24-3252

United States Court of Appeals
for the Second Circuit

REMO DELLO IOIO, *et al.*,

Plaintiffs-Appellants,

against

CITY OF NEW YORK, *et al.*,

Defendants-Appellees.

Full caption on second page.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLEES

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October 31, 2025

Full case caption:

REMO DELLO IOIO, SUZANNE DEEGAN, MARITZA ROMERO, JULIA HARDING, CHRISTINE O'REILLY, SARA COOMBS-MORENO, JESUS COOMBS, ANGELA VELEZ, SANCHA BROWNE, ZENA WOUADJOU, CHARISSE RIDULFO, TRACY ANN FRANCIS MARTIN, KAREEM CAMPBELL, MICHELLE HEMMINGS HARRINGTON, CARLA GRANT, OPHELA INNISS, CASSANDRA CHANDLER, AURA MOODY, EVELYN ZAPATA, SEAN MILAN, SONIA HERNANDEZ, BRUCE REID, JOSEPH RULLO, CURTIS BOYCE, RASHEEN ODOM, JESSICA CSEPKU, JOSEPH SAVIANO, EDWARD WEBER, ROSEANNE MUSTACCHIA, NATALYA HOGAN, FRANKIE TROTMAN, MARIA FIGARO, PAULA SMITH, LYNDSAY WANSER, SARAH WIESEL, CHRISTIAN MURILLO, DIANNE BAKER-PACIUS, DAWN SCHOL, SUZANNE SCHROETER, ALTHEA BRISSETT, TRACEY HOWARD, MARC ROSIELLO, AUDREY DENNIS, MARIE JOSEPH, PATRICIA CATOIRE, SALLY MUSSAFI, COLETTE CAESAR, BERTRAM SCOTT, DIANE PAGEN, STELLA M PRESTON, RACHELLE GARCIA, JULIE LAWLEY, SUSANNE PHILLIP, MARIA ESTRADA, JENNETTE FRAZER,

Plaintiffs-Appellants,

WOMEN OF COLOR FOR EQUAL JUSTICE, ELIZABETH LOIACONO, AYSE USTARES, AMOURA BRYAN, MARK AYNE, MONIQUE MORENE, GEORGIANN GRATSLEY, MERVILYN WALLEN, YULANDA SMITH, SUZANNE SHROETER, WANSER LYDSAY, MARVILYN WALLEN, MONICA MARTIN, MARK MAYNE, MONIQUE MOORE,

Plaintiffs,

against

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.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

PRELIMINARY STATEMENT

Appellants are current and former employees of the City of New York and the New York City Department of Education (DOE) who challenge the prior requirement that they receive COVID-19 vaccinations as a condition of their continued employment. The United States District Court for the Eastern District of New York (Komittee, J.) dismissed their claims, prompting appellants to belatedly seek the district court's disqualification because of alleged ties to Moderna, a manufacturer of COVID-19 vaccines. Appellants appealed only from the dismissal of their complaint, not the subsequent denial of their recusal motion.

This Court should affirm. First, this Court lacks jurisdiction to review the order denying recusal given the failure to appeal. In any event, because the motion was improperly delayed, the decision not to recuse is subject to only plain error review, and the district court made no error at all. The court's ownership stake in a diversified investment fund that might hold Moderna stock falls squarely in the safe harbor for such investments that does not require recusal, and the other grounds appellants press as a basis for recusal are entirely unsubstantiated.

Second, the district court properly dismissed appellants' claim under the Occupational Safety and Health Act ("OSH Act"). They concede, as they must, that courts have universally held that the Act creates no

private cause of action, and appellants cannot invoke 42 U.S.C. § 1983 to circumvent those holdings. In any event, neither of the OSH Act provisions they cite grants them the universal right to refuse vaccinations mandated by the City pursuant to its police powers and the New York City Administrative Code merely by raising a religious objection.

Third, appellants' claim that the OSH Act preempts local vaccine requirements also fails. This challenge is moot in light of the City's withdrawal of this requirement. In any event, nothing in the OSH Act or its regulations preempts such a requirement. The OSH Act by its terms applies only to private employers, not local governments. And far from preempting the field of occupational safety and health, the OSH Act expressly permits state regulation that does not conflict with its provisions. The provision appellants cite limits *the federal government*'s ability to issue vaccine requirements under the Act; it says nothing about municipal or state authority at all. And no federal regulation has already addressed virus prevention, such that there could be conflict.

Appellants' other arguments are also meritless. The First Amendment and substantive due process claims fail under this Court's precedent. The claim that the City's arguments are sanctionable is itself frivolous. And this Court has no jurisdiction to review the denial of class certification as premature, which was in any event wholly correct.

ISSUES PRESENTED

1. Should this Court reject appellants' challenge to the district court's denial of their post-dismissal motion to recuse for lack of jurisdiction, or in the alternative affirm on plain error review?

2. Did the district court properly conclude that appellants could not sue under the OSH Act or 42 U.S.C. § 1983 for alleged violations of the Act, where established precedent holds that the Act creates no private cause of action, and where appellants' theory fails in any event?

3. Should this Court affirm the rejection of appellants' OSH Act preemption claim, where that claim is moot given the withdrawal of the vaccination requirement, and where appellants in any event fail to identify any conflict with the Act's terms or purposes, or any overlapping regulation promulgated under the Act?

4. Did the district court properly conclude that requiring vaccines as a condition of employment was a generally applicable regulation that did not infringe a fundamental right and thus did not violate the First Amendment or substantive due process?

5. Did the district court properly reject as utterly meritless appellants' remaining claims under the New York City Human Rights Law and their motions for sanctions and class certification?

STATEMENT OF THE CASE

A. Appellants' complaint challenging the City's prior vaccine mandates for employees

Appellants' operative complaint in this purported class action challenges the City's prior requirement that City workers receive COVID-19 vaccinations as a condition of their continued employment (Appellants' Appendix ("A") 1319, 1324).[1] They press their claims on behalf of all City employees who were denied any kind of exemption and who have not returned to work after being placed on leave (A1324–29, 1354, 1383).[2] Appellants also assert their claims on behalf of those who ultimately accepted the vaccine despite objecting, including because their financial circumstances demanded it (A1327, 29–30, 1354, 1357,

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[1] Several parties appear on this Court's docket sheet who appellants' counsel conceded were improperly named as plaintiffs. These parties include Georgiann Gratsley, Mark Ayne, Marvilyn Wallen, Rachelle Garcia, Susanne Phillip, Suzanne Deegan, Natalya Hogan, and Julie Lawley (EDNY ECF No. 117, 120; ECF No. 21 (notice of appearance requesting certain parties' removal)). In addition, Diane Baker-Pacius, listed as a plaintiff-appellant on the docket sheet, was not named as a plaintiff in the operative complaint (A1316).

[2] Parties allegedly included in this putative class include Remo Dello Ioio, Maritza Romero, Julia Harding, Christine O'Reilly, Sara Coombs-Moreno, Sancha Brown, Zena Wouadjou, Evelyn Zapata, Edward Weber, Tracy Ann Francis Martin, Michelle Hemmings Harrington, Ophelia Inniss, Cassandra Chandler, Carla Grant, Charisse Ridulfo, Kareem Campbell, Bruce Reid, Joseph Rullo, Sean Milan, Sonia Hernandez, Curtis Boyce, Joseph Saviano, Jessica Csepku, Roseanne Mustacchia, Maria Figaro, Rasheen Odom, Frankie Trotman, Paula Smith, Christian Murillo, Dawn Schol, Suzanne Schroeter, Sarah Wiesel, Althea Brissett, Tracey Howard, Marc Rosiello, Audrey Dennis, Marie Joseph, Patricia Catoire, Sally Mussafi, Colette Caesar, Bertram Scott, Diane Pagen, Stella Preston, and Jennette Frazer (A1326–29).

1383).[3] Unless otherwise noted, the following background derives from appellants' fourth amended complaint, accepting all factual allegations as true. *Hamilton v. Westchester Cnty.*, 3 F.4th 86, 90 (2d Cir. 2021).

According to the complaint, the City issued nine orders between August and December 2021 requiring all City and DOE employees and contractors to receive a COVID-19 vaccination as a condition of their continued City employment unless they qualified for a religious or medical exemption (A1319, 1348–49). These orders, which appellants themselves annexed multiple times to their motion papers, were issued in response to the public health emergency to protect the "health and welfare" of all City residents from COVID-19 since March 2020 (A377 (October 20, 2021 order); *see* A359–396, 645–56, 876)). "[T]o assure the maintenance of the protection of public health" as well as to address the fact that unvaccinated individuals accounted for nearly all hospitalizations and deaths associated with COVID-19, the City determined that its employees and contractors "should take reasonable measures to reduce the transmission of COVID-19," including vaccination (A377–78).

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[3] Parties alleged to represent this putative class include Angela Velez and Jesus Coombs (A1329–30). While the complaint also names additional parties, the docket sheet indicates that many are not participating in this appeal, including Elizabeth Loiacono, Amoura Bryan, Monique More, Yulonda Smith, and Ayse Ustares (A1326, 1329).

As the City observed, the U.S. Centers for Disease Control and Prevention had determined that vaccination was "an effective tool to prevent the spread of COVID-19," had prevented hundreds of thousands of COVID-19 cases and scores of deaths and hospitalizations, and benefited both the recipient and those with whom they came into contact (A377). Accordingly, mandatory vaccination was "necessary for the health and safety of the City and its residents" (A377–79). Those who did not qualify for an exemption and did not provide proof of vaccination were placed on leave without pay and prohibited from returning to their workplaces, which included some 2,400 employees (A1319, 1341, 1349, 1351).

