No. 23-A___

In The
Supreme Court of the United States

WOMEN OF COLOR FOR EQUAL JUSTICE, ET AL.

Applicant,

v.

MAYOR ERIC L. ADAMS, COMMISSIONER ASHWIN VASAN, MD, PHD, IN THEIR OFFICIAL CAPITY, THE CITY OF NEW YORK, DEPARTMENT OF HEALTH AND MENTAL HYGIENE AND DEPARTMENT OF EDUCATION, DOES 1-20

Respondent.

To the Honorable Sonia Sotomayor, Associate Justice of the United States Supreme Court and Circuit Justice for the Second Circuit

EMERGENCY APPLICATION FOR STAY PENDING APPELLATE REVIEW OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF CERTIORARI AND STAY PENDING RESOLUTION

IMMEDIATE RELIEF REQUESTED

Jo Saint-George
Counsel of Record
14216 Dunwood Valley Dr.
Bowie, MD 20721
(602) 326-8663
jo@woc4equaljustice.org

Counsel for Applicants

QUESTIONS PRESENTED

This emergency motion for preliminary injunctive relief pursuant to 28 U.S.C. §1292(a)(1) and §1651 is one of first impression that 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 Appendix 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. The Vaccine Orders violate of the Occupational Safety and Health Act ("OSH Act") 29 U.S.C. 669 Section 20(a)(5) and 29 U.SC. 660, Section 11(c), which abrogated authority from states and private employers under field and conflict preemption to mandate any vaccine because vaccines do not meet OSHA safety standards and precludes any adverse action by any employer against any employee for exercising their OSHA protected First Amendment Free Exercise and Fourteenth Amendment substantive due process right to refuse any vaccine medical treatment. While Applicants right to refuse and obtain an automatic exemption from any vaccine without employer pre-approval is indisputably clear in OSH Act and under Due Process Clause strict scrutiny, 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.

Section 11(c) of the OSH Act indisputably makes clear that Applicants have a private right of action under the federal OSH Act, the district court nonetheless denied Applicants motion for TRO, declaratory relief under the Declaratory Judgment Act (DJA) 28 U.S. Code §2201 and §2202 and denied Applicants request to preliminary enjoin the enforcement of the Vaccine Orders and to prohibit the City from: (1) continuing to lock out Applicants from their specific jobs without pre-condition, and (2) withholding backpay to be immediately paid within several days of the district courts order. The district court denied the requested injunctive and declaratory relief[2] because district court held that neither relief can be granted absent a private right of action under the OSH Act based on the holdings in *Donovan v. Occupational Safety & Health Rev. Comm'n*, 713 F. 2d, 918, 926 (2nd Cir. 1983) and *Quirk v. Difiore*, 582 F. Supp. 3d 109, 115 (S.D.N.Y. 2022), which held "[u]nder OSHA, employees do not have a private right of action," despite the fact that neither of those cases involved claims for violations of the OSH Act automatic religious exemption provision in Section 20(a)(5) and express right of action for wrongful termination for exercising the right to refuse vaccines contained in Section 11(c).

This Application for extraordinary relief meets the "high bar necessary to warrant an emergency injunction from this Court" because this is one of the most "rarest of cases"[3] in the history of America wherein states and private sector

[2] Applicants TRO & preliminary injunction motions sought declaratory and injunctive relief under the federal Declaratory Judgment Act 28 U.S. Code §2201 and 2202 as a milder alternative injunctive relief standard and claimed injunctive relief under 42 U.S.C. §1983. *Steffel v. Thompson*, 415 U.S. 452, 453 (1974)

[3] *Wheaton Coll. v. Burwell*, 134 S.Ct. 2806, 2809-2810, 573 U.S. 958, (2014) (Judge Sotomayor Dissenting)

employers have locked out millions of Americans from jobs and a livelihood because they are mandating – in violation of indisputably clear federal OSHA law and federal common law - Covid-19 vaccination when adult vaccination has never been mandated since the *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) case. Furthermore, the district court has a pending Motion to Dismiss from the City claiming that the federal courts lack jurisdiction to adjudicate the case because the OSH Act does not contain a private right of action for which relief can be granted, which makes a preliminary injunction from this Court "necessary…. in [the] aid of … jurisdiction" and to stop the ongoing violation of federal law and Constitutional rights that have caused irreparable harm to thousands of employees wrongly locked out of employment for over 18 months. (See Appendix 46 – Motion to Dismiss) The circumstances of this case qualifies as one of "the most critical and exigent circumstances" warranting relief and conversion of this case to a petition for certiorari and stay pending resolution. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 1313, 107 S.Ct. 682, (1986) (SCALIA, J., in chambers) to address the following questions:

1. Whether Congress through legislative enactment of the OSH Act overruled the federal common law in *Jacobson* and preempts, renders void, illegal and unconstitutional any conflicting state, municipal or private sector vaccine mandate enforced as pre or post condition of employment.

2. Whether the OSH Act provides a private right of action to employees wrongfully discharged for exercising their fundamental right to refuse any vaccine

medical treatment, which right of action provides compensatory and punitive damages, among other remedies.

3. If the OSH Act preempts state law, whether the right to refuse or choose "medical treatments" of any kind, including vaccines, is a fundamental right for all employees for religious and non-religious reasons under Due Process requiring strict scrutiny to be applied to any government vaccine mandate or any "medical treatment" mandate, which can only be justified by a "compelling interest" that is "narrowly tailored" to meet a legitimate public health and safety interest.

4. Whether federal declaratory relief is precluded when a federal statute is violated but the remedies or private right of action are provided in an alternate federal statutory provision or state or municipal statute.

PARTIES AND RULE 29.6 STATEMENT

Applicant is the Women of Color for Equal Justice a 501(c)(3) including its members, Remo Dello Ioio, Elizabeth Loiacono, Suzzane Deegan, Martiza Remero, Julia Harding, Christine O'Reilley, Ayse P. Ustares, Sara Coombs-Moreno, Jesus Coombs, Angela Velez, Sancha Browne, Amoura Bryan, Zena Wouadjou, Chrisse Ridolfo, Tracy-Ann Francis Martin, Kareem Campbell, Michelle Hemmings Harrington, Mark Mayne, Carla Grant, Ophela Innis, Cassandra Chandler, Aura Moody, Evelyn Zapata, Sean Milan, Sonia Hernandez, Bruce Reid, Joseph Rullo, Curtis Boyce, Joseph Saviano, Monique Moore, Natalya Hogan, Jessica Cspeku, Roseanne Mustacchia, Yulanda Smith, Maria Figaro, Rasheen Odom, Frankie Trotman, Georgiann Gratsley, Edward Weber, Mervilyn Wallen, Paula Smith,

Sarah Wiesel, Suzanne Schroeter, Dawn Schol, Lyndsay Wanser, Christian Murillo and Dianne Baker – Pacius individually and on behalf of similarly situated individuals (Hereinafter collectively "Applicant"). Applicant is a Plaintiff in the United States District Court for the Eastern District of New York and is Appellant in the United States Court of Appeals for the Second Circuit. Applicant, Women of Color for Equal Justice has no parent corporation, and there is no publicly held corporation that owns 10% of more of its stock.

