No. 23-1212

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RACHEL SPIVACK,

Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA AND LAWRENCE S. KRASNER,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Case No. 2:22-cv-01438-PD

BRIEF OF DEFENDANT-APPELLEE LAWRENCE S. KRASNER

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May 30, 2023

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INTRODUCTION

Throughout the COVID-19 pandemic, the Philadelphia District Attorney's Office ("DAO") faced unprecedented challenges protecting the health and safety of its staff while maintaining the operational capacity required to fulfill its constitutional criminal justice responsibilities. To this end, District Attorney Lawrence S. Krasner implemented a vaccine mandate that required all DAO employees under his authority to be vaccinated (unless ineligible for medical reasons) without regard to their personal, political, philosophical, religious or other objections. This neutral and generally-applicable vaccine mandate is identical to the smallpox vaccination requirement the United States Supreme Court long ago deemed constitutional in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and is rationally related to a legitimate governmental purpose.

Plaintiff-Appellant Rachel Spivack joined the DAO in the fall of 2021 and requested a religious exemption. After her request was denied, Ms. Spivack sued Defendants-Appellees District Attorney Krasner and the City of Philadelphia, alleging that the DAO vaccine mandate violates the Free Exercise Clause of the First Amendment and Pennsylvania law. The United States District Court for the Eastern District of Pennsylvania (Diamond, J.) granted summary judgment in favor of District Attorney Krasner and the City.

In this appeal, as in her briefing to the District Court, Ms. Spivack's arguments distort the summary judgment record and disregard the applicable law. Among other things, Ms. Spivack wrongly claims that the DAO vaccine mandate gives District Attorney Krasner "absolute discretion" to grant or deny an exemption request, that the limited medical exemption permits subjective judgments regarding "health and safety," and that the mandate is not "generally applicable" because District Attorney Krasner lacks authority to set employment terms for union employees. To the contrary, the record before this Court unequivocally demonstrates that the DAO vaccine mandate is neutral towards religion and complies with the First Amendment. Ms. Spivack does not address and cannot distinguish *Jacobson* and the other more recent federal court decisions upon which District Attorney Krasner relied in issuing the mandate—all of which uniformly hold that vaccine mandates without religious exemptions are constitutional.

COUNTER-STATEMENT OF ISSUES

1. Did the District Court correctly grant summary judgment to District Attorney Krasner and the City on Ms. Spivack's First Amendment claim on the ground that the DAO vaccine mandate is a neutral and generally-applicable policy that satisfies rational basis review?

2. In the alternative, did the District Court correctly conclude that the DAO vaccine mandate also satisfies strict scrutiny?

COUNTER-STATEMENT OF THE CASE

I. The Summary Judgment Record

Defendant-Appellee the City of Philadelphia (the "City") is a Pennsylvania municipal government established by Philadelphia Home Rule Charter. Defendant-Appellee District Attorney Lawrence S. Krasner is an independently-elected City official. Appx161. As an independently-elected official, Mr. Krasner has the authority to set employment policies for DAO attorneys and other non-union employees. Appx076, 160-161, 235-236, 255, 483. Mr. Krasner does not, however, have the authority to set employment policies for union employees, whose employment is governed by collective bargaining agreements with the City and arbitration awards. Appx147-148, 250, 252-254, 259.

A. The DAO Vaccine Mandate

The COVID-19 pandemic severely disrupted the operations of the DAO and its ability to fulfill its constitutional responsibilities in the criminal justice system. Appx237-238, 484. Among other things, these responsibilities require assistant district attorneys to work in close quarters in and out of the office, including activity in courtrooms that must be in person as well as many other forms of work that cannot be done remotely. Appx237, 294, 484-485; *see also* Appx490 (describing the in-court and in-office responsibilities of junior assistant district attorneys). The nature of the DAO's operations created "enormous administrative problem[s]" when DAO attorneys and staff were exposed to the virus and required to quarantine. *See*

Appx248-250 (describing "the exponential and/or nuclear spread of people quarantining" and the impacts on the DAO); *see also* Appx119-120 (describing COVID-19 outbreaks in the municipal court and trial units). It also heightened the risks of exposure for DAO staff and their families (many of whom were medically vulnerable), as well as for victims, witnesses, defendants, judges, court staff and other participants in the criminal justice process. Appx118-120, 239-243, 485-486.

Over the course of the pandemic, as infection rates spiked and dipped and as public health guidance changed, the DAO repeatedly updated its COVID-19 safety policies and practices, largely relying on guidance from the Center for Disease Control and the Health Commissioner for the City of Philadelphia. Appx153-154, 162-163, 234-237, 485. The DAO policies sometimes were the same as the City policies and sometimes were not. Appx084, 487. When vaccines became readily available, District Attorney Krasner made the independent decision to require mandatory vaccination of DAO staff and promulgated the first iteration of the DAO vaccine mandate on August 13, 2021. Appx051-053, 164, 267-268, 485.