In 2023, the City lifted the mandate after more than 96 percent of City workers became fully vaccinated against COVID-19 and 90 percent of City residents of all ages had received at least one vaccination dose (A1319, 1490–95). But those who had separated from City service because of the mandate were not automatically reinstated (A1319, 1483–86). Instead, these employees—including approximately 1,780 who were terminated for failure to submit proof of vaccination—had to apply for reinstatement or rehire if they wished to resume City employment (A1356, 1484). *See* Personnel Rules & Regs. of City of New York §§ 6.2.1–6.2.6; Office of the Mayor, Emergency Executive Order No. 331,

Feb. 9, 2023, *available at* https://perma.cc/LDR8-B3ZT; City of N.Y., FAQ Regarding New York City Employees and the COVID-19 Vaccine, 3/10/2023, *available at* https://perma.cc/H4Q7-JEDU.

Appellants sued under the Declaratory Judgment Act, the Occupational Safety and Health Act, and 42 U.S.C. § 1983 (A1319–21, 1359, 1372). Their complaint seeks damages; immediate reinstatement; and declarations that COVID-19 vaccines are ineffective, that mandates requiring them are unenforceable, that "all employees" have the right to refuse any vaccination for any reason, including an "absolute right" to a religious exemption, and that these rights are enforceable through a private right of action under the OSH Act (A1319–21, 1369, 1374–76, 1384–86). Appellants' theory is that vaccine mandates violate the OSH Act because OSHA has not approved them, and because the OSH Act allegedly requires granting any request for a religious exemption regardless of merit pursuant to 29 U.S.C. § 669(a)(5) (A1338, 1341–46, 1352, 1359, 1375–76). Appellants also allege that vaccines are not "capable" of satisfying the OSH Act because vaccines cannot "remove airborne hazards," including those resulting in the transmission of COVID-19 (A1335–36, 1342).

According to appellants, the mandates also violated their free exercise rights under the First Amendment and their substantive due

process right to refuse medical treatment under the Fourteenth Amendment (A1321, 1364–71). Except for plaintiff Amoura Bryan, who refused continued representation by appellants' counsel and is not a party to this appeal (A35; EDNY ECF Nos. 102–108), the complaint does not detail the religious beliefs that the vaccine mandate purportedly violated. Instead, some appellants relied on affidavits annexed to the complaint claiming that vaccines violated their Christian faith (A179, 205, 210, 235, 246, 332, 354–55), or other allegedly religious beliefs (A327 (citing beliefs in "healthful living")).

Appellants also argued that the vaccine mandates violated Title VII and the New York City Human Rights Law ("NYCHRL"), including because their applications for religious exemptions were denied (A1321, 1371, 1377–79). And they asserted fraud claims based on the City's representation that vaccines were "an effective tool to prevent the spread of COVID-19" and were otherwise "necessary" in the fight against COVID-19, which appellants claimed was false given that vaccines did not completely halt the disease's transmission (A1318, 1321, 1380–82).

B. The City's motion to dismiss the complaint and appellants' extensive motion practice in response

This litigation has included extensive motion practice initiated by appellants, including several failed motions for preliminary injunctive relief and multiple amended pleadings (A9–14). Upon appellants' filing of the third amended complaint, the City moved to dismiss (A20, 628–69). Appellants opposed and filed a premature motion for summary judgment before the start of discovery (A17–21).

Appellants also moved for sanctions and to vacate the district court's previous denial of a preliminary injunction, arguing that the City had misrepresented the law (A936, 1141, 1276). As relevant here, appellants argued that the City had improperly argued that there was no private right of action under the OSH Act (A947–48). According to appellants, while "approximately 200 federal court cases" had found no private right of action for the OSH Act claims raised in those cases, none had held that appellants' specific OSH Act claim could not be raised (A947–48). The City opposed, arguing that these cases, coupled with appellants' failure to cite a single case holding that a private cause of action existed for any OSH Act claim, demonstrated that the City's position was far from frivolous as required to support sanctions (A1096–97).

The court reserved decision on the sanctions motion and declined to permit summary judgment motion practice to proceed, but granted appellants an opportunity to file a fourth amended complaint, the operative pleading here (A23–27). The City moved to dismiss that complaint, incorporating by reference the City's earlier motion to dismiss as well as the City's opposition to appellants' attempts to secure another preliminary injunction (A606, 1517). In response, appellants renewed their opposition to dismissal (A1532).

C. The district court's interlocutory orders denying class certification as premature and dismissing the complaint

The district court denied appellants' motion for class certification as premature, and appellants did not seek to appeal that determination (A22, 25), even though they could have sought permission to do so. *See* Fed. R. Civ. P. 23(f); 28 U.S.C. § 1292(b).

By separate order, the district court granted the City's motion and dismissed the complaint. After observing several deficiencies in some of the individual plaintiffs' ability to seek relief (SPA44–46),[4] the court

[4] In particular, some of the individual plaintiffs' claims were barred by res judicata (SPA45–46). Based on the docket sheet, many of those individual plaintiffs are not participating in this appeal, including Ayse Ustares, Elizabeth Loiacono, Monique Moore, and Amoura Bryan (A622–24). Plaintiffs who are participating but whose

(cont'd on next page)

held that appellants could not bring any of their claims under the OSH Act, nor did 42 U.S.C. § 1983 provide a vehicle for that relief (A47–48). The OSH Act did not permit a "private right of action" given the existing "detailed statutory scheme" for enforcing OSH Act violations, which was also inconsistent with enforcement under § 1983 (A48–49).

The district court also rejected appellants' preemption claim. In doing so, the court adhered to its past order rejecting that claim during earlier motion practice (SPA64–65 (citing EDNY ECF No. 39)). As the court explained in its prior order, because neither the Supremacy Clause nor the OSH Act permitted appellants to raise their claims, they could not bring a claim that the OSH Act preempted the vaccine mandates (EDNY ECF No. 39 at 4–5). Nor could appellants recast their claims under the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202, which did not create an independent cause of action or "provide a form of relief previously unavailable" (EDNY ECF No. 39 (citing *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993); A1372–77)).

Rejecting appellants' First Amendment claims, the district court held that the mandates were neutral, "generally applicable," and did not

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claims are barred by res judicata include Curtis Boyce, Sarah Wiesel, Maritza Romero, Julia Harding, Sara Coombs-Moreno, Angela Velez, and Aura Moody (SPA45–46; A622–24)

treat religious belief "less generously than lay practice," requiring only rational basis scrutiny (SPA50–53). Similarly, the court applied rational basis scrutiny in relation to appellants' substantive due process claim because there was no constitutionally protected "fundamental right" to refuse vaccination "in the face of a public health emergency" (SPA54–55).

The court then dismissed virtually all of appellants' Title VII and NYCHRL claims, reasoning that only one plaintiff—Amoura Bryan—had adequately pled that the mandates infringed her religious beliefs and that she had suffered adverse action because of those beliefs (SPA56–64). The court also dismissed appellants' fraud claims for lack of standing given that no appellant alleged that they were misled by the City's descriptions of the vaccine's effectiveness (SPA65–69). And the court denied appellants' motion for sanctions and their motion to vacate the denial of a preliminary injunction for the City's alleged misconduct (SPA70).

D. The parties' post-dismissal motions, including appellants' application for the district court's recusal and vacatur, and the dismissal of all of appellants' claims

The district court's interlocutory dismissal order was entered on September 25, 2024. Fourteen days later, on October 9, the City moved

for reconsideration of the district court's denial of its motion to dismiss Amoura Bryan's Title VII and NYCHRL claims on res judicata grounds (A33–35; EDNY ECF Nos. 102, 125). Then, on October 25, appellants noticed an appeal from the district court's dismissal order, specifying that the appeal would challenge that order's legal reasoning in dismissing appellants' claims on the merits as well as its denial of sanctions (A1803–06).

The same day appellants noticed an appeal, they also moved to vacate the dismissal of their complaint and for the district court's disqualification from considering that motion based on material that should have been available to them at the time they commenced this lawsuit. As relevant here, appellants argued that the district court should have recused itself under 28 U.S.C. § 455 based on the court's past employment as general counsel with Viking Global Equities LP, an asset management firm, as well as ongoing investments in Viking and a related entity (A1693–97, 1700–01, 1754, 1763). Those investments purportedly included financial interests in Moderna, a COVID-19 vaccine manufacturer (A1623, 1685–89). Appellants also made various other claims, unsupported by evidence, that the court had learned about Moderna's vaccine science in 2018 (A1622–23, 1680–86, 1695, 1714, 1724, 1730); that the court's uncompensated involvement with Viking's

affiliated charitable foundation kept the court "in close proximity" to Viking's investments (A1695, 1702, 1726–27, 1751, 1760); that the court had made "millions" by denying their challenge to vaccine mandates (A1623–24, 1628, 1643, 1697–98); and that the court must have been "bribed" to dismiss their claims (A1681–82). The City opposed vacatur. EDNY ECF No. 114.

In a separate, final order disposing of this proceeding, the district court denied appellants' motions for vacatur and recusal, while granting the City's motion to reconsider the denial of the City's motion to dismiss Bryan's Title VII and NYCHRL claims. EDNY ECF No. 125. The court observed that it had no "direct investment in Moderna," nor had appellants identified any. EDNY ECF No. 125 at 3. As for Viking-related assets, the court held a stake only in a "diversified investment fund" that fell within 28 U.S.C. § 455(d)(4)'s "safe harbor for securities held through a 'mutual or common investment fund.'" And to the extent those funds owned stock in Moderna, which went public in December 2018 long before the pandemic, the court held only "an investment in a common investment fund that, in turn, held shares in a publicly traded company." EDNY ECF No. 125 at 3. Appellants thus failed to demonstrate that there was an actual or apparent conflict. *Id.* What's more, the court observed, appellants had not even showed how this litigation

would have affected Moderna, particularly given that it was not a party and the challenged vaccine mandates had long expired. *Id.* at 3–4.