Respondents, Eric L. Adams, in his official capacity as the Mayor of the City of New York and Commissioner Ashwin Vasan, M.D., PhD in his official capacity for the New York City Department of Health & Mental Hygiene along with the City of New York and Department of Education collectively are Respondents. Respondent is the Defendant in the United States District Court for the Eastern District of New York and is the Appellee in the United States Court of Appeals for the Second Circuit.

RELATED CASES

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii) except as follows:

- Women of Color for Equal Justice et. al. v. City of New York, No. 22-cv-2234, U. S. District Court for the Eastern District of New York (PI Order denied November 18, 2022, and TRO denied November 15, 2022)
- Women of Color for Equal Justice et. al. v. City of New York, Docket No. 22-3065, U.S. Court of Appeals for the Second Circuit (PI Order denied Feb, 15, 2023)

DECISIONS BELOW

All decisions in this case in the lower courts are styled Women of Color for Equal Justice, et. al. v. The City of New York. The order of the United States Court of Appeals for the Second Circuit, dated February 15, 2023, denying Applicant's motion for declaratory and preliminary injunction pending appeal is attached to the Appendix as Appendix B. The text order of the United States DistrictCourt for the Eastern District of New York ("District Court"), dated November 18, 2022, denying Applicant's motion for Temporary Restraining Order ("TRO Order") is attached to the Appendix as Appendix A which includes with the text of the order of the District Court denying Applicant's motions for declaratory and preliminary injunction, and request for conditional class certification, which orders are on appeal in the Second Circuit court (the "PI Order") The District Court denied Applicants' PI and TRO Orders without hearing.

Applicants have a pending Motion for Summary Judgement on all claims under the OSH Act, Section 1983 and the New York Human Rights Law that cover the same legal issues in this Application for which a decision by this Court could eliminate a later duplicate appeal. A stay in the lower court has been requested and denied. Also, there has been a delay in the filing of this emergency Application due to a hospitalization and non-Covid-19 related painful illness of counsel of record and murder of a counsel of records family member, which should not be held against the Applicants emergency request.

JURISDICTION

Applicant has a pending interlocutory appeal in the United States Court of Appeals for the Second Circuit, pursuant to 28 U.S.C. § 1292(a)(1). This Court has jurisdiction, pursuant to 28 U.S.C. §1651.

REQUEST FOR STAY OF LOWER COURT PROCEEDINGS
REQUEST TO TREAT APPLICATION AS A PETITION FOR CERTIORARI

Applicant has requested both the Second Circuit and the New York Eastern District courts to stay its proceedings, which has been denied. To avoid duplication and a possible future appeal on the same issues that are purely questions for this Supreme Court and to stop the irreparable harm that should not continue another day, Applicant respectfully requests this Court to stay both lower court proceedings and treat this Application as a Petition for Certiorari to allow for oral argument before the full Court on the above questions of national importance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provision

Statutes

Regulations

United States Supreme Court Cases

Federal Court Cases

TO THE HONORABLE SONIA SOTOMAYOR,
ASSOCIATE JUSTICE OF THE SUPREME COURT AND
JUSTICE FOR THE SECOND CIRCUIT

Pursuant to Rules 20, 22, and 23 of the Rules of this Court, and 28 U.S.C. § 1651, Applicant the Women of Color for Equal Justice, et. al ("Applicant") by and for those similarly situated[4] respectfully requests an emergency application for preliminary injunctive relief that is of national importance and will ultimately put an end to the "Great Controversy" over whether federal, state and private employers have the constitutional right to mandate compulsory Covid-19 vaccination of employees and/or persons in public businesses and enforce grave sanctions including termination from employment, deprivation of employment benefits, preclusion of compensatory damages and exclusion from public places. See *Epic Energy LLC v. Encana Oil & Gas* (U.S.) Inc. (D. N.M. 2019) and see *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007).

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 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 articulated in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and without regard to or compliance with the indisputable mandates of the OSH Act. National bar associations have also declared that *Jacobson* is still good law.[5] Those "beliefs," however, are erroneous and a blatant disregard for the clearly established OSHA safety regulations and laws and a reckless disregard for the fundamental rights

[4] Applicants lower court Motion for Declaratory and Injunctive relief also requested conditional class certification that was also denied. (See Appendix A)
[5] 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/

of competent adults to choose or refuse medical treatment for any reason. While the masses of Americans maintain the "common belief" that government and private sector employers need to enforce vaccines mandates for the "common good" of the health and safety of society to prevent dangerous communicable disease - as was the thought over 100 years ago in the *Jacobson* case - the undisputed facts then and now is that vaccines are incapable of preventing exposure to any infectious disease nor can any vaccine remove an infectious disease from the atmosphere where it is transmitted.

Therefore, this Application first establishes that the *Jacobson* decision was overturned over 80-years ago when Congress enacted 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"). Specifically, the 1944 PSW Act overruled Jacobson by not codifying the *Jacobson* federal common law into law and then by limiting federal and state government police power to protect public health and safety during a communicable disease outbreak to only the enforcement of quarantine laws that carry criminal sanctions for a citizen's violation.

Then Congress enacted the 1970 OSH Act that also overruled *Jacobson* and preempts - based on field preemption and conflict preemption - any government or private employer vaccine mandate because the OSH Act: 1) abrogated state/municipal power to establish minimum safety standards and methods for managing communicable diseases; 2) abrogated state/municipal police power to criminally sanction or sanction in any way an employee who exercises their fundamental right to refuse any vaccine medical treatment based on First Amendment Free Exercise grounds and 3) provides employees a private right of action for, among other remedies,

compensatory and injunctive relief under 29 U.S.C. §660 Section 11(c)(1)&(2) of the OSH Act for deprivations of an employee's right to refuse a vaccine medical treatment or any other right under the Act.

Once the *Jacobson* federal common law decision is declared overruled – specifically the "reasonableness standard in the law," this Application next establishes that no state or federal government vaccine mandate is constitutional under the Free Exercise and Due Process clauses able to withstand strict scrutiny review because no vaccine or immunization of any type is capable of meeting the required OSH Act "minimum" safety standard for authorized methods that "prevent" the transmission of airborne hazards, including airborne communicable disease like Covid-19 based on the OSHA Respiratory Regulations in 29 CFR §1910.132 and §1910.134.

