, et al. (Docket# 24-3252) was served by ECF upon the party as listed below:

New York City Law Department
Appeals Division
100 Church Street
New York, New York 10007

Dated: November 28, 2025

/s/ Jo Saint-George
Jo Saint-George