UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WOMEN OF COLOR FOR EQUAL JUSTICE, et al. and on behalf of similarly situated individuals, PLAINTIFFS v. THE CITY OF NEW YORK, MAYOR ERIC L. ADAMS, COMISSIONER ASHWIN VASAN, MD, PHD DEPARTMENT OF HEALTH AND MENTAL HYGIENE, THE DEPARTMENT OF EDUCATION, AND DOES 1-20 DEFENDANTS	Civil Action No: 1:22 CV 02234-EK-LB **EXPEDITED HEARING REQUESTED WITH DEFENDANTS MOTION TO DISMISS**

PLAINTIFFS MEMORANDUM OF LAW IN SUPPORTION OF MOTION FOR SUMMARY JUDGMENT ON ALL PLAINTIFFS CLAIMS AND IN SUPPORT OF PLAINTIFFS OPPOSITION TO MOTION TO DISMISS RENEWED MOTION FOR CLASS CERTIFICATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provision

Statutes

Regulations

United States Supreme Court Cases

Federal Court Cases

I PRELIMINARY STATEMENT

This Motion for Summary Judgement ("Motion") seeks declaratory and permanent injunctive relief pursuant to the Declaratory Judgment Act (DJA) 28 U.S. Code § 2201, §2202 as well as compensatory and punitive damages pursuant to the private rights of actions provided in the OSH Act and the New York City Human Rights Law (NYCHL) applied though Section 1983 which expressly permits claims against state and municipal agencies for acts that deprive individuals of federal and constitutional rights. Specifically, this Motion makes substantive constitutional challenges to the "authority" of the City of New York ("City") Health Commissioner to issue nine (9) Covid-19 vaccine orders (the "Vaccine Orders"[1]) (See SOF P.7, ¶27. Exhibit 24) mandating City employees to take the Covid-19 vaccine medical treatment or be placed on indeterminate involuntary leave without pay, health benefits, unemployment and retirement benefits (ILWOP) and requiring private sector employers to mandate their employees to take the Covid-19 vaccine medical treatment or suffer monetary sanctions.

This case will resolve two (2) of the most pressing controversial constitutional issues in the history of America, which include: 1.) the right of every competent individual to choose one's own medical treatment (or refrain from receipt of a medical treatment) versus 2.) the authority of federal, state, municipal governments and

[1] While the New York City Mayor announced that he will make the Vaccine Orders optional effective on February 10, 2023, the declaration and injunction is still needed because the City is still enforcing it police power to prevent City workers placed in IILWOP from automatically returning to their jobs and to deny City workers backpay due because of the void orders.

private sector employers to mandate compulsory vaccine medical treatment or suffer grave financial sanctions as a method to manage public and workplace health and safety during a national public health emergency. This Motion seeks relief for Plaintiffs and those similarly situated nationally; and therefore, this Motion request for class certification.

The U.S. Supreme Court already has determined, as a matter of federal common law, that the right to choose one's own medical treatment, including the right to refuse government sponsored vaccine medical treatment, is a fundamental human right based on the holdings in *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)[2] and re-iterated in *Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 279 (1990) (holding – "we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." – based on substantive Due Process)

However, the City (along with many public and private employers currently mandating Covid-19 vaccines as a condition or pre-condition of employment) believe they have the constitutional right to nevertheless mandate employees and persons utilizing public businesses to submit to the Covid-19 vaccine or any vaccine now or in the future based on the federal common law regarding the "police power of the states" that was also articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

[2] *Jacobson* at 26. (held that "the inherent right of every freeman to care for his own body and health in such way as to him seems best……But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint…….This court has more than once recognized it as a fundamental principle….")

Even national bar associations have declared that *Jacobson* is still good law.[3] Those "beliefs, however, are erroneous and a blatant disregard for the well-established fundamental rights of competent adults to choose or refuse medical treatment for any reason.

Consequently, this Motion first asks this Court to declare, as a matter of law, that the federal common law in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), (which permits states, under its police power, to criminally sanction any citizen who refuses government sponsored medical treatment so long as the criminal sanction is "reasonable,") has been overruled over 80 years ago by Congress through the enactment of the 1944 Public Health & Welfare Act (1944 PHWA), the 1970 OSH Act and the 1972 Communicable Disease Program Act (1972 CDPA) (hereinafter collectively the Safety Acts). This Motion establishes as a matter of law that the Safety Acts collectively legalized and protects each person's fundamental right to refuse any vaccine on religious or non-religious grounds for which strict scrutiny is applied.

This Motion next asks this Court to make two declarations, as a matter of law: 1) that the OSH Act expressly pre-empts and renders void all state, municipal and private sector vaccine mandates, including the Vaccine Orders, that expressly conflicts with the OSH Act's "minimum standards" and express prohibition against sanctioning employees for exercising their fundamental right to refuse government

[3] See American Bar Association, October 21,2021 – "Not Breaking News: Mandatory Vaccination Has Been Constitutional for Over a Century" @ https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2021/winter2022-not-breaking-news-mandatory-vaccination-has-been-constitutional-for-over-a-century/

sponsored vaccine medical treatment on religious grounds, and 2) that all vaccine mandates violate federal common law articulated in *Cruzan*, which gives every citizen the fundamental right to refuse any medical treatment for any reason, because the mandates cannot meet strict scrutiny review as required by the U.S. Supreme Court's 1963 holding in *Sherbert v. Verner*, 374 U.S. 398, 403-404 (1963).[4]

Although the City's Vaccine Orders have been either repealed or amended pursuant to new orders dated February 6 and 8, 2023 which make the Covid-19 vaccine optional for City employees effective as of February 10, 2023 (See SOF P.11, ¶43-44, Exhibits 41-42), the amendments continue to prevent Plaintiffs from returning to work because the City's February amendments now require Plaintiffs to reapply for their jobs (with no guarantee they will be allowed to return to their specific job) and require that the Plaintiffs waive their rights to monetary damages in the form of backpay, including compensatory and punitive damages, which is their right under Section 11(c)2 of the OSH Act and allowed under the NYCHRL. (See Exhibits 41-42)

These new conditions of employment mandated by the City are just continuing violations of the OSH Act and the Constitution which arise from Plaintiffs first exercise of their right to refuse the Covid-19 vaccine back in October 2021. The City's demand that Plaintiffs waive their rights to compensatory damages

[4] See *Sherbert v. Verner*, 374 U.S. 398, 403-404 (1963) which held that ineligibility for unemployment benefits, based solely on a refusal to violate the Sabbath, has been analogized to a fine imposed on Sabbath worship that violates the First Amendment Free Exercise Clause – the distinction between the facts in *Sherbert* and the facts in the Employment Division, Oregon v. Smith, 494 U.S. 872 (1990) case are that the religious practice in question in *Smith* was a crime and the religious practice of observing the Seventh-Day Sabbath from sun down Friday to sun down Saturday according to the Fourth Commandment is in the Bible and Torah has never been a crime.

is particularly outrageous and a "shock to the conscience" because the 1st Circuit already held back in 1994 that backpay and punitive damages can be awarded for wrongful discharge claims under OSH Act, and the NYCHRL expressly provides those remedies for religious discriminatory discharge. See *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1190 (1st Cir. 1994) It is well settled that voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin Castle, Inc*, 455 U.S. 283, 289 (1982) Therefore, this Court is also requested to declare that all public or private sector employees who requested an exemption from the Covid-19 vaccine from their employer and were denied and the denial caused the employee to lose their job for any period of time – those employees also have a private right of action against their employer under the OSH Act and NYCHRL.

Once these declarations are determined as a matter of law, this Motion finally requests this Court to enter a permanent injunction and award all appropriate monetary damages as outlined in the attached proposed judgment, including class certification, as a matter of law, against the City for its ongoing unconstitutional deprivation of Plaintiffs' right to return to their jobs unvaccinated and against the City's attempt to deprive Plaintiffs of their right to compensatory and punitive damages provided by the OSH Act and NYCHRL.

Unlike the many cases around the country that have addressed the constitutionality of Covid-19 vaccine mandates, including the Second Circuit, based on "procedural due process," this case argues substantive violations of federal and

constitutional law that have yet to be reviewed and decided by any lower court.

Only this federal court has authority to declare federal common law overruled and to provide injunctive and compensatory relief necessary to stop what has been the greatest ongoing civil rights violation against all Americans since the enforcement of illegal segregation laws against African-Americans.

II STANDARD OF REVIEW

A. Standard of Review for Summary Judgment

Summary judgment is appropriate when there are no genuine issues as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 55(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553 (1986). A party opposing summary judgment "may not rest upon mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Western World Ins. Co. v. Stack Oil, Inc*. 922 F.2d 118, 121 (2d. Cir. 1990); Fed.R, Civ. P. 56(e). "The non-movant cannot escape summary judgment merely by vaguely asserting the existence of some unspecified disputed material facts, or defeat the motion through mere speculation or conjecture." Id. The party opposing summary judgment must come forward with specific facts to show there is a factual question that must be resolved at trial.