This Application finally establishes that a preliminary injunction and declaratory relief are necessary remedies because the City continues to deprive, under color of the law, Applicants their right to return to work unvaccinated and receive employment benefits, including compensatory and punitive damages as it their right under 29 U.S.C. §660 Section 11(c)(2) of the OSH Act.

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. (See Appendix 24(a)-(i)) Applicants, and all similarly situated employees, have been "locked out" from their jobs since October 2021 and the City continues to prevent them from returning to their jobs unvaccinated for exercising their

fundamental right.

Although the 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 Appendix 41 & 42), the amendments continue to prevent Applicants from returning to work because the City's February amendments require Applicants to reapply for their jobs (with no guarantee the will be allowed to return to their specific job) and they must waive their rights to monetary damages in the form of backpay, including compensatory and punitive damages which they have a right to under Section 11(c)2 of the OSH
Act and under the New York City Human Rights Law.

These new conditions of employment mandated by the City are continuing violations of the OSH Act and the constitution which arise from Applicants first exercise of their right to refuse the Covid-19 vaccine back in October 2021. The City's demand that Applicants waive their rights to compensatory damages is particularly outrageous and a "shock to the conscience" because the 1st Circuit already held in 1994 that backpay and punitive damages can be awarded for wrongful discharge claims under OSH Act. See *Reich v. Cambridgeport Air Systems, Inc*., 26 F.3d 1187, 1190 (1st Cir. 1994) Also, 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)

Moreover, the Vaccine Order amendments are also a continuation of the religious harassment by the City who has previously sent letters to the Applicants attempting to coerce them to give up their religious beliefs in exchange for their jobs

in violation of the New York State Human Rights Law which prohibits employers from engaging in coercive "quid pro quo" harassment tactics. (NYCHRL §8-107).

(See Appendix 39)

While Applicants have met their burden of proof for equitable relief, on November 18, 2022, the New York Eastern District Court denied Applicants motions for declaratory and injunctive relief based on two (2) errors of law, reviewable de novo, that 1.) the OSH Act does not provide a private right of action, and 2) the lack of a private right prevents Applicants from prevailing on the merits of their OSH Act claims to obtain any equitable relief. (See Appendix A, District Court Order)

Although the facts of this case focus on the City's illegal Vaccine Orders, Applicants request a broader declaration of rights applicable to all public agencies and private sector employers along with injunctive and backpay relief and conditional class certification available under the DJA §2202.

Finally, a declaration of rights and a grant of a preliminary injunction with conditional class certification by this Court would not disrupt the status quo by allowing Applicants and similarly situated employees robbed of one of the most precious fundamental right to immediately go back to their jobs and immediately receive backpay to recover from the horrific financial and mental damage caused by the tortuous acts of the City, which no amount of money can adequately compensate. Only equitable relief along with all relief available will stop what has been one of the greatest ongoing civil right violation against all Americans since the segregation laws against African Americans based on color.

FACTUAL BACKGROUND

On March 11, 2020, the World Health Organization declared the infectious airborne Covid-19 virus a Global Pandemic. (See Appendix #1) According to the CDC, the principal mode by which people are infected with the virus is through exposure to respiratory fluids carrying infectious virus, which exposure occurs in three principal ways: (1) inhalation of very fine airborne respiratory droplets and aerosol particles (e.g., quiet breathing, speaking, singing, exercise, coughing, sneezing) in the form of droplets across a spectrum of sizes that are in the atmosphere, (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose, or eye by direct splashes and sprays, and (3) touching mucous membranes with hands that have been soiled with virus on them. (See Appendix #2)

For decades since its enactment in 1970, the OSH Act has had mandatory minimum health and safety standards that cover all infectious and communicable diseases, specifically airborne infectious diseases, that public and private employers must comply with. The list of minimum approved safety methods for respiratory communicable diseases exclusively include the General Respiratory Standard at 29 CFR §1910.132, the Personal Protective Equipment standard at 29 CFR §1910.132, the Respiratory Protection standard at 29 CFR §1910.134 and the General duty Clause of the OSH Act 29 U.S.C. §654 (collectively hereinafter "Respiratory Standards"). (See Appendix #3)

Before the *Jacobson* decision in 1905, Congress had not enacted any law that governed federal or state authority to management emerging communicable disease. The historical archives of the Center for Disease Control report that as early as 1798

the Marine Hospital Services was the first public health entity in the U.S. to manage communicable diseases of seaman through the safety method of quarantine on ships. (See Appendix #4) It was not until 1944 when Congress passed the Public Health and Welfare Act that specifically legislated the federal and state management of communicable disease through authorized "quarantine mandates." (See Appendix #5(a) – (b))

In 1902, however, Congress enacted legislation to regulate the sale and licensing of virus, serums, and toxins called "The Act", which gave the U.S. Surgeon General national authority to sell and license viruses, serums and toxins in interstate commerce. The Act did not regulate any specific methods to be used by federal or state agencies to manage communicable disease outbreaks. (See Appendix #6) It was not until 1970, when Congress specifically enacted the OSH Act to set minimum safety standards regarding, among other things, methods on how to manage airborne hazardous infectious communicable diseases (See Appendix #7) In 1979 OSHA adopted In- door Ventilation and In-door Air Quality regulations under 29 C.F.R. Section 1926.57 which outlines authorized methods for removal of airborne hazards from the workplace atmosphere. (See Appendix # 8 & Appendix #9)

In 1972, Congress enacted the Communicable Disease Control Programs, a "spending law," that only allows the Secretary of HHS to make vaccines freely available to the general public through federal grants to states. The legislative history of the Communicable Disease Program reveals that it has never authorized the U.S. Department of Health & Human Services nor any other federal agency to mandate compulsory human vaccination under threat of criminal penalty. (See Appendix #10)

Fast forward to 2009, the World Health Organization declared H1N1 a "global pandemic" and OSHA did not add vaccines to the list of approved safety methods. (See Appendix 11) In 2015, OSHA, along with the CDC, published Hospital Respiratory Protection Program Toolkit (which applies to any employer), which outlines the effectiveness of various "respirators" that are required under the OSHA Respiratory regulations. The publication notes that Powered Air Purifying Respirators (PAPR) and/or N95 Respirator are the best of all respirators for shielding Employees from hazardous airborne viruses because they are 99.97% effective at shielding employees from exposure to any airborne hazards. (See Appendix #12, and Appendix #13, Affidavit of OSHA Expert Hygienist, P. 7 & 16)