Appellants did not notice an appeal from this order or file an amended notice of appeal in response to this order. The district court did not enter a separate judgment either before or after this order.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

All of appellants' challenges to the district court's orders fail. At the outset, this Court does not have jurisdiction to review the district court's order denying appellants' motion for recusal because they never appealed that order. To the extent this Court may nonetheless review the district court's retention of the case, that decision is subject to plain error review because appellants' motion was untimely. *Matson v. Bd. of Educ.*, 631 F.3d 57, 63 n.5 (2d Cir. 2011).

Satisfying plain error review requires demonstrating (1) a "deviation from a legal rule which has not been waived," (2) that "at a minimum" is "clear under current law," and (3) that "affect[s] substantial rights, which normally requires a showing of prejudice." *United States v. Bayless*, 201 F.3d 116, 127–28 (2d Cir. 2000) (cleaned up). Even if these conditions are met, reversal is warranted only if the error "seriously affects the fairness, integrity or public reputation of judicial

proceedings," *id.* at 128 (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)), and should be considered only with "extreme caution in the civil context." *Yukos Capital S.A.R.L. v. Feldman*, 977 F.3d 216, 237 (2d Cir. 2020).

Applying these principles, appellants failed to demonstrate that the district court was required to recuse itself under any standard. The court's holdings in a diversified investment fund fall within 28 U.S.C. § 455(d)(4)(i)'s safe harbor for such investments, and their contentions that the court has other, more direct interests in Moderna's stock are unsubstantiated. Similarly, appellants offer nothing but speculation that the district court learned anything of relevance regarding vaccine science merely from the court's role as general counsel at an asset management firm that invested in Moderna years before the pandemic.

Turning to the merits of appellants' claims, even reviewing the district court's grant of the City's motion to dismiss de novo and drawing all inferences in their favor, *Hamilton v. Westchester Cnty.*, 3 F.4th 86, 90 (2d Cir. 2021), the court properly dismissed all of their claims. At the outset, appellants' brief on appeal offers no argument on their Title VII or fraud claims, nor do they argue that the district court erred in concluding that their allegations did not establish a prima facie violation of the NYCHRL. These claims should thus be deemed abandoned. *See*

Ritchie Capital Mgmt., L.L.C. v. GE Capital Corp., 821 F.3d 349, 351 n.1 (2d Cir. 2016).

Appellants' remaining claims variously fail both for procedural reasons and on the merits. First, the district court properly dismissed appellants' claims under the OSH Act because the Act creates no private right of action that is cognizable under 42 U.S.C. § 1983 or otherwise. Instead, the OSH Act sets forth a detailed enforcement scheme that vests authority with the Secretary of Labor to pursue any violations of the Act. Nor does 29 U.S.C. § 669 permit such direct claims in federal court or prohibit the City's vaccination requirement, as appellants contend. That provision describes limitations on the *federal government's* authority under the OSH Act to research occupational safety and health issues by requiring vaccinations. It does not create an individual right to refuse vaccination, let alone one that is enforceable either by private right of action or under § 1983.

Second, appellants' claim that the OSH Act preempts the City's vaccine mandates is moot. Preemption claims may serve as the basis for only injunctive or declaratory relief, but the City long ago stopped requiring COVID-19 vaccination as a condition of employment due to high rates of vaccination that demonstrated the need for mandates had passed. And as this Court has already held, the end of the City's vaccine

mandates due to changed circumstances does not implicate any exception to mootness. *New Yorkers for Religious Liberty, Inc. v. City of N.Y.*, 125 F.4th 319, 327–28 (2d Cir. 2024).

Mootness aside, the OSH Act also does not preempt local vaccine mandates. The OSH Act is clear that it preempts state and local regulations only where those regulations conflict with an applicable occupational safety and health standard promulgated by OSHA. But there is no conflict here because the City is exempt from the OSH Act's requirements, and because appellants have identified no regulation that creates a conflict. The Supreme Court has also signaled that the OSH Act does not authorize the federal government to enact generally applicable vaccine requirements, indicating that the OSH Act cannot divest the City of its authority to do so. *Nat'l Fed'n of Indep. Bus v. Dep't of Lab.*, 595 U.S. 109, 117 (2022). And the existing OSHA regulations that appellants cite on respiratory protection from "airborne hazards," and other protective equipment, do not address attempts to stem the transmission of viruses and thus do not displace the City's authority to promulgate vaccination requirements.

Third, the district court also properly concluded that the City's mandates did not violate appellants' First Amendment or substantive due process rights. As this Court has previously held, rational basis

review applies to both claims because the mandates are neutral laws of general applicability that do not disadvantage religious people, and because refusing vaccination during a public health emergency does not infringe a fundamental right. *Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021); *see We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021). The emergent need facing the public from the COVID-19 pandemic plainly provided a rational, and even compelling, basis here.

Fourth, for all of these reasons, the district court properly rejected appellants' request for sanctions against the City based on the City's argument that the OSH Act does not create a private cause of action. This Court reviews the denial of sanctions for abuse of discretion and any underlying factual findings for clear error, *Fishoff v. Coty Inc.*, 634 F.3d 647, 654 (2d Cir. 2011), and the City's successful argument that no private right of action exists under the OSH Act was well supported and far from frivolous. Finally, appellants' challenge to the dismissal of their NYCHRL claims relies on nonexistent law and fails on the merits, and their challenge to the denial of their premature class certification demand fails for lack of jurisdiction and in any event lacks merit.

ARGUMENT

POINT I

APPELLANTS' CHALLENGE TO THE DISTRICT COURT'S RECUSAL ORDER FAILS FOR LACK OF JURISDICTION AND ON THE MERITS

This Court does not have jurisdiction over appellants' challenge to the district court's order denying their post-dismissal motion to recuse. A notice of appeal in a civil case must designate the judgment, order, or part thereof being appealed, and it must be filed within 30 days of the entry of the judgment or order being appealed. Fed. R. App. P. 3(c)(1)(B), 4(a)(1), (4)(a)(4)(B)(ii); *Adamou v. Doyle*, 674 F. App'x. 50, 51 (2d Cir. 2017) (summary order). But here, appellants appealed only from the district court's prior dismissal order (A1803–05), not from the later order denying recusal. Although they could have sought to amend their notice of appeal to include a challenge to the recusal order, they did not do so. Fed. R. App. P. (4)(a)(4)(B)(ii). As a result, this Court cannot review the order. *See Adamou*, 674 F. App'x at 52 (notice of appeal

from prior order cannot be interpreted as encompassing "future orders").[5]

To the extent this Court still has jurisdiction to review the district court's retention of this case as a general matter, *see Matson v. Bd. of Educ.*, 631 F.3d 57, 63 n.5 (2d Cir. 2011), there is still no basis to reverse. First, because appellants noticed an appeal only from the dismissal order predating their recusal motion, *id.*, the materials that appellants submitted in connection with that belated motion are outside the record on this appeal. *See, e.g.*, *United States v. Singh*, No. 23-8038, 2025 U.S. App. LEXIS 5587, *3 (2d Cir. 2025) (summary order) (materials "post-dating the district court's decision" are outside appellate record (citing *Loria v. Gorman*, 306 F.3d 1271, 1280 n.2 (2d Cir. 2002))); *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (papers submitted after ruling challenged on appeal "should be stricken

[5] Appellants noticed their appeal from a nonfinal order dismissing all claims except for Amoura Bryan's Title VII and NYCHRL claims. Nevertheless, it appears that this Court has jurisdiction over the remainder of the appeal with the exception of class certification because "[a] premature notice of appeal from a nonfinal order may ripen into a valid notice of appeal if a final judgment has been entered by the time the appeal is heard and the appellee suffers no prejudice." *Gavin/Solmonese LLC v. D'Arnaud-Taylor*, 639 F. App'x 664, 666 (2d Cir. 2016) (summary order). Although the district court did not formally enter final judgment, more than 150 days have passed since both the order on appeal as well as the subsequent order dismissing Bryan's claims, and so judgment is deemed entered pursuant to Fed. R. App. P. 58(c)(2)(B). *See Arzuaga v. Quiros*, 781 F.3d 29, 33 (2d Cir. 2015) (deeming final judgment entered after 150 days from order dismissing claims).

from the record on appeal"). And because those materials are the sole basis for appellants' claims of financial impropriety, they cannot support recusal. *See Munn v. Hotchkiss Sch.*, 795 F.3d 324, 330 (2d Cir. 2015) (review generally limited to record on appeal).

Second, even if the Court could consider these documents, appellate review of this issue is limited. Appellants forfeited their recusal claim by failing to raise it until after the court dismissed the complaint. *United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000) (untimely recusal motion after decision rendered was at least forfeiture). The judicial questionnaire and financial disclosures that appellants relied on were available years before the City's motion to dismiss and the court's order granting it. *See Sacerdote v. N.Y. Univ.*, 9 F.4th 95, 122 (2d Cir. 2021) (motion for disqualification must be made "at the earliest possible moment"). As a result, if this Court considers appellants' recusal claim at all, review is limited to only "plain error," as if appellants' untimely motion had never been made. *Matson*, 631 F.3d at 63 n.5; *Bayless*, 201 F.3d at 127 (plain error applies to forfeited recusal claim).