The undisputed material facts of this case are set forth in Plaintiffs' Statement of Undisputed Material Facts filed contemporaneously herewith and incorporated by reference. The City does not dispute that it demanded all City and private sector employees to take the Covid-19 vaccine, and neither does the City dispute that it placed thousands of City employees who required exemptions from the Vaccine Orders on

involuntary leave without pay, health benefits, and without unemployment benefits and that its orders against the private employers within the City also caused private sector employees to be terminated for refusing to submit to the Covid-19 vaccine. Therefore, this Motion will focus solely on the constitutional legal issues that warrant judgment as a matter of law.

B. Standard of Review Infringements of Fundamental Rights

"The First Amendment forbids all laws 'prohibiting the free exercise' of religion." *Daniel v. Paty*, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978) In general, government "may justify an in-road on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718, 101 S.Ct. 1425 1432, 67 L.Ed.2d 624 (1981); see also *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). Moreover, "only a compelling state interest would justify a sweeping restriction on a constitutionally protected interest…." *Maher v. Roe,* 432 U.S. 464, 473 & 489 (1977), which includes the right to refuse medical treatment or the right to choose a specific medical treatment. See *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 262 (1990)

III. DECLARATORY RELIEF IS WARRANTED AS A MATTER OF LAW

A. Congress Overruled the Federal Common Law in *Jacobson* 80-Years Ago Through Three Congressional Enactments

"Federal common law in an area of national concern is resorted to in the absence of an applicable Act of Congress. When Congress addresses a question

previously governed by a decision rested on federal common law, the need for such an unusual exercise of lawmaking by federal courts disappears." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 305 (1981) 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. Federal common law is used as a "necessary expedient" when Congress has not "spoken to a particular issue." See *Connecticut v. American Elec. Power Co., Inc.*, 582 F.3d 309, 374 (2nd Cir. 2009) Moreover, courts are to look to Congressional legislative history of a statute to determine if a statutory provision was "designed to overrule" a court ruling on the same subject. If there is no specific statement in the legislative history regarding a court ruling, then the explicit terms and language of a statute is to be analyzed to ascertain congressional intent. See *U.S. v. Rybicki*, 354 F. 3d 124, 136 (2nd Cir. 2003).

In 1905, when the U.S. Supreme Court legislated from the bench in the case *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) to determine the authority of states to manage an outbreak of a communicable disease, that decision enunciated a framework through which federal and state governments could respond specifically to a smallpox outbreak centered in Massachusetts at that time. The *Jacobson* Court's ruling was consistent with the 10th Amendment of the Constitution, which grants states and local governments "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

reserved to the States respectively, or to the people."

Also, consistent with the 10th Amendments federalist principles, the *Jacobson* Court stepped out on a ledge and boldly held that states not only have the general police power to enact criminal laws for public health and safety, but also states specifically are authorized to enact laws that criminalize the exercise of fundamental rights, including religious activity, ordinarily protected from government deprivation by the Constitution. *Jacobson* at 11 and 29. When the *Jacobson* Court upheld the State of Massachusetts criminal prosecution of Mr. *Jacobson*, a minister of a church, for refusing the smallpox vaccine based on medical freedom grounds, that landmark decision became the foundation for the federal common law that fundamental rights, including religious practices can be criminalized, specifically the religious practice of refraining from vaccines, so long as the criminal law is "reasonable" for the protection of public health and safety. Moreover, the *Jacobson* decision expressly enunciated a framework for the use of vaccines as a "method necessary" for the "extermination of a disease" for the protection of public health and safety over individual liberties as granted by the U.S. Constitution. *Jacobson* at 12.

While this judicially created federal common law was issued at a time when Congress had not spoken or legislated on the issue of the governmental management of communicable disease outbreaks, the court was faced with having to determine the constitutionality of Massachusett's criminal sanctions for a citizen's refusal to comply with that states compulsory vaccination law. At the same

time, the *Jacobson* decision also provided a roadmap for Congress to legislate to limit state police power to criminally punish and fine citizens for exercising their fundamental right to refuse government sponsored vaccines as stated below:

> "it is for the legislature, and not the courts, to determine in the first instance whether vaccination is or is not the best mode for the prevention of smallpox and the protection of the public health." Id. at 197. (Emphasis added)

> "A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures." (Emphasis added) *Jacobson* at 11-12.

A careful review of the legislative history of the Congressional enactments of the Safety Acts along with a plain reading of each act, makes clear that the federal common law articulated in *Jacobson* has been overruled as explained below.

1. <u>The 1944 Public Health & Welfare Act First Overruled *Jacobson* By Enacting Quarantine Laws</u>

Prior to the *Jacobson* decision, in 1901, Congress enacted legislation titled "An Act" that regulated the interstate traffic, sale and license of "viruses, serums, toxins, and analogous products applicable to the prevention and cure of diseases of man," (also known as "live immunization/vaccine products" and drugs) that was managed by the Surgeon General of Marine Hospital Service (MHS), which later become the FDA. (See SOF P.2, ¶5, Exhibit 4) According to the Centers for Disease Control Museum archives, MHS was the first public health agency in the U.S. formed in 1798 that was responsible for quarantining sick seamen exposed to contagious diseases on ships. Id.

While the Marine Hospital Service (renamed the Public Health Service (PHS) in 1939, grew to provide quarantine services nationwide, Congress did not enact legislation regarding federal and state management of communicable diseases until 1944 when Congress authorized the PHS Surgeon General to promulgate quarantine regulations to control or prevent the spread of communicable diseases within interstate commerce. (See SOF P.3, ¶6-8, Exhibit 5, 5(a)&(b) - Public Health Service Act, Pub. L. 78 – 4110, § 362, 58 Stat. 682, 704 (1944). The Public Health & Welfare Act, which is now 42 U.S.C. §264(a) titled "Regulations to control Communicable Disease," stated and continues to state as follows:

> The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to **prevent the introduction, transmission, or spread of communicable** diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the **Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.**

The scope of the list of "other measures" that can be implemented by the Surgeon General are contained in subsections Section 264(b) – (d) which permit human detention and includes the measures listed in Sections 265-271, which only include quarantine "measures" under various circumstances. (See Exhibit 5, Page 3, Section 201, See Exhibit 5(a) and 5(b))

The vaccine manufacture, development and licensing expanded between 1901 and 1944 – as revealed in the legislative history of the 1972 Communicable Disease Program Act. Congress, however, never codified the 1905 *Jacobson* decision into law to authorize the Surgeon General of PHS to enforce *Jacobson* type "compulsory vaccination and criminal sanctions" on American citizens as a method to control or prevent communicable diseases. In a comprehensive review of the regulatory powers of the U.S. Health and Human Services (HHS) Secretary by the U.S. Middle District of Florida in the case *State v. Becerra*, 544 F. Supp. 3d 1241 (M.D. Fla. 2021), it was pointed out that the primary method for controlling communicable diseases by the federal PHS and states at that time was through quarantine regulations.

Just a few years after the *Jacobson* decision, the U.S. Supreme Court in *Simpson v. Shepard*, 230 U.S. 352, 406 (1913) affirmed state's authority to adopt quarantine regulations that did not conflict with federal law. The 1944 Public Health & Welfare Act (PHW Act) at 42 U.S. C §243 (a) specifically authorized the PHS Secretary to cooperate with states in the enforcement of quarantine regulations but not compulsory vaccination. (See Exhibit 5(a) and 5(b))

The only "police power" granted by Congress regarding control of communicable disease in the 1944 PHW Act to the Secretary or Surgeon General is outlined in 42 U.S.C §271 Penalties for Quarantine Violations – wherein the Surgeon General is authorized to criminally prosecute any person who violates **any quarantine regulations** under Section 264 – 266 subjecting an offender to up to 1 year in prison and/or a fine of up to $1,000. (See Exhibit 5(a) and 5(b)) While the

criminal prison sanction and fine in §271/§368 (old version) is similar to the fine and prison sanctions in the *Jacobson* case, the fact that Congress has only authorized criminal penalties for quarantine violations and did not include sanctions for vaccine refusal is substantial evidence that Congress' passage of the 1944 PHW Act did in fact overturn the federal common law in the *Jacobson* decision. The exclusion of the *Jacobson* common law language from the 1944 PSH Act is evidence that Congress rejected the *Jacobson* Court's authorization of criminal sanctions against citizens who refused to take a vaccine and opted to enact legislation that only criminalized the refusal by citizens to comply with quarantine laws, which is still the law today. If Congress wanted to adopt the judicially created *Jacobson* public policy, Congress could have - but for over 100 years Congress has refused to do so and they never will.