OSHA Respiratory regulations also mandate employers to provide "remote work from home" as a safety method when an employer cannot remove an airborne hazard from the workplace atmosphere. (See Appendix 13, P. 7+16) OSHA Expert Hygienist Bruce Miller explains that "remote work" is an authorized safety method under OSHA. (See Appendix #13, P.7, 16) Expert cardiologist responsible for OSHA compliance, Dr. Baxter Montgomery, states that "vaccines are a medical treatment" and are not a safety method capable of shielding workers from any airborne hazard nor can vaccines remove viral airborne hazardous from the (See Appendix #14, P.5, ¶18a & b), which all OSHA respiratory safety methods must accomplish to become an authorized safety method pursuant to the regulations in 29 CFR §1910.134. (See Appendix #3)

During the 2020 Covid Pandemic, OSHA published guidelines specific to K-12 schools that mandate schools to follow the OSHA Respiratory Standards, including the use of remote work as an authorized safety method. (See Appendix #15)

The New York State Department of Labor through its New York Public Employee Safety and Health (PESH) Bureau has an OSHA approved State Plan that expressly states that all New York employers including municipal employers are required to comply with the OSHA Respiratory Standards. (See Appendix #16)

One month after the Covid-19 Pandemic was declared in March 2020, the Ford Motor Company announced that it was increasing the manufacture of Powered Air Purifying Respirators (PAPRs) and N95 Respirators compliant with the OSH Respiratory Standards. (See Appendix #17) On March 27, 2020, the Federal Government passed the CARES Act and issued over $1.4 Billion to the City of New York for Covid-19 expenses, and the CDC provided an additional $25.1 million to the City specifically to assist the City with compliance with OSHA Respiratory Standards. (See Appendix #18)

On May 29, 2020, the Office of the Solicitor for OSHA issued a Response to an Emergency Petition declaring, in summary, that it was <u>not</u> "necessary" for OSHA to issue any Covid-19 related Emergency Temporary Standards (ETS 1920.502), specifically because the existing Respiratory Standards where sufficient for employers to safely manage the Covid-19 pandemic. (See Appendix #19)

Neither the OSHA Emergency Temporary Standards (ETS) issued in June 2021 nor the ETS issued in November 2021 mandated employees to take the Covid-19 vaccine or lose their jobs; and neither did the ETS authorize employers to terminate employees or place them on leave without pay for refusing to submit to the Covid-19 vaccine. (See Appendix #20)

The City's own marketing materials regarding Covid-19 vaccines reveal that the City knew that the vaccines did not "prevent" the spread of Covid-19 and that OSHA authorized safety methods were mandated to control the outbreak. (See Appendix #21) The New York City Department of Health admits on page 2 of the Covid-19 informational flyer 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" (See Appendix #21, P.2)

Nevertheless, between July 21, 2021, and December 13, 2021, the City issued the Vaccine Orders that applied to City controlled "workplaces," public accommodations and private workplaces mandating that all City employees, and persons in public businesses and private sector employees to provide proof of Covid-19 vaccination or private employers would be fined for non-compliance. (See Appendix #24(a)-(i))

Any City employee who desired an exemption from the Vaccine Orders was required to first submit to the City through an electronic portal a religious exemption request that required them to disclose their religious affiliation or church membership, provide a detailed explanation of their religious practices and/or beliefs, and the City required a letter from a clergy before their request would be considered by the City for an exemption. (See Appendix #25- 36 Affidavits of Applicants) All Applicants who requested exemptions from the Vaccine Orders on religious grounds and/or medical grounds were denied. (See Appendix #25-36)

One Applicant – Amoura Bryan an employee of the New York City Department of Education – specifically exercised her right to refuse the Covid-19 vaccine so that

she could practice her religious Biblical medical practice of Plant-Based Lifestyle Medicine, which includes consuming a 100% plant-based diet according to the Bible instruction in Genesis 1:29 along with practicing the nine (9) lifestyle interventions also prescribed by the Bible, namely exercise, water, outdoor fresh air, cleanliness or hygiene to name a few. (See Appendix #27, Page 17-19, ¶37-40)

With her affidavit to the City/Department of Education to request an exemption, Ms. Bryan provided evidence from three (3) medical journals published before the City enacted their Vaccine Orders that established that her religious practice of Biblical Plant-Based Lifestyle Medicine is effective at reducing Covid-19 deaths and serious injury. Ms. Bryan's affidavit cited a June 7, 2021 study of hundreds of healthcare workers published in the BMJ Nutrition Prevention & Health that reported, in summary, that those who ate a 100% plant-based diet had a 73% reduction in Covid severity. That same study also showed that those who were on a predominantly animal flesh diet had an approx. 45% increase in Covid-19 severity. See https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8219480/ (See Appendix #27, P. 18-19)

Mr. Bryan's affidavit also pointed to a second study, performed by Massachusetts General Hospital published September 8, 2021, which stated, in summary, that a healthy plant-based diet was also linked to a lower risk of "getting" Covid-19 and a lower risk of severe symptoms. Lastly, a third study of approximately 600,000 individuals was published in June 24, 2021 also concluded that a plant-based diet was associated with lower risk and severity of Covid-19. See - https://www.sciencedaily.com/releases/2021/09/210908180530.htm (See Appendix #27, Page 19)

On June 17, 2021, the CDC reported that persons with chronic disease, like diabetes, heart disease and obesity, have an increase rate Covid-19 related deaths and severity, and the CDC reported that "preventative" measures to reduce and prevent chronic disease is key to reducing severe Covid and death, which includes increasing lifestyle interventions that include healthy nutrition, like the Biblical practice of Plant-Base Lifestyle Medicine. (See Appendix #37)

Despite all the medical journal evidence provided by Ms. Bryan regarding the effectiveness of her Biblical medical practice for treating and reducing death and serious illness from Covid-19, her many requests for a religious exemption from the Vaccine Orders were denied. (See Appendix #27, Page 6, ¶22 thru P. 8, ¶30)

On December 20, 2021, the New York City Law Department Office of the Corporate Counsel issued a legal memorandum titled "Guidance on Accommodations for Workers" instructing private employers that they could deny requests for religious exemptions from the Vaccine Orders based on the EEOC "undue burden" standard. (See Appendix #38)

The City also refused to allow "remote work" for Applicants who were already working "remote" and denied "remote work" to those who requested it with their request for exemption. (See Appendix #27 & #31) The City sent standard emails to each Applicant stating that they had no right to a religious accommodation and that they would be placed on leave without pay (LWOP) if they did not take the Covid-19 vaccine with the option of keeping their health insurance if they waived any future claims to compensatory damages by consenting to a resignation. (See Appendix 24 (j)) After City employees were denied vaccine exemptions, they were locked out their

jobs, instructed not to return to any City building and they were placed on indefinite involuntary leave without pay (ILWOP) and denied health insurance, retirement and unemployment benefits. (See Appendix #25-36 generally Affidavits of Applicants)

Many Employees received letters stating that they were "terminated" when not one City employee who refused the vaccine received a formal "misconduct charge" for termination required by the City's Civil Servant progressive discipline laws.[6] (See Appendix #39) Twice the City sent those letters wrongly stating City employees who refused the Covid-19 vaccine were terminated in order to coerce them to go against their religious beliefs by promising their jobs and benefits in exchange for taking the vaccine. Id.