Here, appellants identify no error requiring recusal, much less one that satisfies plain error review. Appellants assert that recusal was necessary under 28 U.S.C. § 455(b)(4) for known "financial interest[s] in the subject matter in controversy … or any other interest that could be

substantially effected by the outcome of the proceeding." But as the district court correctly observed, its assets related to Viking were nothing more than "[o]wnership in a mutual or common investment fund that holds securities" that does not trigger recusal. 28 U.S.C. § 455(d)(4)(i); *see United States v. Teman*, No. 21-1920-cr, 2023 U.S. App. LEXIS 14247, at *9 (2d Cir. June 8, 2023) (summary order) (court's ownership of Berkshire Hathaway, which owned stock in victim bank, did not require recusal). Nor is there evidence, or even an allegation, that the court "participates in the management of the fund" that would proscribe this ownership. 28 U.S.C. § 455(d)(4)(i).

The court's ownership of Viking assets or its past role as Viking's general counsel also does not demonstrate that the court's "impartiality might reasonably be questioned" under 28 U.S.C. § 455(a). For one thing, as the Supreme Court has explained, § 455(a) cannot be interpreted to nullify § 455(d)(4)(i)'s safe harbor for judicial interests in a "common investment fund." *See Likety v. United States*, 510 U.S. 540, 552–53 (1994). Section 455(b) provides that ownership in a common investment fund is not a disqualifying interest, and so "[i]t would obviously be wrong" to hold that a judge's "impartiality could reasonably be questioned" based on that interest. *Id.*; *see N.Y.C. Dev. Corp. v. Hart*, 796 F.2d 976, 980 (7th Cir. 1986) (investment exception meant to allow

judges "to hold securities" without requiring "fine calculations" regarding case's financial effects).

What's more, "[a] reasonable person would not question" ownership in the diversified investment fund at issue here. *Dev. Corp.*, 796 F.2d at 980; *Cent. Tel. Co. v. Sprint Commc'ns Co. of Va., Inc.*, 715 F.3d 501, 516 (4th Cir. 2013) (§ 455(b) "almost certainly" forecloses recusals based on investment fund ownership). There's no evidence that the Viking funds still own any Moderna stock; instead, appellants offered proof of only a 2018 investment, years before this litigation as well as the COVID-19 pandemic and vaccination requirements that prompted it. And even if the Viking funds did hold Moderna stock, there's no proof of the size of that stake, much less the amount attributable to the court's slice of these funds. *See Teman*, 2023 U.S. App. LEXIS 14247, at *9 (small size of court's indirect holdings did not require recusal).

What's more, there's no basis to conclude that this lawsuit would have any effect on Moderna's stock. Millions of people took COVID-19 vaccines before this lawsuit commenced (A1737–42), and no order in this case could have affected Moderna's past distribution of them. And even assuming there may be some who refuse vaccines in the future if the past mandates were deemed unlawful, appellants offer nothing but speculation that this population is large enough to affect Moderna stock,

much less any smaller, diversified holdings that the court may own. *See Dev. Corp.*, 796 F.2d at 980 (potential changes to single stock in diversified fund are inconsequential). Accordingly, the "remote, contingent, or speculative relationship" between the court's investment fund holdings and this case "is not the kind of interest which reasonably brings into question" the court's impartiality. *Sacerdote*, 9 F.4th at 121.

Contrary to appellants' assertion (App. Br. 26), the district court also confirmed that it lacked any direct holdings in Moderna. EDNY ECF No. 125 at 3. Appellants nevertheless assert that the court owned a "$60 million direct Moderna holding" before his appointment to the bench in 2019, but the only evidence appellants cite is reporting on the court's pre-appointment net worth of $60 million that does not once mention any interest in Moderna (A1745). And appellants' claim that the court was "responsible" for a $500 million investment "in the commercialization of the vaccine they refused to take" is unsubstantiated too (App. Br. 26): the court's former employer was one of several institutions that invested that amount in February 2018, over two years before the vaccines at issue were developed and distributed (A1730).

Appellants' bald speculation that the court had personal knowledge of the science underlying Moderna's COVID-19 vaccines also does not support recusal. *See* 28 U.S.C. § 455(b)(1) (requiring recusal

for judge's "personal knowledge of disputed evidentiary facts"). There's no evidence that the court had any involvement in Viking's 2018 Moderna investment or the due diligence that went into it, much less proof that any inquiry delved into the specifics of Moderna's research. *In re Certain Underwriter Defendants*, 294 F.3d 297, 305 (2d Cir. 2002) (no recusal for movants' failure to show that judge had requisite personal knowledge). And while the court was previously responsible as general counsel for a multitude of internal and external legal matters at Viking—a firm that manages tens of billions of dollars in assets (A1724)—that too does not demonstrate the court's specific knowledge of Moderna's research, much less how it might be used over two years down the line in a pandemic that no one saw coming. *See, e.g.*, *In re Chinniah*, 670 F. App'x 59, 60 (3d Cir. 2016) (speculation about "possible personal knowledge" insufficient for recusal).

And even if appellants could demonstrate an error—which they cannot—it did not qualify as "plain" for all the reasons already articulated. Moreover, appellants cannot demonstrate prejudice from the dismissal of their meritless complaint, *see infra* Points II–V, much less that the district court's thorough consideration of their claims "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Bayless*, 201 F.3d at 128.

POINT II

APPELLANTS' CLAIMS UNDER THE OSH ACT FAIL FOR LACK OF A PRIVATE RIGHT OF ACTION AND ON THE MERITS

The district court also properly concluded that appellants failed to state an OSH Act claim under the OSH Act itself or pursuant to 42 U.S.C. § 1983. Neither statute allows appellants to assert a private cause of action for violations of their alleged rights to refuse vaccination under the OSH Act. And in any event, the OSH Act does not prohibit the City from imposing a vaccine mandate with exceptions for only valid religious objections.

A. No provision of the OSH Act permits appellants to bring their claims in federal court.

The district court properly concluded that appellants lack a private cause of action to assert their OSH Act claim in federal court. The existence of a private right of action under a federal statute depends upon "statutory intent," *Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017), and appellants identify nothing in the OSH Act creating an express cause of action for employees to individually bring suit. Absent such express language, "implied rights of action are disfavored, and will not be found in the absence of clear evidence of legislative intent." *Moya v. U.S. Dep't of*

Homeland Sec., 975 F.3d 120, 128 (2d Cir. 2020). Thus, "[w]here the text explicitly contemplates public enforcement only, courts will assume Congress intended to preclude private enforcement." *George v. N.Y.C. Dep't of City Planning*, 436 F.3d 102, 103 (2d Cir. 2006). That is so "no matter how desirable [a private remedy] might be as a policy matter, or how compatible with the statute." *Ziglar*, 582 U.S. at 133.

Applying these principles, this Court has long held that employees cannot assert a private cause of action under the OSH Act. The Act grants the Secretary of Labor broad authority to investigate and correct hazardous conditions in the workplace, thus vesting "sole responsibility" for "enforcement of the Act" with the Secretary. *Donovan v. Occupational Safety & Health Rev. Comm'n*, 713 F.2d 918, 926–27 (2d Cir. 1983). By contrast, employees have only "specific rights in the investigatory and rule-making stages of the Act," which include asking the Secretary to investigate suspected violations, and otherwise have only "a limited role" that does not include "a private right of action." *Id.* at 926. Thus, employees may not "compel the Secretary to adopt a particular standard," nor may they "prosecute" an alleged violation that the Secretary decides not to pursue. *Id.* (citing *Marshall v. Occupational Safety & Health Rev. Comm'n*, 635 F.3d 544, 550–51 (6th Cir. 1980) (OSH Act "does not create a private right of action in favor of employees")).

Appellants themselves admit that there are "200 cases" holding that there is no private cause of action for alleged OSH Act violations (App. Br. 44–45). They nonetheless purport to identify two provisions of the OSH Act that they claim support departure from established precedent. But they fail to identify any authority supporting either exception, and both in any event fail under established principles.

1. 29 U.S.C. § 660 of the OSH Act does not authorize a private right of action.

Contrary to appellants' contentions (App. Br. 36–41), § 11(c) of the OSH Act, codified at 29 U.S.C. § 660(c), does not create a private right of action for the reasons already identified. This section prohibits discharging or discriminating against an employee "because such employee has filed any complaint or caused to be instituted any proceeding under or related to [the OSH Act] … or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." 29 U.S.C. § 660(c)(1). The provision makes clear, however, that the Secretary of Labor possesses sole authority to enforce this provision, like the rest of the OSH Act.

Under § 660(c)(2), while employees may file a complaint "with the Secretary" alleging prohibited discrimination, the statute vests the Secretary with the sole authority to investigate and determine whether

§ 660(c)(1) has been violated. In that case, the Secretary—not the complaining employee—"shall bring an action in any appropriate United States district court." § 660(c)(2). By "deliberately interpos[ing] the Secretary's investigation as a screening mechanism between complaining employees and the district court," Congress did not intend to permit employees to file "individual actions in those same courts." *Taylor v. Brighton Corp.*, 616 F.2d 256, 262 (6th Cir. 1980); *see* 29 U.S.C. § 660(c)(2); *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1096–97 (D.C. Cir. 2017) (no express or implied private right of action in § 660(c)); *Walsh v. Cmty. Health Ctr. of Richmond, Inc.*, No. 21-CV-3094, 2022 U.S. Dist. LEXIS 176471, at *3 (E.D.N.Y. Sept. 28, 2022) ("[o]nly the Secretary may sue under [§ 660(c)(2)]; there is no private right of action").