2. The 1972 Communicable Disease Control Program Overruled *Jacobson* Mandating Funding to Only Provide Voluntary Access to Vaccines

Stronger evidence that the federal common law in *Jacobson* has been overturned, is Congress' enactment of the 1972 Communicable Disease Control Programs, Public Law 92-449, Sec. 1, Section 317, at 42 U.S.C. §247b which is a vaccine grant or vaccine "spending" program wherein Congress annually appropriates funding to PHS/HHS to distribute funding to the states as an incentive for states to develop programs that provide the general public with "access to free vaccines" for communicable disease management, specifically childhood vaccination as outline in 42 U.S.C. §300 generally. 42 U.S.C. §247b, states, in summary, that:

> The Secretary **may make grants** to States, and in consultation with the State Health authority…….. to assist in meeting the costs of communicable disease control programs. …. See Appendix _____

Nowhere in the 1972 or current HHS enabling regulation, contained in 42 U.S.C. Cht. 6A Section 241-243 (See SOF P.4, ¶12, Exhibit 5(c)) did Congress give the HHS Secretary or Surgeon General authority to mandate "compulsory vaccinations with criminal sanctions." Of all the federal agencies for which Congress could have enacted legislation consistent with *Jacobson*, Congress has yet to pass any legislation to empower the HHS Secretary to mandate *Jacobson*-type compulsory vaccinations. A cursory review of most state legislation around the country also reveals that states have not enacted *Jacobson* compulsory vaccinations with criminal sanctions. New York State specifically passed Public Health Law §206(l), which expressly prohibits the mandating of adult vaccines as follows:

> **Nothing in this paragraph shall authorize mandatory immunization of adults** or children, except as provided in sections twenty-one hundred sixty-four and twenty-one hundred sixty-five of this chapter…. New York PHL §206(l)

All of the vaccine mandates around the country that do exist are mainly childhood vaccine requirements for public school admissions that rely on federal funding to provide children access to vaccines. Since the *Jacobson* decision, no state - other than recently in New York and New York City - has passed compulsory adult vaccination laws with criminal penalties.[5]

While the U.S. Supreme Court recently held in *Biden v. Missiouri*, 595 U.S.

[5] See *C.F v. New York City Department of Health and Mental Hygiene*, et al 139 N.Y.S.3d 273 (2020), (held NY City measle vaccine mandate constitutional as a general applicable law, but the court did not address Congressional preemption.)

____(2022) that the HHS general authority clause in 42 U.S.C. §1302, which permits the HHS Secretary to "promulgate regulations as may be necessary to the efficient administration of the functions with which [he] is charged," gives the Secretary broad authority to mandate healthcare facilities to ensure their medical staff is vaccinated or suffer financial sanctions, the *Biden* holding conflicts with its earlier holding in 1973 in *Mourning v. Family Publications Service*, 411 U.S. 356, 369 (1973), which is still good law. The Mourning decision which was rendered just one (1) year after the passage of the 1972 Communicable Disease Control Program, held the following:

> "The standard to be applied in determining whether the Secretary exceeded the authority delegated to him . . . is well established . . . Where the empowering provision of a statute states simply that the agency may `make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it **is `reasonably related to the purposes of the enabling legislation."**

The *Mourning* holding stands for the principle that federal agency Secretaries can only exercise those powers that are "reasonably related" to the specific approved authorized activities listed in an agency's enabling legislation. In this case, the enabling language in the PHW Act since 1944 until now listed at 42 U.S.C. Chpt 6A Section 241-243 titled "General Powers" only authorizes the HHS Secretary to engage in activity related to the implementation of either "quarantine regulations and sanctions" or to provide grants and funding to states to make vaccines available for voluntary public use for communicable disease control. This limiting language

in the PHW Act is substantial evidence that the federal common law articulated in *Jacobson* has been overruled by Congress and not codified into law. Neither HHS nor any other state or private entity can enforce *Jacobson*-type compulsory vaccinations with any sanctions, criminal or otherwise.

3. The 1970 OSH Act Also Overruled Jacobson & Abrogated State Authority to Set Minimum Health & Safety Standards

Two years before the 1972 Communicable Disease Control Program, Congress enacted the historic Occupational Safety & Health Act of 1970 (OSH Act) (See SOF, P.4, ¶10, Exhibit 7), which created the federal Occupation Safety and Health Administration (OSHA) through its Constitutional power under Article 1, Section 8 of the Commerce Clause. The OSH Act specifically overruled the *Jacobson* decision by abrogating state police power to regulate in the area of health and safety specifically in places of business and workplaces affecting interstate commerce by providing exclusive authority to OSHA's Secretary through 29 U.S.C. §655 Section 6(b)(6)(iii) to promulgate "minimum" health and safety standards and to determine the "practices, means, **methods,** operations, and processes" to meet the minimum standards. (See SOF – Exhibit 7, 29 U.S.C. 651 Section 2(b)(5))

Specifically, Congress reserved to the OSHA Secretary the power to set "a nationwide floor of minimally necessary safeguards" that federal, state and private employers and places of business are mandated to meet for public health and safety, established field preemption of state law to set minimum standards. 29 U.S.C. § 651(b) see *Solus Indus. Innovations, LLC v. Superior Court of Orange*

Cnty., 228 Cal. Rptr. 3d 406 (Cal. 2018). The OSH Act was enacted "to address the problem of uneven and inadequate state protection of employee health and safety" and to "establish a nationwide 'floor' of minimally necessary safeguards." *United Air Lines, Inc. v. Occupational Safety & Health Appeals Bd*., 32 Cal.3d 762, 772, 654 P.2d 157 (1982)

The constitutionality of this exclusive authority to set minimum standards mirrors Congress' power to set "minimum wage standards" in the Fair Labor Standards Act 29 U.S.C.A. §201 et seq. (FLSA) passed years earlier in 1933. See *Opp. Cotton Mills v. Administrator of Wage and Hour Division of Department of Labor*, 312 U.S. 657 (1941). Furthermore, the U.S. Supreme Court made clear in *City of Boerne v. Flores*, 521 U.S. 507, (1997), that "Congress can certainly enact legislation……. enforcing the constitutional right to the free exercise of religion." Before the *Boerne* case, the U.S. Supreme Court recognized in the *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 878-882 (1990) "that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use." *Smith* at 890. The OSH Act at 29 U.S.C. §669 Section 20(a)(5) specifically "shields" employees' fundamental free exercise religious right to refuse vaccines.

While 29 U.S.C. §667 of the OSH Act expressly reserves to states the right to assume authority to promulgate new "higher" standards for which OSHA standards already exist, municipalities do not have the right to regulate below the

"minimum standards as expressed in 29 U.S.C. 667 Section 18 of the OSH Act as follows:

> (c) The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgement --(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, **which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 6** which relate to the same issues,.... (Emphasis added)

Both the U.S. Supreme Court in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) and the Second Circuit in *Steel Inst. of N.Y. v. City of N.Y.*, No. 12-276 (2nd. Cir. 2013) declared, in summary, that municipalities cannot regulate outside the express authority provided by the OSH Act.

While all vaccines obtain federal approval from the Food & Drug Administration (FDA), the 1938 Federal Food, Drug, and Cosmetic Act ("FDCA") 21 U.S.C. § 301 et seq., only grants the FDA authority to regulate all "drugs" and "devices," which include any "articles (other than food) intended to affect the structure or any function of the body," as well as any components of such articles. Id. § 321(g)(1)(C)- (D), (h)(3) (Emphasis added). The FDA does not have authority to regulate methods to be used to provide health and safety in physical places of business and workplaces. Neither does FDA approval of any vaccine, nor does CDC recommendation that the Covid-19 vaccine is "safe and effective," automatically make any vaccine an OSHA approved "safety method." The OSH Act provides minimum standards that regulate the "environments" of public and private

workplaces and public accommodations (as they touch and concern the outside of a human person). The FDA regulates medical treatments or products that are injested inside a human person that every competent person has the fundamental right to refuse. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 262 (1990)

Moreover, the OSH Act does not authorize the Secretary nor employers regulated by the OSH Act to prescribe "medical treatments" to eliminate workplace hazards. According to Dr. Montgomery and the FDA, vaccines are a medical treatment and not an environmental safety method. The prescribing of the Covid-19 vaccine as a medical treatments is exclusively reserved to physicians and licensed healthcare workers in the 50 states. It is a felony in New York for any unauthorized person to prescribe a "medical treatment." See New York Education Law §6520& §6521 and §6512

Because Congress gave exclusive control over the setting of minimum safety standards to the OSHA Secretary, the police power afforded to states and municipalities by the *Jacobson* decision was fully abrogated preventing state/municipal agencies and private employers from establishing safety measures that they "believe" are "reasonable" based on a state's, municipality and private employers' independent discretion or guess work.