According to the City's former Mayor DeBlasio in a New York Times report, approximately 12,000, or less than 5% of all City employees requested exemptions from the Covid-19 Vaccine Orders based on religious grounds. (See Appendix #40) (See Appendix #39)

After several months of being locked out from their jobs, many City employees including some Applicants did go against their God, their religious practice or the conscious and took the Covid-19 vaccine when they ran out of money and were afraid to lose all they had worked for. (See Appendix #36 – Affidavit of employee who went against his faith and took the Covid-19 vaccine because he is the sole income for this family) Also, after the City sent City employees another coercive "no jab no job" letter around September 2022, approximately 450 City teachers, who previously refused to

[6] 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.

take the Covid-19 vaccine and were placed on leave without pay, took the Covid-19 vaccine so they could get back to work after going without pay for almost a year. (See Appendix 44)

Affective February 10, 2023, the City amended the Vaccine Orders to make the Covid-19 vaccine optional, but the Amendments continue to prevent Applicants from returning to their jobs. (See Appendix #41) The new amendments now require Applicants to re-apply for their jobs (with no guarantee they will be allowed to return) and to waive their right to backpay in order to return to the jobs. (See Appendix #42) On February 10, 2023, the City's Mayor Adams announced that he would reinstitute vaccine mandates at any time. (See Appendix #43)

STANDARD OF REVIEW

A district court's denial of a preliminary injunction is reviewed for abuse of discretion, but legal conclusions are reviewed de novo, if "(1) it bases its decision on an error of law or uses the wrong legal standard; or (2) it bases its decision on a clearly erroneous factual finding…" *Klipsch Grp., Inc. v. ePRO E-Commerce Ltd.,* 880 F.3d 620, 627 (2d Cir. 2018)

DECLARATORY JUDGMENT ACTION STANDARD OF REVIEW

For a court to issue a declaratory judgment, this Supreme Court has " required that the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests'; and that it be 'real and substantial' . . . .which calls for specific relief through a degree of conclusive character…" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). Whether the City or any employer has the constitutional right to mandate vaccination as a condition of employment and

whether employees and persons entering places of business affecting interstate commerce have the right to refuse any vaccination medical treatment mandate are two of many ongoing controversies raised by this case that needs a DJA determination by this Court.

Applicants are not required to meet the strict requirement under Federal Rule of Civil Procedure 65 wherein they must prove a "likelihood of success on the merits" (which they have established) before a declaratory and injunctive relief can be issued when a state statue violates a federal law and unconstitutional. This Supreme Court held, in summary, in *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 127 (2007) that a declaratory judgment can be issued and injunction relief award if the claims asserted satisfies Article III's case or controversy requirement outlined above. Finally, "principles of federalism not only do not preclude federal intervention, they compel it" because Applicants also have a 42 U.S.C. §1983 claim that provides remedies for municipal violations of both federal and constitutional law. *Steffel* at 472.

STANDARD OF REVIEW FOR INFRINGEMENTS OF FIRST AMENDMENT FREE EXERCISE AND 14TH AMENDMENT SUBSTANTIVE DUE PROCESS 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). "[O]nly a compelling state interest would justify a sweeping restriction on a constitutionally protected interest…." *Maher v. Roe,* 432 U.S. 464, 473 & 489 (1977).

REASONS FOR GRANTING THE APPLICATION

I. IT IS INDISPUTABLY CLEAR THAT PRELIMINARY INJUNCTIVE RELIEF IS NECESSARY TO STOP THE ONGOING VIOLATION OF APPLICANTS FUNDAMENTAL FREE EXERCISE AND DUE PROCESS RIGHTS

The All-Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the full Court to issue equitable relief, including an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). As explained in this Application, it is indisputably clear that neither the City nor any private employer in this country has or ever had the right - since at least as early as 1944 but no later than 1970 - to enforce any vaccine mandate as a condition or pre-condition of employment. Because there is this irrational belief that *Jacobson* is still good law giving the states and employers the right to ignore the federal OSHA law, it is absolutely necessary for this Court to grant preliminary injunctive relief because the City along with other state, municipal and private sector employers are blatantly and recklessly disregarding the supremacy of the OSH Act, its obligations and the fundamental rights of millions of Americans.

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, specifically the right to refuse government compulsory vaccine medical treatment, 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 religiously motivated 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 governmental management of communicable disease outbreaks, the *Jacobson* Court 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. The 1944 Public Health & Welfare Act First Overruled *Jacobson* By Enacting Quarantine Laws

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 Appendix #6) 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. (See Appendix #4)

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 Appendix #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**. (Emphasis added)

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 Appendix #5, Page 3, Section 201, See Appendix #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. (See Appendix #5) 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, 1258 (M.D.

Fla. 2021), it was pointed out that the primary method for controlling communicable diseases by the federal PHS was through quarantine regulations.

Just a few years after the *Jacobson* decision, this 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 Appendix #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 the criminalization of quarantine violations and did not include criminal sanctions for vaccine refusal is substantial evidence that Congress' passage of the 1944 PHW Act did in fact overturn the federal common law in *Jacobson*.

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 10, Bates117

Nowhere in the 1972 or current HHS enabling regulation, contained in 42 U.S.C. Cht. 6A Section 241-243 (See Appendix 5(a) Bates#055) did Congress give the HHS Secretary or Surgeon General authority to mandate "compulsory vaccinations with criminal sanctions." (See Appendix #5b Bates059) 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 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 in 1905, no state - other than recently in New York City - has passed compulsory adult vaccination laws with criminal penalties.[7]

While this Supreme Court recently held in *Biden v. Missiouri*, 595 U.S. ____(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 HHS Secretary broad authority to mandate that healthcare facilities ensure their medical staff is vaccinated or suffer financial sanctions, the *Biden* holding conflicts with this Court's earlier holding in 1973 in *Mourning v. Family Publications Service*, 411 U.S. 356, 369 (1973). The Mourning decision which was rendered just one (1) year after the passage of the 1972 Communicable Disease Control Program, which held as follows:

> "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."**

[7] 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 under procedural due process as a general applicable law, but the court did not address Congressional OSH Act preemption.)

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 Appendix #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 Appendix 7 - 29 U.S.C. 651 Section 20(a)(5))

Specifically, Congress reserved to the OSHA Secretary the exclusive 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. 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, this 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, this 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 Section 18(a) 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(c) of the OSH Act as follows: (See Appendix #7)

> (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 this 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 and neither can employers enforce safety requirements as pre-conditions of employment.