The August 13, 2021 mandate was drafted by DAO Deputy Chief of Staff Cecilia Madden and approved by District Attorney Krasner. Appx075, 166-167. It required all DAO employees to be vaccinated by September 1, 2021, and contemplated the possibility of medical, religious and disability exemptions while

the DAO investigated whether, and to what extent, it was legally required to allow exemptions. As District Attorney Krasner explains:

> We decided we would require full vaccination as defined by the CDC and once we did that, we wanted to make sure that we were in compliance with all of the laws and, therefore, while we were figuring out the legal requirements, we gave the people an opportunity to apply [for exemptions].

Appx271; *see also* Appx180. Non-vaccinated employees requesting exemptions were directed to double mask as an interim measure only. In issuing this mandate, the DAO emphasized that it intended to set "a higher standard of health and safety due to the nature of our work, which requires many of us to work indoors and to interface with the public on a regular basis in our roles as public servants." Appx051.

Under the August 13, 2021 mandate, employees seeking an exemption from the DAO policy were instructed to complete a Request for Exemption from Vaccination Policy Form. Appx052. A few months later, on December 8, 2021, the DAO directed all employees who had not submitted proof of vaccination to provide additional information if they intended to seek a religious or medical exemption. Appx058.

During this same period, however, District Attorney Krasner continued to evaluate the DAO's legal obligations with respect to vaccine exemptions. Appx180, 269-275. As the Omicron variant surged nationwide in December 2021 and January 2022, District Attorney Krasner conducted his own legal research and consulted with

counsel, and ultimately decided to eliminate all exemptions other than the narrow medical exemption approved in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and other more recent cases.[1] Appx172-173, 276-80, 304, 309, 486-487. District Attorney Krasner's sole purpose in making these changes was protecting the health and safety of participants in the criminal justice system, especially DAO employees and their families, and ensuring that the DAO had adequate staff to support its operations. Appx309-310, 312, 319, 486-487. He considered it to be "an imperative of his oath" to "stop the spread of disease." Appx263.

District Attorney Krasner made the decision to eliminate all exemptions except a narrow medical exemption in January 2022, before he had reviewed any of the medical or religious exemption requests that had been submitted under the initial August 13, 2021 mandate. Appx281, 284-86. It was only after he had made this

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[1] The City's vaccine mandate was also in flux during this period. On August 11, 2021, the City's issued its initial mandate, effective September 1, 2021, which applied only to new employees and provided generally for exemptions on a case-by-case basis. Appx386-387. On October 22, 2021, the City revised its policy, effective December 1, 2022, extending the vaccine mandate to all current exempt and non-union employees and specifying medical and religious exemptions. Appx398-399. On November 19, 2021, the City further revised its policy, effective January 14, 2022, extending the mandate to City contractors. Appx400-403. The City also engaged in interest arbitration with the various unions that resulted in arbitration awards imposing a vaccine mandate on union members. *See* Appx413-427 (District Council 22 award dated December 29, 2021 and effective January 24, 2022); Appx428-436 (Police Lodge No. 5 award dated February 1, 2022 and effective February 11, 2022); Appx453-463 (IAFF Local 22 award dated May 26, 2022 and effective June 30, 2022).

decision that District Attorney Krasner reviewed the medical exemption requests to determine whether any of the employees seeking a medical exemption had provided certification that vaccination posed a risk of serious illness or death. Appx186-187, 287-89, 292 ("our north star was public safety; it was to protect lives. I was not inclined to kill somebody to have that person vaccinated"). He and Ms. Madden also read the religious exemption requests solely out of respect for the employees who had taken the time to prepare them. Appx187, 284.

District Attorney Krasner informed the executive team of his decision to limit exemptions in a senior staff meeting in February 2022. Appx076-079, 097, 287-88. He advised them that he had eliminated religious exemptions from the DAO mandate based on the applicable law, and that he had limited medical exemptions to those for whom vaccination could cause serious illness or death. He further advised that he had granted one medical exemption request but denied the others based on that objective standard. Appx288-289, 315.

The DAO ceased accepting religious exemption requests but did not issue a new written policy. Appx175, 177-179, 312. The DAO's policy and practice as implemented is simple: All DAO employees under District Attorney Krasner's control were required to be vaccinated. Medical exemptions were limited to those for whom vaccination could pose a significant health risk as certified by a physician. There was no provision for religious or secular exemptions. Appx006.