4. <u>The OSH Act Consensus Requirement Further Abrogated State Police Power</u>

Lastly, Congress' intent to overturn *Jacobson* is further manifested by the

fact that 29 U.S.C. §655 Section 6(a) & (b)(1)&(5) of the OSH Act requires the OSHA Secretary (when promulgating or modifying standards) to seek consensus on standards with other national organizations including specifically the Secretary of HHS as well as state or political subdivisions, which must be "based upon research, demonstrations, experiments," as stated below:

> Secretary shall, …….by rule promulgate as an occupational safety or health standard any national consensus standard……. upon the basis of information submitted to him ……by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision……. Section 6(a) &(b)1
>
> Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee… Section 6(b)(5)

The articulated goal of the consensus requirement should be interpreted as an express rejection of the holding in *Jacobson* that scientific proof or evidence is not needed to enforce compulsory vaccines as a public health and safety method – as was stated in *Jacobson* below:

> "The **common belief**, however, is that it has a decided tendency to prevent the spread of this fearful disease and to render it less dangerous to those who contract it. **While not accepted by all, it is accepted by the mass of the people,** as well as by most members of the medical profession. It has been general in our State and in most civilized nations for generations. It is generally accepted in theory and generally applied in practice, both by the voluntary action of the people and in obedience to the command of law. Nearly every State of the Union has statutes to encourage, or directly or indirectly to require, vaccination, and this is true of most nations of Europe. **A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts.** The **fact that the belief is not universal is not controlling**, for there is scarcely any belief that is accepted by everyone**. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive, for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases.**
>
> *Jacobson* at 34-35.

Because Congress had not enacted legislation in 1905 regarding the management of the smallpox communicable disease, the *Jacobson* Court had no problem with enforcing criminal sanctions against a resident who refused to take a government sponsored vaccine based solely on the "common beliefs" of the masses and without any evidence of how the smallpox vaccine had a "tendency to prevent the spread of this fearful disease."

Congress' enactment of the consensus requirement language in 29 U.S.C. §655 Section 6(a) & (b)(1) in the OSH Act is direct evidence that Congress' intended to establish safety standards on more than "common beliefs," but upon the recommendations of consensus of leaders in the environmental and public health industries and on "available research, demonstrations, experiments…… to assure "the greatest protection of the safety or health of the affected employees." See 29 U.S.C. §655 Section 6(a) & (b)(1) (Emphasis added) Essentially, the *Jacobson* Court favored the "common beliefs" of the masses over the "beliefs" of those like Mr. Jacobson who did "not believe" in the use of vaccines as a method to manage the smallpox disease, which the OSH Act expressly protects. The *Jacobson* Court gave deference to the "police power" of the states, in the absence of Congressional action, despite the fact that there was no evidence to support the state of Massachusetts "common beliefs" about vaccines. The OSH Act consensus requirement expressly eliminated the power of courts and governments to enforce "arbitrary belief systems" about the effectiveness of vaccines to prevent transmission of communicable diseases while protecting the individual citizens right to believe and choose their

"health practices."

Since its inception, the OSHA Secretary through the consensus process has never approved vaccines as an approved "environmental safety method." Vaccines are approved by the FDA for voluntary personal ingestion but are incapable of meeting the OSHA safety method standards, as discussed below. The decision in *Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 279 (1990) read in conjunction with the OSH Act standards and mandates establishes that each person has the fundamental right for religious or non-religious reasons to refuse FDA approved or emergency authorized vaccine medical treatments and has the right to practice whatever medical treatment each person chooses, including for many the medical practice of Plant-Based Lifestyle Medicine followed by at least one of the Plaintiffs.

Rather than comply with OSHA minimum standards and respect the holding in *Cruzan*, the City and private employers have blatantly disregarded OSHA mandates and have arrogantly enforced an illegal safety method simply because the City and private employers "believe" they have "authority" to enforce whatever safety method they "believe" to be in the best interest of their employees, which is simply not the case. The City represented its "common belief" that it has power to regulate without accountability in its motion to the New York Supreme Court in the case *Garvey v. City of New York,* NY Slip Op 22335 (NY Supreme Court, Richmond 2022), as follows:

> "The City, as a government employer, has a duty to maintain a safe workplace. See generally N.Y. Labor Law §27-a. **The obligation of how best to do so is within the discretion of the employer**. See New York State Inspection Sec. & law Enforcement Emples. Dist. Council, 82 v. Cuomo, 64 N.Y. 2d 233, 237-40 (1984)."

See Exhibit 45, City Cross Motion to Dismiss – only relevant parts.

This irrational belief by the City can only be corrected by an express declaration by this Court that *Jacobson* has been overruled, including specifically the "reasonable" standard which the *Jacobson* court held was sufficient to enforce public health compulsory vaccines or medical treatments sought to be mandated by government or private sector employers. Otherwise, states and private employers will continue to take advantage of the fact that a court has not expressly overruled *Jacobson* in a written opinion, despite the legislative history and law that clearly establishes that *Jacobson* was overruled over 80 years ago.

B. The OSH Act Expressly Preempts Conflicting State And Municipal Law

Not only has the OSH Act overruled federal common law, but also, the OSHA Act preempts both state and municipal conflicting laws. "Congress derives its power to preempt state law under the Supremacy Clause in VI of the United States Constitution. See *Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018)*. "Conflict preemption, occurs ….." where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) see also *Arizona v. United States*, 132 S. Ct. 2492, (2012) Conflict preemption requires that the state law materially

impede or thwart the federal law or policy or alternatively impose a duty that is inconsistent—i.e., in conflict—with federal law. See *Mutual Pharmaceutical Co. v. Bartlett*, 570 U.S. 472, 493 (2013).

As will be discussed in detail below, the City's Vaccine Orders conflict with the entire scheme of the federal OSH Act, primarily because it is impossible for the Covid-19 vaccine or any vaccine to meet the OSH Act Respiratory Standards. (See SOF P.5, ¶17, Exhibit 14 & Exhibit 3) Consequently, the City's Vaccine Orders thwart and expressly conflicts with Congress' policy of only permitting the use of "authorized" safety methods to be used in workplaces and applicable public places for the purpose of preventing exposure to airborne hazards like the Covid-19 virus. Failure to meet the "minimum" safety standard is a clear conflict that cannot be overcome.

Additionally, the Vaccine Orders have also impermissibly served as a substitute for compliance with the existing Respiratory Standard requirements that requires the use of respirators and/or ventilation equipment known to remove airborne hazards from the workplace, including virus hazards like the Covid-19 virus. See *ConocoPhillips,* 520 F.Supp.2d 1282, 1330 (N.D. Okla 2007) *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) The Vaccine Orders do not mandate and sanction employees with the threat of termination for the failure to use City provided respirators nor do the Vaccine Orders mandate that all City employees comply with the other OSHA Respiratory standard requirements regarding the use of personal protective equipment and processes including washing

of hands, wearing of gloves, use of hand sanitizers and the sanitizing or washing down daily of high traffic areas within City buildings. In other words, the City severely sanctions employees for failing to comply with taking an illegal Covid-19 vaccine but does not sanction any employee for failing to comply with the "legal" safety precautions authorized by the OSH Act, which approved safety methods the City is first obligated to provide to all City employees which the City has failed to do.

Furthermore, the City has refused Plaintiffs the right to remote work, which is a specific OSHA authorized safety standard authorized specifically for k-12 schools. (See SOF P.6, ¶18, Exhibit 15 & SOF P.5, ¶15-16, Exhibit 13) Essentially, the City's practice of enforcing the Vaccine Orders has effectively replaced enforcement and compliance with the existing OSHA Respiratory/Infectious disease safety requirements, with which the City is mandated to comply.

The City received over $1.4 billion dollars from the Federal Government and $25.1 Million from the CDC (See SOF P.6, ¶21, Exhibit 18) to purchase new equipment like ventilation systems that can remove infectious airborne hazards from the workplace atmosphere in order to comply with the existing authorized OSHA safety methods. Yet, the City has yet to disclose to its employees during the Pandemic that it made any investment in any new ventilation systems that can remove the Covid-19 airborne virus from the workplace atmosphere in all City buildings or purchased new PAPR respirators for employees to provide the highest level of protection of City employees, which is mandated by the OSH Act. (See

Exhibit 13 and Exhibit 14 Affidavit of OSHA Experts)

While the pandemic has been declared over, the CDC has said that the "airborne" Covid-19 virus is still with us. The City's failure to enforce the other OSHA minimum precautions to rely mainly on an illegal vaccine when the threat of Covid-19 and all variants still exist in the atmosphere is another reason the Vaccine Orders conflict with the overall objective of the OSHA Respiratory standards and should be invalidated.