Appellants nevertheless argue that this Court should infer a private right of action because § 660(c)(2) provides that an employee "may" file a complaint with the Secretary within thirty days of a violation, without stating that the employee "must" file such a complaint with the Secretary, or expressly precluding the filing of a complaint in federal court (App. Br. 37–39). But that analysis, which relies on implication, gets the applicable standard backwards. As this Court has emphasized, a "clear manifestation of congressional intent" is necessary to infer the existence

of a private right of action, *Moya*, 975 F.3d at 128, and cannot be "created through judicial mandate," even based on equity or any other policy matters. *Ziglar*, 582 U.S. at 133; *see Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698 (2d Cir. 2010) ("colorable evidence" of intent to confer "individual right" did not demonstrate intent "to create a right of action").

And appellants misread the provision in any event. Section 660(c)(2)'s use of the word "may" merely indicates that employees are authorized, but not required, to bring allegations of a violation to the Secretary's attention. In other words, employees may also allow their claim to lapse without violating federal law. And by setting forth exactly what the Secretary's responsibilities are if an employee does submit a complaint, the OSH Act's "detailed statutory scheme," including its enforcement provisions, preclude a private right of action and demonstrate that "enforcement of the Act is the sole responsibility of the Secretary." *Donovan*, 713 F.2d at 927.

Nor can a private right of action be inferred from § 660(c)(2)'s description of available remedies (*see* App. Br. 40–41). Under that provision, federal courts "shall have jurisdiction" in "any such action" to order appropriate equitable relief. § 660(c)(2). By using the term "such action," the statute refers expressly to actions described "in the

immediately preceding clause," i.e., those brought by the Secretary. *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 424 (2d Cir. 2005) (defining "such" as "previously characterized or described"). This language is not an authorization of *other* actions that are not described in § 660(c)(2), including by employees.

What's more, where Congress wanted to vest employees with an independent right to seek judicial intervention, Congress did so explicitly. Under 29 U.S.C. § 662(d), an employee may bring an action *against the Secretary* for "arbitrarily or capriciously" failing to enjoin serious dangers in the workplace. And employees also have the right to challenge the period of time in which an employer must address a hazardous or unsafe condition. 29 U.S.C. § 659(c); *see Donovan*, 713 F.3d at 926 (noting that these are the only situations in which "the Act subordinates the prosecutorial discretion of the Secretary to the rights of employees"). That Congress did not also create a mechanism for employees to seek independent judicial review under § 660(c) demonstrates that no such right may be implied.

2. 29 U.S.C. § 669 of the OSH Act does not authorize a private right of action.

Appellants also contend that the Court should infer a private right of action to enforce one sentence found in § 20(a)(5) of the OSH Act,

codified at 29 U.S.C. § 669(a)(5). This sentence is tucked into a subsection describing the Secretary of Health, Education, and Welfare's authority to research occupational health and safety issues,[6] which includes "requiring employers to measure, record, and make reports on the exposure of employees to substances or physical agents" and establishing "such programs of medical examinations and tests as may be necessary for determining the incidence of occupational illnesses." *Id.* The language appellants cite merely states that nothing in that provision, or in the OSH Act, "shall be deemed to authorize or require medical examination, immunization, or treatment for those who object on religious grounds, except where necessary for the protection of the health and safety of others." § 669(a)(5).

This language nowhere indicates, let alone clearly, that Congress intended to create a private right of action in relation to § 669(a). Instead, it describes only the scope of what the OSH Act itself may "authorize or require," without including any "rights-creating language" focused on the "individuals protected." *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007); *compare Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 (1979) (language that "no person shall be denied the

[6] The Department of Health, Education, and Welfare was split into the Department of Health and Human Services and the Department of Education in 1979.

right to vote" created individual right). By locating this limitation on the scope of the OSH Act within the rules governing the federal government's research of occupational safety hazards, the provision is "phrased as a directive to federal agencies" regarding such programs, not the creation of "new rights" enforceable through private action. *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).

That the statute speaks in generalized terms also supports the conclusion that it creates no private right of action. Statutory language is not rights-creating where "the right assertedly protected by statute" is "so vague and amorphous that its enforcement would strain judicial competence." *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 150 (2d Cir. 2006). Here, neither the statute nor any regulations clarify what sorts of "religious grounds" qualify for protection, the extent to which the federal government may verify them, or under what circumstances protecting others may be "necessary." Implying an enforceable individual right based on this squib of text directed at federal research authority would "strain judicial competence," counseling against a private right of action. *Id.*; *see Blessing v. Freestone*, 520 U.S. 329, 345 (1997) (refusing to find private right where vague standard was difficult to apply); *Egbert v. Boule*, 596 U.S. 482, 491 (2022)

(Congress is "far more competent than the judiciary" to weigh policy regarding creating cause of action).

Appellants are also wrong that, if this Court does not craft a private right of action from § 669(a)(5), there would be no remedy for employees claiming that they were discharged for exercising a right under the OSH Act (App. Br. 42–50). As explained above, § 660(c)(2) authorizes the Secretary to investigate complaints regarding any "discharge" or "discriminat[ion]" for an employee's exercise of "any right afforded by the [OSH Act]," and successful complainants may receive "all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay." If appellants were correct that § 669(a)(5) created a universal right to refuse vaccination—and they are not—an administrative complaint could be brought under § 660(c)(2).

Contrary to appellants' claims, that § 669(a)(5) may touch upon subjects addressed by the First or Fourteenth Amendment in other contexts is no reason to look past Congressional intent. *See Alexander*, 532 U.S. at 280–81, 289–93 (no private right of action although regulation implicated Equal Protection Clause); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979) (improper for courts to focus on "desirability" of private right of action "to effectuate the purposes of a given statute"). Appellants ignore that statutory intent is the

"determinative question," and that absent clear evidence that Congress intended a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Ziglar*, 582 U.S. at 133.

Nor is there anything in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and its progeny that supports appellants' contentions (*see* App. Br. 50–51). In *Bivens*, 403 U.S. at 394–96, the Supreme Court addressed the judiciary's authority to imply private rights of action for alleged constitutional violations, not statutory violations. And indeed, the Supreme Court has emphasized that different principles apply in the latter context. *See Ziglar*, 582 U.S. at 133 (finding it "logical" that Congress would be "explicit if it intends to create a private cause of action" by statute, as compared to *Bivens* claims).

What's more, appellants ignore that the Supreme Court has emphasized that new *Bivens* actions are "disfavored," particularly where an "alternative, existing process" for particular claims exists—such as the process in § 660(c)(2). *See Ziglar*, 582 U.S. at 135, 137. And even under *Bivens*, nothing like appellants' First Amendment or substantive due process claims has ever been recognized. *See, e.g.*, *Egbert*, 596 U.S. at 499 (no *Bivens* action for First Amendment retaliation); *United States v. Stanley*, 483 U.S. 669, 671–72, 683–84 (1987) (no *Bivens*

substantive due process claim for military's secret administration of LSD); *Ziglar*, 582 U.S. at 135 (cataloging refusals to extend *Bivens* to new contexts). Appellants demand that this Court simply exercise "judicial muscle" to stitch these doctrines together and imply a new statutory cause of action, but the Supreme Court has firmly rejected this kind of legislation by judicial fiat, untethered from Congressional intent. *Ziglar*, 582 U.S. at 133; *see Egbert*, 596 U.S. at 491 (discouraging courts from creating causes of action, which is "a legislative endeavor").

B. Appellants cannot rescue their OSH Act claims by asserting them under 42 U.S.C. § 1983.

For many of the same reasons, appellants also cannot bring their OSH Act claims via 42 U.S.C. § 1983 (App. Br. 53). Whether § 1983 provides a vehicle for asserting a federal statutory violation turns first on "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002); *see also Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 183 (2023) (no § 1983 cause of action absent "unambiguous conferral" of individual right). This inquiry is no different from determining whether an implied right of action exists within the statute itself, and so "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private

suit, whether under § 1983 or under an implied right of action." *Gonzaga*, 536 U.S. at 286.

And as explained above, § 669(a)(5)'s limitations regarding the OSH Act's scope does not speak in terms of an "individual entitlement" to refuse vaccination. *See Gonzaga*, 536 U.S. at 287. Instead, the language operates as a limitation on the kinds of research that the federal government may conduct regarding occupational safety and health unless it is deemed "necessary" to protect the public. The statute thus lacks the "unmistakable focus on the benefited class" necessary to permit private suits, under the OSH Act itself or § 1983. *Id.*; *see Loyal Tire*, 445 F.3d at 149 (applying *Gonzaga* to conclude that Commerce Clause legislation did not permit suit under § 1983).

What's more, even if § 669(a)(5) could be interpreted as conferring an individual right, Congress intended the OSH Act's "remedial scheme to be the exclusive avenue through which a plaintiff may assert [OSH Act] claims." *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 252 (2009). For the same reasons that the OSH Act vests exclusive authority with the Secretary to prosecute violations under § 660(c)(2), including alleged violations of § 669(a)(5), the statutory structure also precludes alternative enforcement through 42 U.S.C. § 1983. Any other result would contravene the legislative scheme, which was designed to

"interpose[] the Secretary's investigation as a screening mechanism between complaining employees and the district court." *Taylor*, 616 F.2d at 262; *see Donovan*, 713 F.2d at 927 ("enforcement of the Act is the sole responsibility of the Secretary").