B. Ms. Spivack's Employment

Ms. Spivack graduated from law school in May 2021. She accepted an assistant district attorney position with the DAO on April 23, 2021, and started work for the DAO on September 13, 2021. Appx041-043. Ms. Spivack was assigned on arrival to a non-barred attorney position in the juvenile diversion unit because she had failed to register for the July 2021 Pennsylvania bar examination and was not licensed to practice law. Appx192, 359-361, 374. Ms. Spivack worked in this non-barred position until she was discharged on April 8, 2022. If her employment had not been terminated, she would have transferred to an assistant district attorney position in the municipal unit in April 2022, as soon as she passed the bar examination. Appx365, 489.

C. Ms. Spivack's Religious Exemption Request

On September 3, 2021, the DAO provided Ms. Spivack with a copy of the August 13, 2021 vaccine mandate and advised her that compliance was a condition of employment. Appx045. On September 19, 2021, Ms. Spivack provided the DAO with a letter from her rabbi, dated September 6, 2021, as notice of her intent to request a religious exemption. Appx054-057, 363. Ms. Spivack later submitted the additional documentation requested by Ms. Madden as further support for her religious exemption request. Appx060-065.

As discussed above, the DAO vaccine mandate, as implemented, did not include a religious exemption. Accordingly, District Attorney Krasner denied Ms. Spivack's religious exemption request, along with all other religious exemption requests submitted to the DAO, without any individualized assessment. Although District Attorney Krasner did not conduct an individualized assessment of Ms. Spivack's request for an exemption, he has never questioned the sincerity of her religious beliefs. Appx175, 283-284.

Members of the DAO's executive team met with Ms. Spivack on March 4, 2022 to inform her of this denial, and to explain what would happen if she did not comply with the vaccine mandate. Appx092-093, 200-201, 203, 366. A few days later, on March 7, 2022, Ms. Madden provided Ms. Spivack with written notice of the denial. Appx066-68, 070.[2] On March 9, 2021, Ms. Spivack spoke to her supervisor in the juvenile diversion unit regarding the exemption denial and he recommended that she speak to First Assistant Listenbee, which she did the following day. Appx367-368. Mr. Listenbee told her that District Attorney Krasner had decided not to grant religious exemptions based on his review of the law.

[2] The form Ms. Madden used for the exemption denials was a form that had been created at the time she drafted the initial August 13, 2021 vaccine mandate. *See* Appx066-067, 327-329, 331. District Attorney Krasner was unaware that this outdated form was used for the exemption denials. Appx329.

Appx096, 368.[3] Ms. Spivak had no further discussions regarding the exemption denial with anyone at the DAO, other than a brief follow up conversation with her supervisor. Appx368-369, 372. Her last day of employment was April 8, 2022. Appx365.

II. Procedural History

Ms. Spivack filed this action on April 12, 2021, claiming that her discharge violated the First Amendment's Free Exercise Clause, U.S. Const. amend. I, and the Pennsylvania Religious Freedom Protection Act, 71 Pa. Stat. Ann. §§ 2401-07. Appx519 (Dkt.1). A few weeks later, on May 4, 2021, Ms. Spivack moved for a temporary restraining order and preliminary injunction, asserting that the loss of her employment constituted irreparable harm and demanding reinstatement. Appx520 (Dkt. 7). Shortly after this filing, District Attorney Krasner offered to reinstate Ms. Spivack to a fully-remote attorney position in the Law Division writing briefs, motions and memoranda. Appx007, 374-375. Ms. Spivack rejected this offer, stating that she wanted to be a trial attorney and had no interest in a remote position.[4]

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[3] To the extent First Assistant Robert Listenbee's deposition testimony suggests that District Attorney Krasner conducted individualized assessments of the religious exemption requests (*see*, *e.g.*, Appx097, 111), his testimony is mistaken speculation. Unlike Ms. Madden, Mr. Listenbee had no direct role in handling the exemption requests. Appx092 ("It is not something I participated in.").

[4] Without any support in the summary judgment record and contrary to her May 4, 2022 filing seeking reinstatement, Ms. Spivack now falsely claims that District Attorney Krasner's post-litigation offer was made "after she had moved away from

Appx374-376. On May 17, 2021, the District Court denied Ms. Spivack's request for injunctive relief. Appx521 (Dkt. 7). Ms. Spivack, District Attorney Krasner, and the City each moved separately for summary judgment after the close of discovery. Appx522-23 (Dkts. 32, 33, 34). On January 4, 2023, the District Court granted summary judgment in favor of District Attorney Krasner and the City on all claims. Appx525 (Dkt. 50). In this appeal, Ms. Spivack challenges the District Court's grant of summary judgment in favor of District Attorney Krasner and the City on her § 1983 First Amendment claim.[5]

SUMMARY OF THE ARGUMENT

The Court should affirm the District Court's decision granting summary judgment for District Attorney Krasner on Ms. Spivack's First Amendment claim because there is no genuine issue of material fact that the DAO vaccine mandate is a neutral and generally applicable policy that satisfies rational basis review.