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 the vaccine or 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 ingested 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. (See Appendix #14, P.5, ¶18) 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. The OSH Act Consensus Requirement Further Abrogated State Police Power

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)
>
> (See Appendix #7)

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." Id.

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 a 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) At that time, 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 rights of citizen to believe and choose their own "health practices," including the rights of citizens like Applicant Amoura Bryan who puts her belief and faith in Biblical Plant-Based Lifestyle Medicine.

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, even if that choice could result in death. *Cruzan* at 279

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 Appendix #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 Government And Private Employer Vaccine Mandates

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 Appendix #14, Page 5, ¶18-19 & Appendix #3 Respiratory Reg & Section 5 General Duty Clause) 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 nor sanction employees with the threat of termination for an employees non-compliance with the OSHA infectious disease standard requirements, including the use of masks, hand washing, 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's Vaccine Orders 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 the City is mandated

to comply with.

Furthermore, the City has refused Applicants the right to remote work, which is a specific OSHA authorized safety standard authorized specifically for k-12 schools. (See Appendix #15 and Appendix #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.

The City received over $1.4 billion dollars from the Federal Government and $25.1 Million from the CDC (See Appendix #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 or air purification systems that can remove the Covid-19 airborne virus from the workplace atmosphere in all City buildings nor has the City reported that it has purchased new PAPR respirators for employees to provide the highest level of protection of City employees, which is mandated by the OSH Act. (See Appendix #13 and Appendix #14 - Affidavits of OSHA Experts)

While the Covid-19 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 Appendix #3 & Appendix #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,[8] (See Appendix #11) and other infectious diseases for which OSHA has established directives, including SARS, MRSA, Zika, Pandemic Influenza, Measles, and Ebola. (See Appendix #12, Page 1) Furthermore, at the beginning of the Covid-19 Pandemic, the supply of respirators was increased by the Ford Motor Company

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

who increased manufacture of PAPRs and other safety equipment to meet the demand. (See Appendix #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 Appendix #3 (Respiratory Reg. & General Duty Clause, Appendix #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 (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 the atmosphere of workplaces and public places. (See Appendix #2) Therefore, to effectively provide a safe workplace during the Covid-19 pandemic, employers are mandated by the OSHA regulations to use only safety "methods" that meet the OSHA Respiratory regulation. (See Appendix #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 the minimum authorized standard and are therefore illegal. (See Appendix #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 Appendix, #13, Page 7 & 16)

Finally, this Court 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 Vaccine 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), this 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 laws of general applicability, the City's Vaccine Orders do not meet the definition. The Vaccine Orders only apply to City and private sector employers and do not apply to all City residents like the retired, or 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 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. Applicants Are Entitled To Declaratory Judgement As a Matter of Law

Based on the foregoing undisputed facts and legislative history, Applicants 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. This 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)

Moreover, this Court in *Steffel v. Thompson*, 8212 5581, 415 U.S. 452, 471 (1974) made clear that it would be inappropriate to "engraft upon the Declaratory Judgment Act all of the traditional equitable prerequisites to the issuance of an injunction" would defy Congress' intent to make declaratory relief available in cases where… a local ordinance was unconstitutional". While the OSH Act does contain an express private right of action, even if it did not, equitable relief is still available to enjoin the enforcement of the Vaccine Orders along with all available relief allowed under the DJA §2202, which includes reinstatement of jobs and backpay to Applicants because the Vaccine Orders would be void violative of the federal OSH Act and unconstitutional making the additional remedies available to place the Applicants in the same position they would have been but for the enforcement of the unconstitutional Vaccine Orders.

II. THE RIGHT TO CHOOSE AND REFUSE MEDICAL TREATMENT IS A FUNDAMENTAL RIGHT SUBJECT TO STRICT SCRUTINY

Once the *Jacobson* federal common law regarding the state police power to regulate workplace and public accommodation health and safety is declared overruled as abrogated by Congressional enactment of the OSH Act, this Application respectfully requests that this Court next find that every competent citizen has the fundamental right to refuse and choose government sponsored vaccine medical treatments or any medical treatment and that any compulsory government sponsored medical treatment is subject to strict scrutiny rather than the "reasonable" standard articulated in Jacobson. *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).[9]

Besides enumerated rights in the Constitution, including the First Amendment Free Exercise right, this "Court stated many years ago that the Due Process Clause protects those liberties that are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental'." *Gitlow v. People of State of New York*, 268 U.S. 652, 666, (1925) (citing *Snyder v. Com. of Massachusetts*, 291 U.S. 97, 105, (1934)) Years later in *Griswold v. State of Connecticut,* 381 U.S. 479, 491(1965) this Court further described fundamental rights are those rights that are "so basic and so fundamental and so deeprooted in our society…."

To determine specifically whether the right to choose or refuse medical treatment, including vaccine medical treatment, is a "clearly established"

[9] 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)

fundamental right subject to strict scrutiny, this Court established a three (3) part test wherein this Court looks to: (1) whether the right was defined with reasonable specificity; (2) whether Supreme Court or court of appeals case law supports the existence of the right in question, and (3) whether under preexisting law a reasonable defendant would have understood that his or her acts were unlawful." *Francis v. Coughlin*, 891 F.2d 43, 46 (2d Cir.1989) (citing *Anderson v. Creighton*, 483 U.S. 635, 668 (1987))

The *Jacobson* Supreme Court was the first to define and support the right of medical autonomy or the right to choose or refuse medical treatment when it held that:

> "the inherent right of every freeman to care for his own body and health in such way as to him seems best……" *Jacobson* at 26

This Court further supported the existence of the medical freedom right 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.") While both cases involved the right to refuse government medical treatment – in *Jacobson* the right to refuse vaccines on religious grounds and *Cruzan* the right to refuse lifesaving hydration and nutrition in the context of a person's right to die while in a incapacitated state, both cases clearly establish that the fundamental right exists which the City of New York and all employers would be on notice that any mandate of a vaccine medical treatment would be contrary to the fundamental medical freedom of an individual would be unlawful.

Besides the fact that the common law of informed consent to medical treatment in state law is well established, it is common sense that the decision to use any medical treatment that is ingested into one's body or placed on the outside of one's body is so rooted in the conscience of society to be deemed fundamental. Whether a medical treatment is a prescribed pharmacological medication or an over-the-counter treatment, device or is a plant derived supplement, herb or lifestyle interventions like Biblical Plant-based Lifestyle Medicine, what a person puts in their body to sustain their life or what a person refuses to put in their body either for religious or non-religious reasons is fundamentally their choice based on *Jacobson* and *Cruzan* subject to strict scrutiny. See also *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 320, 332 (1992).