1. OSHA's Authorized Respiratory Risk Mitigation Methods Preempts All Unauthorized Methods And Renders Vaccines Unnecessary

An occupational safety and health standard is one that "requires conditions, or the adoption or use of one or more practices, means, **methods**, operations, or processes, reasonably **necessary** or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §652 Section 3(8) (Emphasis added). To specifically address infectious communicable diseases of any severity, including Covid-19, TB, SARS or Ebola, OSHA has only approved the specific methods in the list of Respiratory Standards, that include OSHA's Personal Protective Equipment standard 29 CFR §1910.132, the Respiratory Protection standard 29 CFR §1910.134 which mandates employer to provide employee respirators, like the Powered Air Purifying Respirators (PAPR); and the OSHA General Duty Clause 29 U.S.C. §654 Section 5, which mandates employers to eliminate any known hazard in the workplace through engineer and administrative methods, which includes authorized ventilation and air purification regulations that

can remove airborne viruses from the atmosphere. (See SOF P.2,¶3, Exhibit 3 & P.4, ¶11 Exhibit 8 &9 -Ventilation Standards)

These approved safety methods have not changed despite the number of global pandemics involving hazardous respiratory agents, including the 2009 H1N1 Global Pandemic,[6] (See SOF P.4, ¶13, Exhibit 11) and other infectious diseases for which OSHA has established directives, including SARS, MRSA, Zika, Pandemic Influenza, Measles, and Ebola. (See Exhibit 12, Page 1) Furthermore, at the beginning of the Covid-19 Pandemic, the supply of respirators was increased by the Ford Motor Company who increased manufacture of PAPRs and other safety equipment to meet the demand. (See SOF P.6, ¶20, Exhibit 17)

The primary objective of the OSHA Respiratory Standards is to implement "practices, means, **methods**, operations, or processes" that, at minimum, either: 1) remove hazardous airborne contaminations from the atmosphere of a workplace and/or 2.) prevent employee exposure to known airborne contaminates in the workplace atmosphere based on a plain reading of the Respiratory regulation in 29 CFR 1910.132 and the OSHA General Duty Clause. (See Exhibit 3, 7 and 8) Consequently, employers have a non-delegable duty to take "immediate action to eliminate employee exposure to an imminent danger identified" in the workplace atmosphere, when dealing with airborne contaminants. See 29 USC 670 §21(d)(3), Pub.. L 105-97, §2 See *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 33

[6] In 2009 the World Health Organization declared H1N1 a global pandemic – See https://www.youtube.com/watch?v=10Nfk0zcTAk&t=38s

(2d Cir. 1980) (held that OSHA regulatory standards created a non-delegable duty to remove a known hazard.)

According to the CDC, the virus that causes Covid-19 is an airborne hazardous viral infection that is transmitted in airborne sprays or droplets from person to person in all environments and is an infectious disease which will always be in workplaces and public places. (See SOF P. 1-2, ¶2, Exhibit 2) Therefore, to effectively provide a safe workplace during the Covid-19 pandemic, employers are mandated by the OSHA regulations to only use safety "methods" that meet the OSHA Respiratory regulation. (See Exhibit 12, 13 & 14)

In summary, if a safety method does not meet the two objectives listed above, then the method cannot meet the OSHA minimum safety method standard. It is obvious that it is impossible for any vaccine to remove infectious diseases from the atmosphere, and neither can a vaccine shield a person from exposure to any airborne infectious hazard. As addressed in the affidavit of Dr. Montgomery, and the FDA, vaccines are a "medical treatment" and cannot meet this minimum authorized standard and are therefore illegal. (See Exhibit 14, Page 5, ¶18) It is important to understand that the basic safety principle undergirding the OSHA standards is the duty of employers to remove "hazards" from the workplace and not "people" under the General Duty clause.

Furthermore, OSHA expert and Certified Hygienist Bruce Miller explains that the OSHA authorized respirators, specifically the Powered Air Purifying Respirators (PAPR) are 99.97% effective at shielding employees from exposure to

any airborne hazard, which is the highest level of effectiveness rendering vaccines unnecessary. (See SOF P. 4-5, ¶14-15 Exhibit 13) Mr. Miller further explains that OSHA also mandates employers to install new ventilation/air purification systems capable of removing Covid-19 like infectious airborne hazards from the workplace atmosphere as another most effective method for meeting the OSHA respiratory standard. (See Exhibit 13, Page 7 & 16)

Finally, it was held in *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88 (1992) that "when a state law directly and substantially regulates workplace safety or health issue with respect to which a federal standard has been established, including OSHA minimum standards, then the state law or regulation is preempted" and should be declared unconstitutionally void as a violation of a federal law implemented under Congress' powers authorized by the Constitution. Id. 116

2. The NYC Vax Orders Are Not Saved As Laws of General Applicability

A state or municipal safety law could possibly be saved from preemption according to the findings in *Gade* at 109, but, only if the law: 1) is "generally applicable" issued under a state's general police power, and 2) does not conflict with OSHA standards. Unlike the "general applicable" definition first articulated in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U. S. 872, 873 (1990), the court in *Gade at* 107 defined laws of general applicability, in the context of "health and safety" standards governed by the OSH Act, as laws that "regulate workers simply as members of the general public…" Examples of safety laws of general applicability are "traffic safety or fire safety," "taxi, bridges or tunnel

regulations or criminal laws that "regulate the conduct of workers and nonworkers alike" or regulate workers in non-workplaces to protect the public. See also *Steel Institute of New York v. City of New York*, 716 F.3d 31,38 (2nd Cir. 2013) (held New York law regulating construction cranes outside the workplace as generally applicable to the safety of the general public.)

Based on the *Gade* definition of a workplace safety law of general applicability, the City's Vaccine Orders do not meet the definition. The Vaccine Orders expressly conflict with the Respiratory minimum standards and the Vaccine Orders only apply to City and private sector employers and do not apply to all City residents including the retired, unemployed residents. Also, the "generally applicable" definition in the landmark case *Employment Division, Oregon v. Smith*, 494 U.S. 872 (1990) does not apply in the case of vaccine mandates because the choice to refuse to submit to a vaccine mandate is no longer a crime. The *Smith* holding was predicated based on the fact that the religious practice of smoking Peyote was a crime that "generally applied" to all persons, which the Vaccine Orders do not.

C. Plaintiffs Are Entitled To Declaratory Judgement As a Matter of Law

Based on the foregoing undisputed facts and legislative history, Plaintiffs are entitled to declaratory judgment regarding the validity of the *Jacobson* decision, the preemption of the OSH Act over state, federal, and private vaccine mandates and the rights of every citizen to refuse a vaccine medical treatment. The U.S. Supreme Court has held that declaratory judgment can be awarded so long as "the facts alleged,

under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Medimmune, Inc. v. GenenTech, Inc.*, 549 U.S. 118 (2007)

Therefore, this Court can declare as a matter of law that: 1) the federal common law in *Jacobson* has been overruled wherein governments and private employers do not have the right to mandate citizens to take a vaccine medical treatment under any circumstances either as a condition of employment or pursuant to government police power to regulate public health and safety, 2) the OSH Act preempts federal, state, and private employer vaccine mandates or any medical treatment mandate that conflicts with the OSH Act, and 3) all citizens have the fundamental right to refuse or choose medical treatments and all employees have the right to refuse vaccine medical treatment based on religious grounds pursuant to the OSHA Act, which is explained in more detail below.

IV. STRICT SCRUTINY APPLIES TO PLAINTIFFS SECTION 1983 AND NYC HUMAN RIGHTS LAW CLAIMS

Once the *Jacobson* case is declared overruled wherein the state police power to regulate health and safety in conflict or below OSH Act standards has been abrogated through OSHA preemption, and the "reasonable" standard determined inapplicable in determining if a government health and safety regulation is constitutional, then all government regulations of health and safety must therefore meet the strict scrutiny standard articulated in *Sherbert v. Verner*, 374 U.S. 398,

83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).[7] Because vaccines can never meet a compelling government interest in preventing exposure to communicable diseases nor can vaccine remove an airborne infectious communicable disease from the air, government sponsored vaccines can never be mandated under any circumstance, and all citizens have the fundamental right to refuse vaccines or any other medical treatment. Applying strict scrutiny to Plaintiffs Section 1983 and NYCHRL claims, Plaintiffs prevail as a matter of law.

42 U.S.C. Section 1983 allows persons to sue municipal entities whose officials' actions or policies, under color of state law, deprives them of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States, including the First Amendment right to the free exercise of religion See *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412 (2nd Cir. 1995) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 320, 332 (1992).

In this case, the Vaccine Orders do not "incidentally infringe" on Plaintiffs fundamental right to refuse the Covid-19 vaccine – rather the Vaccine Orders on their face expressly deprives public and private employees of their fundamental right to refuse the Covid-19 vaccine medical treatment by stating that all unvaccinated City employees "must be excluded from premises at which they work beginning November 1, 2021" for failing to provide proof of Covid-19 vaccination.

[7] See *Lyng v. Northwest Indian Cemetery Protective Assn*., 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to [the] scrutiny" employed in *Sherbert v. Verner*, supra,); see also Braunfeld v. Brown, 366 U.S. 599 606-607 (1961) (plurality opinion)

(See Exhibit 24) The Vaccine Order also precludes any employees who chooses to practice their own religious plant-based lifestyle medicine as a "method" to treat any potential infection and remain in their jobs.

Plaintiffs, and all similarly situated, have been "locked out" from their jobs since October 2021 for exercising their fundamental right to refuse and choose their own medical treatment and the City continues to prevent them from returning to their jobs based on new unconstitutional conditions that violate the OSHA Act and the NYCHRL. (See SOF P.10 ¶38, generally Exhibits 25-36 – Affidavits of Plaintiffs) Because Section 1983 protects the fundamental right to refuse medical treatment for any reason as declared in *Cruzan* under the Due Process clause, employees who refused the Covid-19 vaccine for medical or any other reason and experienced an adverse employment action also prevail on their claims as a matter of law based on the strict scrutiny.