Nor does *Health & Hospital Corp. v. Talevski*, 599 U.S. 166 (2023), which appellants cite (App. Br. 51, 53–54), support a different result. There, the Supreme Court confirmed that the proper inquiry is whether Congress "unambiguously conferred individual rights upon a class of beneficiaries to which the plaintiff belongs." *Id.* at 183. *Talevski* then went on to consider two statutory provisions that are very different from § 669(a)(5). These provisions, which govern the rights of nursing home residents regarding their care and discharge, are expressly defined as "requirements relating to residents' rights," and the provisions repeatedly described the rules at issue as personal "rights" belonging to the resident. *Talevski*, 599 U.S. at 184–85. And the underlying statute's remedial scheme also did not preclude § 1983 enforcement, given that the statute lacked any "private judicial right of action, a private federal administrative remedy," or anything else demonstrating that a § 1983 claim would circumvent the statute's limitations. *Talevski*, 599 U.S. at 189–90.

By contrast, § 669(a)(5) has no similar emphasis on individual rights, and § 660(c)(2) prescribes exactly how employees may bring an administrative claim. Circumventing those procedures through § 1983 would contravene Congress's intent and grant remedies "unavailable" under the statute. *Talevski*, 599 U.S. at 189–90.

C. Even assuming a private right of action, the vaccine mandates did not violate 29 U.S.C. § 669(a)(5) of the OSH Act.

Because the OSH Act creates no private right of action, this Court need go no further. In any event, appellants' claim that the vaccine mandates at issue violate § 669(a)(5) fails under the plain language of that provision.[7] Appellants argue that this subsection grants them an automatic "statutory right" (App. Br. 43) to refuse vaccination on religious grounds, and that requiring them to receive COVID-19 vaccinations as a condition of employment violates that right.

But no court has ever adopted this reading, and for good reason. As explained, the single sentence on which appellants rely is part of a provision describing the federal government's authority "to conduct

[7] This Court may review "purely legal questions" even if they were not raised below. *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002); *United States v. Delis*, 558 F.3d 177, 180 (2d Cir. 2009) ("statutory interpretation" is "purely a question of law").

research, experiments, and demonstrations" regarding occupational health and safety, and it clarifies that the OSH Act does not authorize the federal government to implement a program requiring immunization over religious objection unless "necessary" for public health. 29 U.S.C. § 669(a)(5). The law thus pertains only to what the OSH Act itself may "authorize or require," and says nothing about preventing local governments from implementing vaccine mandates pursuant to other sources of law.

The Supreme Court also indicated that § 669(a)(5) cannot be so broadly interpreted in *National Federation of Independent Businesses* ("*NFIB*") *v. Department of Labor*, 595 U.S. 109 (2022). In *NFIB*, the Supreme Court rejected a Sixth Circuit decision relying on this provision to conclude that OSHA could require COVID-19 vaccination for all employees. *Id.* at 117. As a dissenting Sixth Circuit judge observed, this interpretation of § 669(a)(5) "squeeze[s] a lot of power out of a very small statutory tube." *MCP No. 165 v. U.S. Dep't of Labor*, 20 F.4th 264, 282 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc); *see NFIB*, 595 U.S. at 116, 118 (citing Judge Sutton's dissent approvingly). Appellants' reading of § 669(a)(5) is even farther afield, and if Congress had meant this statute to impose a nationwide, no-questions-asked religious exemption for any vaccine mandate anywhere, it

would have done so much more clearly instead of burying it in an obscure provision concerning the federal government's research authority.

POINT III

APPELLANTS' PREEMPTION CLAIM IS BOTH MOOT AND MERITLESS

Appellants also claim that the OSH Act itself preempts the City's vaccine mandates. But they offer no cognizable theory under which this Court could entertain this contention, and in any event, appellants' claim is moot under established precedent because the City no longer requires vaccinations as a condition of employment. And even setting all that aside, the OSH Act in no way displaces the City's authority to enact vaccine mandates as a condition of employment and did not preempt the City's efforts to stem the tide of COVID-19.

A. Appellants' preemption claim does not rely on any cognizable theory and is moot because the City no longer requires COVID-19 vaccination.

The district court properly concluded that appellants failed to set forth any cognizable theory upon which it could consider their preemption claim. *See Lopes v. City of N.Y.*, No. 22-CV-08271, 2024 U.S. Dist. LEXIS 154150, at *13–14 (S.D.N.Y. Aug. 27, 2024) (concurring that "neither the Supremacy Clause nor OSHA provides a private right of

action" and rejecting preemption claims on that basis). Appellants asserted this claim only under the Declaratory Judgment Act, which does not provide an "independent cause of action," *In re Joint E. & S. Dist. Asbestos Litig.*, 14 F.3d 726, 731 (2d Cir. 1993), and the only other theories appellants offer—under the OSH Act and 42 U.S.C. § 1983—fail for the reasons stated because neither authorizes a private right of action in these circumstances.

But even setting that aside, appellants' preemption claim is moot. While a party under some circumstances may assert federal preemption on a theory that "federal law immunizes him from state regulation," doing so permits only an injunction at equity "against state officers who are violating, or planning to violate, federal law." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). A request for such an injunction becomes moot where the challenged regulation is no longer in effect. *Chrysafis v. Marks*, 15 F.4th 208, 213 (2d Cir. 2021) ("[c]onstitutional challenges to statutes are routinely found moot when a statute is amended"). The same is true of any associated request for declaratory relief. *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 395 (2d Cir. 2022).

That is precisely what happened here. As this Court has already recognized with respect to the City's prior vaccination requirements in

particular, demands for declaratory or injunctive relief regarding these requirements are moot because those orders no longer bar employees from the workplace for refusing vaccination. *New Yorkers for Religious Liberty, Inc. v. City of N.Y.*, 125 F.4th 319, 327–28 (2d Cir. 2024); *Marciano v. Adams*, No. 22-570, 2023 U.S. App. LEXIS 11915, *2 (2d Cir. May 16, 2023). With no vaccine requirement to enjoin, appellants cannot obtain an injunction based on a preemption theory. *See Chrysafis*, 15 F.4th at 210–11 (appeal challenging "expired provisions of the old statute" held moot); *see also Brach v. Newsom*, 38 F.4th 6, 11 (9th Cir. 2022) (when "there is no longer any state order for the court to declare unconstitutional or to enjoin," then "[i]t could not be clearer that this case is moot"); *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 9 (1st Cir. 2021) ("with the offending [rule] wiped away, there is nothing harming" the plaintiff). Declaratory relief on that basis is foreclosed as well. *Marciano*, 2023 U.S. App. LEXIS 11915, at *2–3.

To be sure, appellants seek damages because they were dismissed from their jobs after refusing COVID-19 vaccinations or submitted to vaccinations only because of the prior mandates, and they further demand reinstatement with backpay. But those alleged injuries cannot save their preemption claim given that any relief is limited to preventing enforcement of the now-defunct mandates, and they have no private

cause of action to seek additional remedies. *See Conn. Citizens Defense League, Inc. v. Lamont*, 6 F.4th 439, 448 (2d Cir. 2021) (plaintiff relying only on "past injury" lacks standing to pursue injunctive relief); *Loyal*, 445 F.3d at 139, 149 (affirming district court's refusal to grant damages despite successful preemption claim). Instead, appellants' preemption claim is limited to enjoining vaccine mandates that are no longer being enforced, and thus, their claim is moot. *See Stanley*, 483 U.S. at 683 (distinguishing between damages and "traditional forms of relief" like an injunction "to halt or prevent [a] constitutional violation").

Nor can the voluntary-cessation exception to mootness save appellants' declaratory and injunctive claims. *Marciano*, 2023 U.S. App. LEXIS at *4. That doctrine is mainly concerned with a defendant who "temporarily" changes course to evade judicial review. *Mhany Mgmt. v. Cnty. of Nassau*, 819 F.3d 581, 603–04 (2d Cir. 2016); 15 Moore's Federal Practice Civil § 101.99[2][a] (2022) (doctrine doesn't apply when cessation occurs for reasons "unrelated" to litigation). But here, the City ended the vaccine requirement only because it had "served its purpose" in driving up vaccination, resulting in nearly all City workers and most City residents receiving vaccinations, and because new tools to fight the disease had been developed (A1483–84, 1490–95).

Given these circumstances, there is also nothing to suggest a "reasonable expectation" of new mandates to support the mootness exception for issues capable of repetition yet evading review either. *New Yorkers*, 125 F.4th at 327. And even if there were, a new mandate would not evade review, as the voluminous litigation over the old mandates demonstrates. *See, e.g.*, *Kane v. De Blasio*, 19 F.4th 152 (2d Cir. 2021); *Broecker v. N.Y.C. Dep't of Educ.*, No. 23-655, 2023 U.S. App. LEXIS 30076 (2d Cir. Nov. 13, 2023); *see also Exxon Mobil Corp. v Healey*, 28 F.4th 383, 396 (2d Cir. 2022) (issue not "too short-lived to be fully litigated" given prior litigation).

B. The OSH Act does not divest the City of its ability to protect public health by requiring vaccination.

In any event, appellants' preemption claim also fails on the merits because they identify no conflict between the text or purposes of the OSH Act or any relevant standard and the City's mandates. The OSH Act regulates worker safety and authorizes the federal government to promulgate "occupational safety or health standards" that are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." *Steel Inst. of N.Y. v. City of N.Y.*, 716 F.3d 31, 33 (2d Cir. 2013). But the Act does not regulate state and local

governments, which are not covered "employer[s]" under the Act. 29 U.S.C. § 652(5).