While the *Anderson* Court developed a three-part test for determining the existence of a fundamental right, the quintessential determinant of any right identified by the *Gitlow Court* in 1925 is what that court defined as the "conscience of our people." Webster Dictionary defines "conscience" "as perceiving, apprehending, or noticing with a degree of controlled thought or observation." It is the conscience that is the foundation that every person has to exercise their power to choose based on what they perceive, apprehend, or notice in their thought life. Mankind is made up of a body that is controlled by a mind that has the power through its five senses, which include the sense of sight, sound, touch, taste, smell, to exercises conscience in order to make split second choices. Because medical treatment of any type affects the body – which everyone owns from birth – each person has the right to exercise their conscious to choose what goes in their body. This is a fundamental right that no

government can control because the right is exercised daily by each and every person. While external images, sounds, smells, and things that are touched or tasted can influence the conscious, including those of a religious nature, every person's conscious is constantly active in their decision making process. Belief systems stem from the constant activity of the conscious that is fundamental to all. When a person chooses whatever medical treatment or refuses, the conscious is automatically involved wherein the persons conscious drives them to "believe" or not believe that the medical treatment will work for them. In other words, when a medical treatment is recommended a person has to consciously believe that it will work based on the representations made about the treatment. If the person does not believe, then they should not be forced to go against their belief or conscious.

In the case of refusing vaccines, the OSH Act at 29 USC §669 Section 20(a)(5) – which is discussed in detail below - expressly protects the right to refuse any vaccine medical treatment on religious grounds as a Free Exercise right already protected by the First Amendment. However, the OSH Act protects the fundamental right to refuse vaccines as an "absolute right," which further overruled *Jacobson*'s exception for "reasonable" health and safety purposes. Therefore, this Court can declare, as a matter of law, that all competent citizens have the fundamental right – subject to strict scrutiny - to choose or refuse vaccines or any other medical or non-pharmacological or plant based or herbal treatment based on the holding in *Cruzan,* so long as the selected medical treatment has not been criminalized by an applicable state statute. As previously discussed, because vaccines cannot meet the OSH Act minimum standards and are any unauthorized medical treatment, no government

agency could ever have a compelling interest in enforcing an illegal safety method.

III. APPLICANTS PREVAIL ON THE MERITS OF THEIR OSHA ACT CLAIMS TO WARRANT INJUNCTIVE RELIEF

A. The OSH Act Provides An Express Right of Action

The district court denied Applicants declaratory and injunctive relief because the court incorrectly concluded that the OSH Act does not contain a private right of action necessary to award equitable relief. (See Appendix A) The City of New York and private sector employers also incorrectly believe this to be true, which has emboldened employers, like the City, to terminate employees who refused the Covid-19 vaccine. While the OSH Act does not contain a section titled "right of action," the OSH Act does expressly provide said right. This 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). The statutory language of the OSH Act at 29 USC §669 Section11(c) clearly provides employees with a right to sue for wrongful discharge for the exercise of rights provided in the Act. (See Appendix #3)

"In approaching a statute, …….. 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) This Court further held in *Robinson v. Shell Oil Co*., 519 U.S. 337, 341, (1997) that:

> "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 the right to engage an activity, Congress must 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 the private right of action contained in §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) (Emphasis added)

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 on religious grounds. 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. 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 not 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 exemptions to all employees who object without any exception and without explanation. Furthermore, this 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). Therefore, Section 20(a)(5) in the OSH Act should be read to have not given employers authority over vaccine exemptions to evaluate in a way that the courts of law cannot do.

Lastly, as previously discussed, vaccines are not necessary and are incapable of preventing exposure to any airborne hazardous infection virus in the atmosphere, including he Covid-19 virus. Therefore, there is no need for any employer to have any discretion over the Section 20(a)(5) vaccine objection provision. No amount of information about an employee's religious practice for a religious exemption is going to change that indisputable fac that vaccines cannot prevent exposure and spread of any infectious virus.

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

employee's Free Exercise right to refuse any vaccine expressly protected by Congress in the enactment of Section 20(a)(5) of the OSH Act.

Notwithstanding the express Congressional prohibition in Section 20(a)(5), the New York City 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 Appendix #38). This reliance on the EEOC undue burden law effectively condoned all private employer's decision 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, which every employer is bound to know.

The City's irrational reliance on the EEOC case law and regulations resulted in the City's reckless denial of Applicants' 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 Appendix #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 is at least as effective as the Covid-19 vaccine at reducing symptoms and death. Id.

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.

Applicants 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 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).

Finally, the district Court's reliance on the holdings in the cases *Donovan v. Occupational Safety & Health Rev. Comm'n*, 713 F. 2d, 918, 926 (2nd Cir. 1983) and *Quirk v. Difiore*, 582 F. Supp. 3d 109, 115 (S.D.N.Y. 2022) to find that the OSH Act did not provide Plaintiffs a private right of action was clear error, when the statute expressly contains a right of action. While the Second Circuit in *Donovan* held in a single sentence without much explanation that "[u]nder OSHA, employees do not have a private right of action," the plaintiffs in the *Donovan* and *Quirk* cases specifically sought to enforce employer compliance with specific OSHA regulations. Those cases involved violations of regulations, which the OSH Act clearly states are controlled by the Secretary under administrative investigation procedures in 29 U.S.C. §659 Section 9.

This case involves violations of the Congressionally mandated anti-retaliation provision of the OSH Act statute, which is not a regulation. The *Donovan* and *Quirk* holdings, along with any similar holdings by other lower federal courts, cannot apply to retaliation claims available under Section 11(c)(2) because the Plaintiffs injuries in this case are not "caused" by an employer's breach of a safety regulation.

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

Not only is it necessary for this Court to declare that the OSH Act provides employees with a private right of action for wrongful discharge for violations of rights conferred by the Act, it is necessary for this Court to clarify that employees do not need to exhaust the OSHA administrative process before exercising their right. 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 **may,….. file a complaint** 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. Also, 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. Also, the OSHA Secretary promulgated standards for Section 11(c) that are consistent with this rudimentary interpretation of the scope and coverage of Section 11(c). (See Appendix #7(a))

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. Section 11(c) is a statutory provision and not a standard, rule or regulation under the authority of the OSHA Secretary. It is a Congressional enacted statutory provision that protects the fundamental Free Exercise Right of employees to refuse vaccines on religious grounds, which this Court in *Boerner* held Congress had power to do. *Boerne* at 508. Therefore, the Secretary cannot promulgate regulations or rules to limit the express private right in any way absent Congressional amendment. Lastly, when federal claims are also premised on 42 U.S.C. §1983 federal courts have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. *Steffel* at 472-473.

4. <u>The Applicable Statute of Limitations For OSHA Act Retaliation Claims Is Not 1 Year – This Case Is Not Moot</u>

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). 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)

While it has been over a year since Applicants and all similarly situated were either placed on leave without pay or terminated in private sector jobs, the relevant statute of limitations for City of New York claims is not one year. Based on the *Tungus* holding, which held in summary, that federal statutes without an express statute of

limitations is generally subject to the statute of limitation for analogous tort claims permitted in a 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 Applicants have also asserted a religious discrimination and harassment claim that precludes "quid pro quo" employment conditions that require employees to surrender their religious beliefs.