Lastly, Plaintiffs also prevail as a matter of law on their NYCHRL claims applying strict scrutiny. The New York City Administrative Code §8-107(3)(a)&(b) defines discriminatory employment practices as follows:

> (a) It shall be an unlawful discriminatory practice for an employer or an employee or agent thereof to impose upon a person as a condition of obtaining or retaining employment any terms or conditions, compliance with which would require such person to violate, or forego a practice of, such person's creed or religion,….. the employer shall make reasonable accommodation to the religious needs of such person…..
> (b) as shall not cause undue hardship in the conduct of the employer's business. ….."Undue hardship" as used in this subdivision shall mean an accommodation requiring significant expense or difficulty (including a significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system).

While the NYCHRL expressly prohibits "quid pro quo" conditions of employment that infringe or violate a religious practice and requires employers to provide reasonable accommodations to religious practices so long as the accommodation does not cause an undue hardship, the undue hardship exception does not apply when a condition of employment is enforced for purposes of "health and safety" governed by the OSH Act. Conditions of employment covered by the OSH Act that directly deprive an employee of their fundamental right to choose their own medical treatment or refuse medical treatment can never be excused by the "undue burden" exception in the NYCHRL. Employers are mandated under the OSH Act to provide "automatic religious exemptions" to employees who refusal a vaccine medical treatment and there is no "undue burden" exception in the statute. If an employer is unable to meet an OSHA safety standard, the employer must seek a temporary variance pursuant to 29 U.S.C §655 Section 6(b)(6) in order to comply with no exception.

Plaintiffs, therefore, also automatically prevail as a matter of law on their NYCHRL religious discrimination claims because the undue burden exception in that statute also cannot apply to any vaccine mandate under strict.

V. PLAINTIFFS PREVAIL AS A MATTER OF LAW ON THEIR COMPENSATORY DAMAGE PRIVATE RIGHT OF ACTIONS UNDER THE OSHA ACT & NYCHRL

A. The OSH Act Provides An Express Right of Action

The U.S. Supreme Court held in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 332 (2015) "that a private right of action under federal law is not

created by mere implication but must be "unambiguously conferred." (citing *Gonzaga Univ. v Doe*, 536 U.S. 273, 283 (2002). The task of the court "is limited solely to determining whether Congress intended to create the private right of action" which "must begin with the language of the statute itself…" *Touche Ross Co v. Redington*, 442 U.S. 560, 568, (1979).

"Absent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive." *Bread Political Action Committee v. FEC*, 455 U.S. 577, 580 (1982) (citations omitted). "In approaching a statute, moreover, a judge must presume that Congress chose its words with as much care as the judge himself brings to bear on the task of statutory interpretation..." *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615, 635(1982) "[T]he legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) The U.S. Supreme Court specifically held in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, (1997) the following:

> "statutory interpretation focuses on the language itself, the specific context in which that language is used, and the **broader context of the statute as a whole**." (Emphasis added)

1. The Right To Refuse Compulsory Vaccines Was Legalized & Protected By the OSHA Act

Before Congress can confer a private right of action for the deprivation of an activity, Congress has to first legalize the activity if it was previously a crime. Until the OSH Act was enacted in 1970, the right to refuse vaccines based on the

Jacobson federal common law was still a crime. Congresses intent to legalize the right to refuse vaccination and to protect all employees free exercise based on religious grounds is unambiguously expressed in OSH Act at 29 U.S.C. §20(a)(5) which must be read collectively with §11(c)(1) & (2) which state as follows:

> **Nothing in this or any other provision of this Act shall be deemed to** authorize or **require** medical examination**, immunization**, or treatment **for those who object thereto on religious grounds**, except where such is necessary for the protection of the health or safety of others. See §20(a)(5) (Hereinafter the "Automatic Right to Refuse Vaccines")
>
> **No person shall discharge any employee……because of the exercise by such employee ……..of any right afforded by this Act**. Section 11(c)(1) (Emphasis added)
>
> **Any employee who believes that he has been discharged** or otherwise discriminated against **by any person in violation of this subsection may**, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. ……. **In any such action** the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and **order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay**. Section 11(c)(2)

Because Congress never codified the *Jacobson* federal common law into statutory federal criminal law, Congress did not need to repeal or expressly legalize an individual's right to refuse government mandated vaccines. Consequently, the protective language in Section 20(a)(5) that provides all employees the right to "object" or refuse any immunization based on "religious grounds" is strong evidence of Congress' intent to legalize the right to refuse vaccines. That phrase, however, must be read in conjunction with the compatible language in Section 11(c)(1) which precludes discharge of an employee for exercising their right to refuse

immunization or any right under the Act. It should be interpreted that Congress' prohibition against retaliatory discharge of an employee for exercising their fundamental right or any right provided in the Act is an express rejection of the *Jacobson's* decision, which permitted criminal sanctions for exercising the same.

Moreover, Section 20(a)(5) provides an "automatic" exemption (hereinafter the "Auto Religious Exemption") for any employee who notifies their employer of their objection to any immunization/vaccine. Nothing in that provision expressly permits any employer to place any preconditions or prerequisites on an employee's right to object and right to receive an exemption under the section. Also, nothing in Section 20(a)(5) permits employers to demand an employee to explain their religious beliefs, or to disclose what faith community they belong to and neither does the provision require employees to provide a letter from their clergy to "prove" they have a "sincerely" held belief. The "sincerely held belief requirement" in most Title VII cases is not applicable in the context of the OSH Acts protection of the free exercise right to refuse vaccines.

Section 20(a)(5) should <u>not</u> be interpreted as a "reasonable accommodation" of the religious practice of refusing vaccines; rather, Section 20(a)(5) is a Congressional mandate, not controlled by the OSHA Secretary (it's not a regulation) that requires all employers to provide automatic vaccine exempts to all employees who object without any exception and without explanation. The Supreme Court already has held that it was "impermissible even for the courts to examine the truth or falsity of religious beliefs." See *United States v. Ballard*, 322 U.S. 78 (1944), which means that

employers should not be given authority for what the courts of law cannot do.

Lastly, since vaccines are not necessary and are incapable of preventing exposure to the Covid-19 virus in the atmosphere, there is no need for any employer to have any discretion over the Section 20(a)(5) objection provision. Since vaccines do not remove airborne viruses from the air, no amount of information about an employee's religious practice for a religious exemption is going to change that indisputable reality.

While the EEOC is also an agency of the U.S. Department of Labor as is OSHA, neither the EEOC Secretary nor the OSHA Secretary has authority to limit an employees Free Exercise right to refuse any vaccine expressly protected by Congress in the enactment of Section 20(a) of the OSH Act.

Notwithstanding this express Congressional prohibition, the City's general counsel issued a letter instructing private employers to irrationally apply the EEOC "reasonable accommodation" and "undue burden" standard to any objection received from an employee (See SOF P.10, ¶36, Exhibit 38). Reliance on the EEOC undue burden law would effectively give all employers the right to violate the OSH Act statute and regulatory mandates by claiming that compliance with the OSH Act regulations are an "undue burden," which the OSH Act expressly prohibits. Nothing in the OSH Act excuses compliance through an EEOC standard, regulation or case law.

The City's irrational reliance on the EEOC case law and regulations also resulted in the City's reckless denial of Plaintiffs' request for an automatic

exemption to exercise their fundamental right to refuse the Covid-19 vaccine protected by the OSH Act. One Seventh-Day Adventist City employee, Ms. Bryan, who practices Biblical Plant-Based Lifestyle Medicine, provided evidence that her 100% plant-based dietary religious medical practice reduced contracting and experiencing serious Covid-19 by approx. 75% based on three scientific studies, including a Harvard Medical study (See SOF P.8, ¶30-35, Exhibit 27, Page 1, 18-19) and her exemption request was denied. Essentially, she was deprived of her right to work unvaccinated even though her religious plant-based medical practice was at least as effective as the Covid-19 vaccine at reducing symptoms and death. (See Exhibit 27)

Moreover, employers are not doctors and are incapable of evaluating refusal of any vaccine based on medical grounds, which is also a fundamental right protected by the Due Process clause under strict scrutiny once the *Jacobson* decision is declared overruled.

Plaintiffs acknowledge that the Auto Religious Exemption provision does contain a limit on an employee's right to object as highlighted in the phrase of Section 20(a)(5) stated below:

> "except where <u>such is necessary</u> for the protection of the health or safety of others."

That "necessary" clause, however, can only be interpreted in two ways that is consistent with the OSH Act's existing infectious disease regulatory standards. First, as previously discussed, vaccines can never be "necessary" to protect the health or safety of others because vaccines cannot remove an infectious virus from the

atmosphere or to "shield an employee or another person from exposure" to an infectious virus. Essentially, the infectious/respiratory standard nullifies the necessity to enforce vaccines as a "protective method" for the safety of others. Therefore, the exception cannot apply immunizations or vaccines.