Even with respect to private employers, the Act explicitly "encourage[es] States to assume fully responsibility" for these issues by promulgating its own plan, subject to federal approval. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99, 103 (1992); 29 U.S.C. § 667(b). And in areas where the federal government has not promulgated an applicable safety and health standard, states may do so without federal approval. *Gade*, 505 U.S. at 100; 29 U.S.C. § 667(a). Given this structure, the OSH Act "impliedly pre-empt[s]" any "nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect." *Gade*, 505 US. at 98–99, 103–05; *see Envtl. Encapsulating Corp. v. City of N.Y.*, 855 F.2d 48, 54 (2d Cir. 1988) (preemption applies to local ordinances).

Appellants refer to OSH Act preemption as both "field preemption" and "conflict preemption," citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) (App. Br. 28, 34). But as both the plurality in *Gade* and the plain text of the OSH Act make clear, the OSH Act does not occupy the field, such that Congress "has left no room for supplementary state legislation." *Murphy v. NCAA*, 584 U.S. 453, 479 (2018). Instead, the Act preempts only unapproved state

regulations where OSHA has enacted an applicable federal standard, with the result that the state regulation "conflict[s] with the full purposes and objectives of the OSH Act," i.e., under an implied conflict preemption theory. *Gade*, 505 U.S. at 98–99. Either way, even if the type of preemption in *Gade* were reclassified as field preemption "for any nonapproved state law regulating the same safety and health issue" as a federal standard, the label carries no "substantive implications for the scope of preemption" under the OSH Act. *Gade*, 505 U.S. at 104 n.2.

Here, appellants have identified no conflict between the mandates and either the OSH Act or OSHA's implementing regulations. They primarily contend that the vaccine requirement does not satisfy OSHA's standard for the prevention of airborne toxins (App. Br. 21). But they overlook that appellees are exempt from the OSH Act's requirements and thus not subject to that standard, or indeed any other OSHA standard. They also overlook that the Supreme Court has indicated that vaccine mandates are not health and safety standards within OSHA's authority. *NFIB*, 595 U.S. at 117.

1. The OSH Act cannot preempt regulations by the City or DOE because they are not covered employers.

Appellants' preemption claims fail at the threshold because there is no health and safety standard applicable to the City with which the vaccine mandates could conflict. That is because appellees are not covered employers under the OSH Act, which expressly exempts "any State or political subdivision of a State" from the OSH Act's requirements. 29 U.S.C. § 652(5); *see* 29 U.S.C. § 654(a) (requiring only covered "employer[s]" to "comply with occupational safety and health standards" under the OSH Act). Therefore, any workplace standards that OSHA may promulgate for private employers cannot preempt the City's or DOE's own requirements applicable only to their own staff, including the vaccine mandates here. *See Gade*, 505 U.S. at 97, 100 ("no possibility" of preemption "where there is no federal regulation"); 29 U.S.C. § 667(a) (OSH Act does not prevent regulating "occupational safety or health issue" where "no [federal] standard is in effect"); *Hartnett v. N.Y.C. Transit Auth.*, 86 N.Y.2d 438, 446 (1995) ("[f]ederal regulations or case law implementing and interpreting OSHA" do not apply to public sector employers).

Appellants observe that the State of New York has adopted an OSHA-approved state plan for public employees implementing

standards similar to OSHA's (App. Br. 30). *See* Public Employee Safety and Health Act (PESHA), N.Y. Labor Law § 27-a (safety and health standards for public employees); 29 C.F.R. § 1952.24 (approving PESHA in 2006). But the existence of the State's plan cannot change the fact that the OSH Act does not independently apply to the City. Indeed, OSHA's approval of the state's plan nullifies direct federal regulation by displacing federal regulations completely. *Gade*, 505 U.S. at 97, 100, 102 (States may "pre-empt[] federal regulation" by "assum[ing] responsibility" for developing and enforcing "occupational safety and health standards" (quoting 29 U.S.C. § 667(b)).

To be sure, the State has promulgated its own rules that mirror many of OSHA's standards. *See* 12 NYCRR § 800.3. But appellants have never argued that the City's vaccine mandates violate the state plan or any state health and safety standard. *See Broecker v. N.Y.C. Dep't of Educ.*, 585 F. Supp. 3d 299, 316 (E.D.N.Y. 2022) (DOE authorized to issue vaccine mandates for its employees under PESHA, N.Y. Labor Law § 27-a), *appeal denied*, 2023 U.S. App. LEXIS 30076 (2d Cir. Nov. 13, 2023). Nor have appellants identified anything in the state plan intended to preempt the City's ability to require vaccination as a matter of public health. To the contrary, the City's responsibilities under the state plan include "furnish[ing] to each of its employees, employment and a

place of employment … which will provide reasonable and adequate protection to the lives, safety or health of its employees." N.Y. Labor Law § 27-a(3). And the state's plan acknowledges that there may be "other safety or health standard[s]," including "local" ones. N.Y. Labor Law § 27-a(2).

2. OSHA has not issued preempting regulations.

Because the City and DOE are not employers covered by OSHA regulations, this Court need go no further. In any event, OSH Act preemption is inapplicable here for two additional reasons. First, recent authority suggests that COVID-19 vaccination mandates are not occupational health and safety standards at all, such that OSHA could not promulgate a standard that would preempt the City's vaccine mandates. There is also "a strong presumption *against* preemption when states and localities 'exercise their police powers to protect the health and safety of their citizens.'" *Steel Inst.*, 716 F.3d at 36 (cleaned up) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 484–85 (1996)).

And in considering OSHA's attempt to promulgate a COVID-19 vaccine mandate, a majority of the Supreme Court signaled that the OSH Act authorizes the Secretary only "to set workplace safety standards, not broad public health measures." *NFIB*, 595 U.S. at 117. Pursuant to that view, the federal government may promulgate only

"occupational safety or health standard[s]" and cannot regulate "universal risk[s]" that employees also face outside of work, like the health and safety threats posed by COVID-19. *Id.* at 118; 29 U.S.C. § 652(8) (defining appropriate OSHA standard as those directed at "healthful employment and places of employment"). Here, the City issued its vaccine mandates to protect both its workforce and the public by slowing the spread of COVID-19 (A377–79), thus exercising authority that OSHA lacks. *See NFIB*, 595 U.S. at 118–19; *Palmer v. Amazon.com, Inc.*, 51 F.4th 491, 510 (2d Cir. 2022) (OSHA has not "promulgate[d] a cross-industry, COVID-19 specific standard").

Second, appellants identify no health and safety standards that could preempt the City's mandates in any event. They point to OSHA's regulations on respiratory protection and personal protective equipment (App. Br. 21–22, 31–32), but neither regulation is directed at airborne communicable diseases. For example, OSHA's regulation of respiratory protection concerns specified airborne contaminants—"dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors"—not viruses that might cause a communicable disease like COVID-19 (SPA112). 29 C.F.R. § 1910.134. Similarly, the regulation applicable to "personal protective equipment" is directed at "hazards of processes or environment,

chemical hazards, radiological hazards, or mechanical irritants," not viruses. 29 C.F.R. § 1910.132.

While OSHA has in the past considered these regulations as applicable to COVID-19, *NFIB*'s reasoning rejects that expansive reading. *NFIB*, 595 U.S. at 118–19; *Flower World, Inc. v. Sacks*, 43 F.4th 1224, 1231 (9th Cir. 2022) (OSHA's existing regulations, including those raised here, address "pollution at the workplace, not the hazard of COVID-19 or other viruses more generally"). Given OSHA's limited authority as suggested in *NFIB,* these regulations do not—and cannot—address "the same conduct" as the vaccine mandates, and so cannot preempt them. *Steel Inst. of N.Y.*, 716 F.3d at 39; *see Flower World*, 43 F.4th at 1233 (state regulations addressed to COVID-19 do not relate to any existing OSHA standard).

Appellants' contention that vaccines are ineffective or do not remove all risk of contracting COVID-19 misses the point (App. Br. 32–33). Vaccine effectiveness is irrelevant to whether the OSH Act displaces the City's authority to conclude that vaccination nevertheless serves public health and safety. *Steel Inst.*, 716 F.3d at 36 (protecting the public "is one of the traditional uses of the police power" and "one of the least limitable"). Indeed, appellants' complaint that vaccine mandates do not fit neatly within OSHA's standards for respiratory or other protection

merely demonstrates that these standards do not address airborne viral infections like COVID-19 and that OSHA lacks authority to regulate in this area (App. Br. 32–35).

Appellants also assert that vaccine mandates "expressly conflict[]" with covered employees' duties under 29 U.S.C. § 654(b) to "comply with [OSHA] standards" issued pursuant to the OSH Act (App. Br. 35). But as explained above, OSHA's regulations do not apply to the City, which is exempt from direct regulation under the Act. 29 U.S.C. § 652(5)–(6). Even setting that aside, nothing in the Act states that employees' sole responsibility is to follow OSH Act standards to the exclusion of all other applicable regulations. And appellants' contention that vaccine mandates violate their rights under § 660(c)(1) or § 669(a)(5) is not a preemption theory at all, but a reiteration of their private causes of action that they do not have (App. Br. 35–36).

POINT IV

APPELLANTS REMAINING CLAIMS UNDER 42 U.S.C. § 1983 FAIL AS A MATTER OF LAW

Nor have appellants offered any basis to revive their § 1983 claims that the vaccine mandates violated their First Amendment or substantive due process rights. This Court has already applied rational basis

review to uphold analogous vaccination requirements in the face of similar legal challenges, and here, the City's mandates requiring vaccinations to protect the public during the COVID-19 public health emergency easily pass muster.