In this case, the City of New York has raised a statute of limitation defense in their Motion to Dismiss (Appendix #46 - excerpts) alleging that Applicants have not timely filed - pursuant to the City's administrative requirement - a notice of claim. While the City's allegations are not true because Applicants did timely file notices of claims for all Applicants and for those similarly situated, and the City allegations do not provide an exacts date in which the notices should have been served to support allegations (Appendix #47). However, the New York Court of Appeals held in 1983 in the case *Mills v County of Monroe*, 59 NY2d 307, 311 (1983) and again in 2001 in *Picciano v. Nassau Civ. Serv*., 290 A.D.2d 164, 736 N.Y.S.2d 55 (N.Y. App. Div. 2001) that notice of claims pursuant to Gen. Mun. Law § 50-e(1)(a) are not required in cases when:

> "actions that are brought to protect an important right, which seek relief for a similarly situated class of the public, and whose resolution would directly affect the rights of that class or group are deserving of special treatment. The interests in their resolution on the merits override the State's interest in receiving timely notice before commencement of an action." Mills at 311

In *Picciano v. Nassau Civ. Serv*., 290 A.D.2d 164, 736 N.Y.S.2d 55 (N.Y. App. Div. 2001), the New York Court of Appeals relied on the earlier decision in Mills and

specifically held that the "failure to timely serve a notice of claim …. to recover damages based on the Human Rights Law" is not fatal if the action has been brought to "vindicate a public interest". This case certainly was filed to vindicate the public interest of millions of similarly situated employees wrongly discharged for exercising their fundamental right to refuse and choose medical treatments.

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 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 to the district court that it is "well settled law that the OSH Act does not provide a private right of action," is clear evidence that a declaration from this Court is necessary to stop the fraud on the public.

In this case, Applicants and all City employees still on LWOP have continuing violations of their fundamental right to refuse the Covid-19 vaccine because the Applicants are union workers who have not been legally terminated from their jobs and have a right under the New York City Civil Service law[10] to automatically return

[10] 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

to their specific positions, which the City continues to refuse. Therefore, the New York three (3) year statute of limitations runs from the date that the Vaccine Orders and amendments are no longer enforced.

IV. SUCCESS ON THE MERITS WARRANT INJUNCTIVE RELIEF

Based on all the forgoing facts and law, the district court erred in denying Applicants declaratory and injunctive relief based on the incorrect conclusion of law that Applicants could not succeed on the merits of their claims because the OSH Act did not provide a private right of action for which relief could be granted. The OSH Act not only contains a private right of action, but it also effectively overruled the federal common law in *Jacobson,* which guarantees Applicants will prevail on the merits of their Section 1983 Due Process claims as well as their Free Exercise claims protected by the Constitution and the OSH Act. Declaratory and injunctive relief with all further relief requested is needed and should be ordered.

It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, (2020)* Applicants have been wrongly locked out of their jobs and denied the right to work unvaccinated for over 18 months and now the City is demanding that they waive all claims to back pay and compensatory damages. When compared with the "seriousness" of constitutional harm to Applicants, which is unlikely to be remedied absent an injunction, the City has no interest in the enforcement of an illegal mandate

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.

that on its face violates federal and constitutional law. See *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2010)

The City's ability to protect the public will remain unimpeded, as the OSH Act provides all of the appropriate safety methods that are capable of protecting the general public. Moreover, the City's Mayor for years has promoted the benefits of a 100% whole plant-based diet and healthy lifestyle that reversed his diabetes and other chronic diseases. Also, the CDC has reported that pre-existing chronic disease is a primary factors for poor outcomes from a Covid-19 infection.[11] Because the City is fully aware of the medical journals that have established through studies and experiment that deaths and serious illness from Covid-19 infections can be reduced by up to 70% through the practice of a whole plant-based food diet along with lifestyle interventions like exercise, proper rest, sunshine, fresh air, increased water consumption (See Appendix 27, P. 15-19), the City can equally implement whole food plant-based nutrition education programs in combination with strictly following the OSHA regulations to manage any future communicable disease outbreaks without having to enforce an illegal vaccine mandate.

The relief the Applicants seek is narrow—and yet extremely meaningful for millions of people who have exercised their fundamental right to refuse the Covid-19 vaccine medical treatment for any reason.

//

//

[11] See *Underlying Medical Conditions and Severe Illness Among 540,667 Adults Hospitalized With COVID-19,* March 2020–March 2021 – CDC Preventing Chronic Disease https://www.cdc.gov/pcd/issues/2021/21_0123.htm

CONCLUSION

In summary, Applicants have met their burden of proof to receive declaratory and preliminary injunctive relief and respectfully requests a preliminary injunction enjoining the Vaccine Orders, and prohibiting the City from reinstating Applicants to their original jobs or equivalent without any new preconditions and prohibiting the City from withholding all backpay from the date Applicants were placed on involuntary leave without pay and to pay all backpay owed to Applicants and all similarly situated City employees within days of an Order by this or the lower courts.

Dated: April 19, 2023

Respectfully submitted,

/s/ *Jo Saint-George*
Jo Saint-George
Counsel for Applicants

IN THE SUPREME COURT OF THE UNITED STATES

No. 23-

Women of Color for Equal Justice, et al
Applicant,
v.
The City of New York,
Respondent.

CERTIFICATE OF SERVICE

I, Jo Saint-George, counsel for the Women of Color For Equal Justice, et al, hereby certify that on this 19th day of April, 2023, I caused three copies of the Application for Emergency Stay Pending Appellate Review or, In the Alternative Petition for Writ of Certiorari and Stay Pending Resolution of lower court proceedings along with Appendix and supporting documents to be served by electronic mail and/or U.S. mail counsel for the City of New York:

Jonathan Schoepp-Wong
Senior Counsel | Appeals Division
New York City Law Department
100 Church Street
New York, New York 10007
(212) 356-2275 | jschoepp@law.nyc.gov

Ingrid Gustafson
Senior Counsel | Appeals Division
New York City Law Department
100 Church Street
New York, New York 10007
igustafs@law.nyc.gov

Richard Paul Dearing
Assistant Corporate Counsel | Appeals Division
New York City Law Department
100 Church Street
New York, New York 10007
rdearing@law.nyc.gov

I further certify that all parties required to be served have been served.

Dated: April 19, 2023

/s/ Jo Saint-George

Jo Saint-George
1416 Dunwood Valley Dr.
Bowie, Maryland 20721
(602) 326-8663
jo@woc4equaljustice.org