However, the "necessary" clause in Section 20(a)(5) also applies to "medical examinations" and "treatments" (other than immunization) also named in the same paragraph. Therefore, the necessary clause must be interpreted to only apply to medical examinations or treatments the OSHA Secretary – with consensus - determines is necessary for the safety of others.

2. The OSH Act Provides a Private Right of Action For Retaliatory Discharge of Employees Who Exercise Their OSHA Rights

Plenty of lower federal district courts have held that the OSH Act provides a private right of action for retaliatory discharge for exercising protected rights under the OSH Act. See *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1190 (1st Cir. 1994) The federal district court in *Perez v. United States Postal Service, 76 F. Supp. 3d 1168, (W.D. Wash 2015)* explained the legislative objective of Section 11(c) as follows:

> "Section 11(c) functions to safeguard employees against adverse actions taken on account of their engagement or suspected engagement in activity protected under the Act, thereby ensuring that health and safety violations will be reported." Perez v. U.S. Postal Serv., 76 F.Supp.3d 1168 (W.D. Wash. 2015)

Section 11(c)(2) of the OSH Act expressly provides a private right of action which states that "[a]ny employee who believes that he has been discharged… by any person in violation of this subsection may… file a complaint…. [and] In any such

action the United States district courts shall have jurisdiction to order all appropriate relief including rehiring, reinstatement of the employee to his former position with back pay." This private right of action and remedies are clear on the face of Section 11(c)2) namely all "appropriate relief including rehiring or reinstatement of the employee to his former position with back pay."

The 1st Circuit in *Reich* also reviewed the legislative history of the OSH Act and found that the term "all appropriate relief" conveyed on courts the power to award compensatory and punitive damages along with rehiring, reinstatement with backpay in a cause of action analogous to an intentional tort. Id. at 1194 (quoting 29 U.S.C. § 660 Section 11(c)(2)). Id at 1190-1191. Courts have also found that appropriate relief includes ……expunging negative employment references, and posting notice. See, e.g., *Marshall v. Wallace*, 1978 WL 18639, *4 (M.D.Penn.1978).

In summary, Section 20(a)(5) should be read together with the plain language in Sections 11(c)(1)&(2) as a "whole" wherein an employee has the right to maintain a right of action for any deprivation of their right to refuse immunization expressly protected in Section 20(a)(5) of the Act.

3. The OSH Act Does Not Require An Exhaustion of Administrative Remedies

Nothing in Section 11(c)(2) expressly requires an employee to first exhaust administrative remedies with the Secretary of OSHA. This fact is evident by the below highlighted phrase:

> Any employee who believes that he has been discharged ….by any person in violation of this subsection **<u>may,….. file a complaint</u>** with the Secretary alleging such discrimination

The single word "may" is irrefutable evidence that Congress did not intend for employees to first exhaust any administrative review process to make a claim for wrongful discharge in Federal Court. If Congress intended otherwise, it could have used the word "shall" to preclude any action. Furthermore, the phrase "In any such action" also supports the interpretation that a wrongly discharged employee is not required to first exhaust any administrative remedy through the OSHA Secretary, but rather the United States district courts "shall" have jurisdiction over "any action" brought. Furthermore, the phrases "no person" in the beginning of Section 11(c)(1) and "any person" in Section 11(c)(2), also establishes Congress' intent to permit claims against "persons," including officials of municipalities or states.

Lastly, the OSH Act private right of action in subsection (c) is listed under Section 11 titled "Judicial Review" but is separate from the enforcement powers granted to the OSHA Secretary in Sections 9 and 10 of the OSH Act. Congress through OSH Act, and not through rules or regulations, created the private right of action to protect the fundamental Free Exercise Right of employees to refuse vaccines in Section 20(a)(5).

This private right of action was not created by the OSHA Secretary, and the Secretary cannot promulgate regulations or rules to limit this express private right action absent a Congressional amendment or repeal. Section 11(c) is a statutory provision that protects the fundamental rights of employees as the *Boerne* court

held Congress had power to do. *Boerne* at 508.

4. The Applicable Statute of Limitations For OSHA Act Retaliation Claims Is Not 1 Year

The OSHA Act is silent regarding the statute of limitations within which an employee may bring a claim in federal court pursuant to Section 11(c). This Court, however, has discretionary power under the Declaratory Judgment Act 28 U.S.C. §2202, to grant "[f]urther necessary or proper relief based on a declaratory judgment or decree." It is well settled that federal courts, of their own initiative, have used state statutes for remedial purposes for which no federal statute of limitations has been provided. See *The Tungus v. Skovgaard*, 358 U.S. 588, 604 (1959)

Consequently, Plaintiffs further request this Court to declare that an employee's private right of action under the OSH Act Section 11(c)(2) is generally subject to the statute of limitation for analogous tort claims permitted in any each state. Claims brought in New York, as in this case would be subject to a three (3) year statute of limitations applicable to the analogous New York City Human Rights Law statute of limitation contained in N.Y.C. Admin Code §8-502(d), under which Plaintiffs have asserted their religious harassment claim.

A declaration by this Court regarding the appropriate statute of limitation is extremely necessary to ensure that all employees in America who have been deprived of their fundamental right to refuse the government sponsored Covid-19 vaccine medical treatment can also - without further delay and unnecessary

litigation obstruction - fairly exercise their private right of action under the OSH Act. Such a declaration will prevent a bog down of the judicial system with irrational legal claims by employers who may arbitrarily argue that the statute of limitations has run on OSH Act claims for employees based on the "1-year" language in Section 11(c)(2).

Again, it is clear that Section 11(c)(2) allows "permissive" administrative claims to the Secretary based on the use of the word "may", and that such permissive claims shall be submitted to the Secretary within 1 year of an employer's retaliatory discharge. However, that clause can be misrepresented to an employee not trained in legal interpretation as a 1-year statute of limitation that bars all wrongly discharged employee claims under the OSH Act. Because we now live in a world wherein "alternative facts" are the norm, a clear declaration from this Court regarding the appropriate statute of limitations is absolutely necessary to prevent further deprivation of employees' fundamental rights protected by the OSH Act and the Constitution. The fact that the City has already fraudulently claimed that it is well settled law that the OSH Act does not provide a private right of action, is clear evidence that a clear declaration from this Court is necessary to stop the fraud on the public.

In this case, Plaintiffs and all City employees have continuing violations of their fundamental right to refuse the Covid-19 vaccine because the Plaintiffs are union workers who have not been legally terminated from their jobs and have a

right under the New York City Civil Service law[8] to automatically return to their specific positions, which the City continues to refuse. Furthermore, the City's amendment to Vaccine Orders effective March 10, 2023 also continues to prevent Plaintiffs to return to work unless they waive their other OSH Act rights to compensatory damage - which is a new demand calculated to coerce Plaintiffs to give up their OSH Act right to damages in exchange for their jobs. Again, a clear declaration of the Plaintiffs rights under the OSH Act is needed. (See SOF P.11 ¶43-44)

B. Plaintiffs Are Entitled to Punitive Damages As A Matter of Law

While the OSH Act and Section 1983 provide remedies in the form of reinstatement, backpay, compensatory damages for emotional distress caused by illegal deprivations of fundamental rights protected by Federal law and the constitution, punitive damages are also available in this case pursuant to the NYCHRL. The NYCHRL §8-126 provides a cap on punitive damages, which in this case should be granted as a matter of law as outlined in the statute below:

> "where the commission finds that a person has engaged in an unlawful discriminatory practice, the commission may, to vindicate the public interest, impose a civil penalty of not more than $125,000. Where the commission finds that an unlawful discriminatory practice was the result of the respondent's willful, wanton or malicious act or where the commission finds that an act of discriminatory harassment or violence as set forth in chapter 6 of this title has occurred, *the commission may, to vindicate the public interest, impose a civil penalty of not more than $250,000*.

[8] See City Disciplinary codes that mandate "progressive discipline" and requires the City to file a formal charge to terminate employees - New York City Education Law §3020, which applies to all tenured teachers, or violation of the New York City Administrative Code §16-101 for Sanitation employees; of the New York City Civil Service Law §75, which applies to all City employees.

The New York Court of Appeals specifically held in *Chauca v. Abraham*, 30 N.Y.3d 325, 67 N.Y.S.3d 85, 89 N.E.3d (N.Y. 2017) (opinion attached as Exhibit 46) that punitive damages under the NYCHRL can be awarded based on a finding of discriminatory conduct that reflects a "recklessness, or where there is a conscious disregard of the rights of others." The *Abraham* court further held that "this Court has acknowledged that all provisions of the NYCHRL must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible."