A. The City's vaccine requirements were generally applicable regulations that did not violate the First Amendment.

The district court properly dismissed appellants' facial First Amendment claim based on rational basis review. The First Amendment forbids the enactment of laws "prohibiting the free exercise" of religion, U.S. Const. amend. I, but "not all laws that burden an individual's exercise of religion" violate this proscription. *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 280 (2d Cir. 2021). Laws demonstrating an "intoleran[ce] of religious beliefs or restrict[ing] practices because of their religious nature" are subject to strict scrutiny. *Fulton v. City of Phila.*, 593 U.S. 522, 533, 541 (2021). By contrast, "'a neutral law of general applicability' is subject to rational basis review even if it incidentally burdens a particular religious practice." *Patriots*, 17 F.4th at 280 (quoting *Employment Div. v. Smith*, 494 U.S. 872, 878–89 (1990)).

Here, the district court properly concluded that the City's vaccine mandates were neutral laws of general applicability that satisfied

rational basis review on their face. This Court already held as much in the context of DOE's vaccine requirements, concluding that this mandate was neutral on its face because it applied to all employees, regardless of religious belief. *Kane*, 19 F.4th at 164. And as this Court has further acknowledged, the City also created a process for religious accommodation that satisfied constitutional scrutiny. *See New Yorkers*, 125 F.4th at 330–32. Appellants do not dispute that they failed to allege that the "mandates targeted religion or treated religious belief less generously than lay practice" (SPA52). So, as this Court has repeatedly held, generally applicable vaccine mandates do not violate the First Amendment on their face. *Patriots*, 17 F.4th at 281; *Kane*, 19 F.4th at 163–67.

Appellants contend that the vaccine mandates are not "neutral laws of general applicability," but their arguments on that score fail. They claim that this standard applies only to "generally applicable criminal laws" (App. Br. 55), but neither this Court nor any other of which we are aware has ever drawn that arbitrary distinction. *See Patriots*, 17 F.4th at 280 (applying *Smith* to non-criminal vaccine mandate); *Kane*, 19 F.4th at 163 (same). And their contention that the mandates are subject to heightened scrutiny because the OSH Act preempts them (App. Br. 55–56) has nothing to do with the First Amendment analysis, and in any event, fails for the same reasons that their preemption claims fail.

Appellants also argue that the vaccine mandates fail rational basis review because the vaccines are insufficiently effective (App. Br. 56–57), but that argument fails too. As this Court explained in upholding the State's vaccine mandate, governments at the height of the COVID-19 pandemic were faced with a public health emergency that had claimed tens of thousands of lives in New York alone, justifying the required use of vaccines to help slow the virus's spread among the public. *Patriots*, 17 F.4th at 290; *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 18 (2020) (stemming COVID-19's spread was "unquestionably a compelling interest"). "This was a reasonable exercise of the State's power to enact rules to protect the public health," *Patriots*, 17 F.4th at 290, and appellants' complaints that the vaccines were not good enough do not detract from the City's rational approach to this crisis. *See Clementine Co., LLC v. Adams*, 74 F.4th 77, 88 (2d Cir. 2023) (enhancing "effectiveness" of COVID vaccination program advanced legitimate interests).

B. The City's vaccine requirements did not violate substantive due process.

To determine whether government action "infringes a substantive due process right," this Court first determines "whether the asserted right is fundamental." *Doe v. Franklin Square Union Free Sch. Dist.*, 100 F.4th 86, 94 (2d Cir. 2024). If the right at issue is fundamental, strict

scrutiny applies; otherwise, the action is reviewed for a rational basis and "the government action need only be reasonably related to a legitimate state objective." *Id.* (cleaned up).

This Court has already determined that vaccine mandates do not implicate fundamental rights. As this Court held when considering New York State's COVID-19 vaccine mandate, "the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." *Patriots*, 17 F.4th at 293. And so, "[a]lthough individuals who object to receiving the vaccines on religious grounds have a hard choice to make" when faced with a vaccine mandate as a condition of their employment, COVID-19 vaccine mandates are subject to only rational basis review. *Id.* at 294.

Appellants' only response is that requiring vaccination infringes an allegedly fundamental right to "refuse unwanted medical treatment" (App. Br. 17–18, 34, 57). They cite *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), for this proposition, but as this Court has explained, *Jacobson* stands for exactly the opposite proposition: in that case, the Supreme Court applied rational basis review in sustaining a criminal conviction "for refusing to be vaccinated" given the state's overriding interest "in preventing disease." *Patriots*, 17 F.4th at 293–94; *see Roman*

Catholic Diocese, 592 U.S. at 23 (Gorsuch, J., concurring) (*Jacobson* "essentially applied rational basis review"). And appellants' reliance on *Cruzan ex rel. Cruzan v. Director*, 497 U.S. 261, 279 (1990), is similarly misplaced given that the case considered only whether there was a right to refuse compelled treatment. As this Court has held, vaccination as a "condition of employment" is not compelled treatment. While choosing between vaccination or job loss may be a "difficult," appellants "do have a choice," and that decision does not implicate a fundamental right. *Patriots*, 17 F.4th at 294–95.[8]

POINT V

APPELLANTS REMAINING SCATTER-SHOT ARGUMENTS LACK MERIT

Appellants also raise a host of assorted contentions regarding the New York City Human Rights Law, sanctions, and class certification. None of these arguments support reversal.

[8] In seeking reversal of the district court's dismissal of this claim, appellants also highlight allegations on behalf of plaintiff Amoura Bryan (App. Br. 57), but these allegations are not properly before this Court. Bryan did not appeal the dismissal of her claims and counsel for appellants does not represent her.

A. Appellants' fictional citations cannot revive their NYCHRL claims.

The district court dismissed appellants' NYCHRL claims because no plaintiff except Amoura Bryan, who did not appeal the dismissal of her claims, adequately alleged their religious beliefs to support an inference that any adverse action was because of their religion.[9] Appellants do not argue that the district court erred in that analysis and have abandoned any contention to the contrary. Instead, they argue only that their NYCHRL claims pass muster merely because the City's vaccine mandates violated "a federal civil right statute" (App. Br. 58). But the provision they rely on, N.Y.C. Admin. Code § 8-107(10)(a), does not include the language that they purportedly quote for this proposition, nor do appellants cite any case supporting that contention. Instead, the two cases that they describe as "leading New York State decisions" do not appear to exist either.[10] And in any event, the NYCHRL does not provide an independent vehicle to assert a violation of the OSH Act or § 1983, which the City did not violate for the reasons stated above.

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[9] As noted, the district court subsequently granted the City's motion for reconsideration as to Amoura Bryan and dismissed her NYCHRL claim on res judicata grounds (EDNY ECF No. 125 at 8–9).

[10] The reporter citations that appellants provide link to cases with different names than those appellants identify and have nothing to do with the NYCHRL.

B. The City's successful advocacy based on longstanding precedent is not "frivolous" conduct that can support sanctions.

This Court should also reject appellants' baseless contention that the City should be sanctioned for correctly arguing that appellants had no private right of action to assert their OSH Act claims (App. Br. 58–60). Sanctions for legal argumentation require demonstrating that a party's position was "frivolous," i.e., that it was "clear under existing precedents that there [was] no chance of success and no reasonable argumentation to extend, modify or reverse the law as it stands." *Mareno v. Rowe,* 910 F.2d 1043, 1047 (2d Cir. 1990); Fed. R. Civ. P. 11(b).

As demonstrated above, the district court properly agreed with the City that there is no private right of action under the OSH Act for appellants' claims. And even if this Court were to conclude otherwise, there is no basis to conclude that the City's arguments had "no chance of success," much less that the district court abused its discretion in accepting the City's arguments. *Mareno,* 910 F.2d 1043, 1047. And to the extent that appellants take issue with the City's statement below that it was "well established" that all their claims lacked merit, that position was "not so obviously foreclosed by precedent as to make [it] legally indefensible." *Kim v. Kimm*, 884 F.3d 98, 106 (2d Cir. 2018). That is particularly so given that appellants still have not identified a single case

holding that Congress intended any kind of private right of action under the OSH Act or that the Act preempts any vaccine mandate.

C. Appellants' application for class certification argument is not before this Court and is premature.

Appellants also ask this Court for class certification, which the district court denied as premature in an order that appellants never sought permission to appeal. *See* Fed. R. Civ. P. 23(f) (permitting appeals from class certification orders by permission from this Court); 28 U.S.C. § 1292(b) (permitting other interlocutory appeals by permission upon district court certification). Nor did they purport to challenge that order in the notice of appeal they subsequently filed from the district court's dismissal order (A1803–05). Accordingly, this Court does not have jurisdiction to review that order or certify a class at this time. *See PHL Variable Ins. Co. v. Town of Oyster Bay*, 929 F.3d 79, 87 (2d Cir. 2019) (appellate court "generally lack[s] jurisdiction to review a decision that was not mentioned in the notice of appeal").

In any event, appellants' request to this Court is plainly premature, as the district court appropriately exercised its discretion to defer consideration of class certification pending disposition of the motion to dismiss and has not ruled on the merits of the application. *Christensen*

v. Kiewit-Murdock Inv. Corp., 815 F.2d 206, 214 (2d Cir. 1987); *see also Baltas v. Maiga*, 119 F.4th 255, 269 (2d Cir. 2024); *Havens v. James*, 76 F.4th 103, 123 (2d Cir. 2023). But fundamentally, as the district court held, there is no need to reach class certification, as appellants' claims fail for procedural reasons and on the merits.

CONCLUSION

The order should be affirmed.

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October 31, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 13,648 words, not including the table of contents, table of authorities, this certificate, and the cover.

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