There is no dispute that the Vaccine Orders on their face violated the NYCHRL by requiring all employees to submit to the Covid-19 vaccine as a condition of employment for City and private sector employees, which the City had no authority to demand. Most important is the fact that the City had "actual knowledge" that the Covid-19 vaccine did **not** prevent the spread of the Covid-19 virus by either shielding employees or citizens from exposure to the airborne Covid-19 virus or by removing the virus from the atmosphere of City buildings. The City's marketing materials used to promote the Vaccine Orders clearly state that the Covid-19 vaccines do not "prevent" the spread of Covid-19 and that OSHA authorized safety methods were mandated to control the outbreak. (See SOF P.7, ¶24, Exhibit 21).

Also, the City's Health Department admits on page 2 of one of its Covid-19 informational flyers (See Exhibit 21, Page 2) that the OSHA authorized safety methods are "the only" …. proven protections" and the flyer lists – "face coverings,

physical distancing, hand hygiene and environmental precautions, such as improved air circulation."

The most egregious and ruthless action of the City to deprive its employees of their right to refuse the vaccine medical treatment was when the City entered into backdoor illegal agreements with the employee unions that approved of placing those who refused the vaccine on LWOP. (See SOF P.7, ¶25, Exhibit 22) The City/Union agreements violate the National Labor Relation Board union laws that prohibit the City and unions from negotiating away civil liberties – in particular religious free exercise rights of employees. (See SOF P.7, ¶25, Exhibit 23) Not one City employee was notified of the agreements nor given any opportunity to object. (See generally Exhibits 25-36 – Plaintiffs Affidavits)

Finally, all Plaintiffs who requested exemptions from the Covid-19 vaccine were denied and locked out of their jobs and denied all employment benefits including unemployment benefits. (See SOF P.10, ¶38, Exhibits 25-36) Immediately after the Vaccine Orders went into effect, many lawsuits were filed which gave the City plenty of notice that they were engaging in religious discrimination.

Based on all the egregious acts by the City to strong arm employees into taking the Covid-19 vaccine against their fundamental right to refuse, no trial is needed to award Plaintiffs compensatory damages for the discriminatory acts by the City against all City employees who requested exemptions from the Vaccine Orders. Moreover, no trial is needed to determine the City's "conscious disregarded" Plaintiffs' fundament right to refuse the Covid-19 vaccine. In at least two cases

against the City determined in 2022[9], New York Supreme Courts determined that the City's denial of exemptions request was arbitrary and capricious. These two cases alone put the City on notice that their Vaccine Orders violated the law, yet the City continued to enforce the Vaccine Orders for over a year and a half.

Notwithstanding the adverse court rulings against the City, the City sent out more threatening and harassing letters to Plaintiffs and other employees on LWOP stating that they had until September 5, 2022 to get the Covid-19 shot or they would be permanently prevented from returning to their jobs. (See SOF P. 10, ¶39, Exhibit 39 & P. 12, ¶47 Exhibit 44) As a result of that harassing letter, 450 teachers who feared losing their retirement and ever having the opportunity to return to work, went against their beliefs and took the Covid-19 vaccine just so they could return to work and earn a living after being locked out from their jobs for a year. (See Exhibit 44) The City's coercive and threatening tactics described above is exactly the type of malicious conduct that the NYCHRL bans.

Also, the City consciously disregarded Plaintiffs right to receive OSHA approved safety methods so that they could continue to work unvaccinated, which included the right to work remotely – which was denied, the right to a powered air purifying respirator that is 99.9% effective in preventing exposure to any airborne hazard, and the right to an air purification/vitalization system installed in their workplace. (See Exhibits 25-36 – Plaintiffs Affidavits)

[9] *See Garvey v City of New York (2022 NY Slip Op 22335), and see Loiacono v. The Bd. of Educ. of City Sch. Dist. of City of New York, 2022 N.Y. Slip Op. 30758 (N.Y. Sup. Ct. 2022)*

Another critical undisputed fact that supports punitive damage claims against the City is the City's conscious and reckless violation of the State of New York Public Health Law §206l, which expressly prohibits any local health commissioner from mandating adult vaccination. Also, the City's own local law only permits the City's health commissioner to make "vaccines available gratuitously" to residents for "voluntary" injection. See NYC Administrative Cod §17-109 and §2194. The City violated its own law and state law, with no local law is to conflict.

Finally, the City's February 10, 2023 amended Vaccine Orders that placed new conditions on their right to return by demanding that Plaintiffs waive their right to backpay and reapply for their jobs is additional evidence of the City's egregious disregard for Plaintiffs rights to return to work unvaccinated. (See SOF P. 11-12, ¶43-45)

The City's acts against Plaintiffs viewed collectively are particularly outrageous and a "shock to the conscience" warranting compensatory and punitive damages, especially when the City had no authority to issue the Vaccine Orders in the first place. Also, the City's Mayor also stated in a press conference that he would reinstitute the mandates in the future if necessary. (See Exhibit 43)

It is clear that punitive damages are warranted, and it is equally clear how much should be awarded based on the Second Circuits holding in *Sooroojballie v. Port Auth.* of N.Y. & N.J., 18-3148-cv Page 14-21 (2nd Ci. 2020) (Summary Order), which held that compensatory damages for "egregious emotion distress" claims for "employers conduct that is "outrageous and shocking …. for prolonged

discriminatory conduct …can sustain an award of "$500,000." (See Exhibit 47 – courtesy copy of ruling) A careful review of the affidavits of the Plaintiffs supporting this Motion, clearly supports a finding by this Court - as a matter of law - that Plaintiffs are entitled to an egregious emotion distress determination as defined by the Second Circuit in *Sooroojballie,* particularly due to the prolonged discriminatory/harassing act of locking out Plaintiffs from their jobs after several courts determined that the lock-outs were arbitrary and capricious. Moreover, while the Plaintiffs were placed on involuntary leave without pay, the City continued to send harassing letters to the Plaintiffs offering them their jobs back only if they take the vaccine in an attempt to coerce Plaintiffs to abandon their rights because they have been without pay for months and denied unemployment benefits by the City's. (See SOF P. 10, ¶39, Exhibit 39) Plaintiffs' counsel warned the City that the letters were harassing and constituted ongoing egregious discrimination that the City had no right to demand and the City until now has ignored all warnings.

Also, pursuant to the statutory punitive damage provision in §8-126 of the NYCHRL, the City's conscious, reckless and wanton disregard of Plaintiffs rights for over a year and half also warrants – as a matter of law - an award of the maximum amount of the NYCHRL punitive damage cap of $250,000. This punitive damage maximum should be awarded to each Plaintiff particularly due to the City's flagrant dishonesty with this Court in misrepresenting the law regarding Plaintiffs private right of action under the OSH Act. The City's attempt to dismiss Plaintiffs case based on a flat out lie is unequivocal evidence of the City's malicious intent to

deprive Plaintiffs of their rights through fraud.

Of even greater importance in determining if punitive damages should be awarded is the undisputed fact that the City received $1.4 Billion dollars through the Federal Government Cares Act and another $25.1 Million from the CDC to support the City's management of the Covid-19 pandemic and to specifically purchase safety equipment. (See SOF P.6, ¶21, Exhibit 18) Also, at the beginning of the Pandemic around April 2020, Ford Motor Company increased manufacture of the powered air purifying respirators (PAPR) to meet demand and the City has not provided any evidence that it purchased PAPRs to give to employees who refused the Covid-19 vaccine since the PAPRs are 99.7% effective at shielding employees and the public from exposure to airborne Covid-19 vaccine.(See SOF P.6,¶20, Exhibit 17) The fact that the City was provided financial resources and money to purchase special equipment like (PAPRS) or air purifiers to give all employees who requested exemptions from the Vaccine Orders so that the employees did not have to be locked out of their jobs. This failure is overwhelming evidence that the City's discriminatory acts against Plaintiffs was conscious, reckless, wanton and blatant disregard for the rights of its employees.

Based on these undisputed facts, Plaintiffs request this Court to enter judgment in their favor and award as a matter of law (through the Courts discretion) each Plaintiff compensatory damages in the maximum amount of $500,000 along with punitive damages for the statutory cap of $250,000 for a total of $750,000 per claim. Plaintiffs seek this Court's authority to make the above monetary awards –

as a matter of law - consistent with the Second Circuits guidance contained in the *Sooroojballie v. Port Authority* case.

VI CLASS CERTIFICATION WARRANTED

Plaintiffs hereby renew their request for Class Certification requested in their prior renewed motion for preliminary injunction filed in ECF Doc #33. Based on the undisputed facts and law contained herein, Plaintiffs, along with all similarly situated City employees, have the same exact claims and damages to warrant class certification as outlined in Plaintiffs prior motion.

VII CONCLUSION

Based on the foregoing, declaratory and injunctive relief is warranted along with damages in the form of the following: 1) backpay for each Plaintiff and all similarly situated; 2) compensatory damage award in the amount of $500,000 for emotion distress damages, 3) punitive damage award in the statutory cap amount of $250,000 4) reinstatement to their jobs or "upgrading" to another job as permitted by the NYCHRL §8-120(1), 4) expungement of negative reports on their employment record, 5) attorney fees and 5) class certification as outlined with the proposed order attached.

Dated: April 3, 2023

Respectfully submitted,

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