Philadelphia to work as a trial attorney." At. Br. at 6-7 n.1, 36. To the extent that the Court considers this factual contention to be relevant to the issues before it, District Attorney Krasner requests an opportunity to present the Court with Ms. Spivack's responses to his requests for admission, in which Ms. Spivack admits that District Attorney Krasner's post-litigation offer was made on May 10, 2022. Ms. Spivack did not receive an offer from Luzerne County until sometime after May 10, 2022, was still interviewing with other prospects on May 10, 2022, and had certainly not moved to Luzerne County before that date. *See* Appx499-500 (stating that the Luzerne County offer letter was "sent out" on May 10, 2022 and that Ms. Spivack interviewed with Camden County on May 10, 2022).

[5] Ms. Spivack does not appeal the District Court's denial of her claim under the Pennsylvania Religious Freedom Protection Act. *See* Appx022-023.

Vaccine mandates without religious exemptions have long been held constitutional and do not represent a "value judgment" that religious objections are less important than secular objections. District Attorney Krasner expressly relied on this authority in adopting a vaccine mandate patterned on the *Jacobson* case. This decision was not motivated by hostility towards religious beliefs or practices; there is no evidence of record even remotely suggesting otherwise. District Attorney Krasner has no discretion under the DAO mandate and there is no mechanism for subjective assessments of individual exemption requests.

That District Attorney Krasner cannot impose a vaccine mandate on union employees does not mean that the mandate is not "generally applicable" because the mandate applies equally to all employees under his authority. Nor does the limited, objective medical exemption defeat general applicability because medical exemptions to vaccination are not "comparable" to other exemptions when measured against the governmental interests at stake in a pandemic. *See* Appx015 ("a stringent medical exemption promotes health and safety; a religious exemption threatens health and safety").

The DAO vaccine mandate unquestionably satisfies rational basis review because it is rationally related to the DAO's legitimate interests. *See* Appx018-019 (limiting the spread of COVID-19 within the office, minimizing staffing disruptions, and protecting medically-vulnerable employees, family members, and participants

in the criminal justice system). And, even if strict scrutiny were to apply (and it does not for all the reasons stated above), the record amply demonstrates that junior assistant district attorneys in trial units like Ms. Spivack were subject to heightened exposure and transmission risks and that requiring vaccination was narrowly tailored to those risks.

STANDARD OF REVIEW

The Third Circuit exercises plenary review over a district court's grant of summary judgment, applying the same standard that the district court should have applied. *FOP v. City of Camden*, 842 F.3d 231, 238 (3d Cir. 2016) (citation omitted); *see also EEOC v. Allstate Ins. Co*., 778 F.3d 444, 448 (3d Cir. 2015) (a district court's grant or denial of summary judgment is reviewed de novo). Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id*.; Fed. R. Civ. P. 56(a).

ARGUMENT

The DAO vaccine mandate treats religious objections to vaccination no differently than secular objections. As the District Court correctly held, there is "no evidence of any 'hostility to religion'" in the summary judgment record and "[t]he undisputed evidence shows that [the DAO vaccine mandate] was intended to prevent sickness and death to the maximum extent possible, and that a single medical

exemption was allowed because it furthered those same goals." Appx010. Accordingly, the DAO vaccine mandate is a neutral and generally-applicable policy that comports with the Free Exercise Clause of the First Amendment.

I. Vaccine Mandates Without Religious Exemptions Are Constitutional.

The United States Supreme Court has long upheld mandatory vaccination requirements against constitutional challenges such as the one presented here. *See Jacobson v. Massachusetts*, 197 U.S. 11, 27, 38 (1905) ("holding a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."); *Zucht v. King*, 260 U.S. 174, 177 (1922) (same); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("the right to practice religion freely does not include the liberty to expose the community . . . to communicative disease or death").

More recently, numerous federal appellate and district courts have similarly held that vaccine mandates without a religious exemption are constitutional. *See, e.g. Does 1-6 v. Mills*, 16 F.4th 20, 30-32 (1st Cir. 2021), *cert. denied,* 142 S. Ct. 1112 (U.S., Feb. 22, 2022) (rejecting Free Exercise challenge to COVID-19 vaccine mandate with medical exemption but no religious exemption); *Nikolao v. Lyon,* 875 F.3d 310, 316 (6th Cir. 2017) (rejecting Free Exercise challenge to mandatory school vaccination requirement and stating that there is no constitutional right to a religious exemption); *Phillips v. City of New York,* 775 F.3d 538, 543 (2d Cir. 2015) (rejecting

Free Exercise challenge to mandatory student-vaccination requirement and holding that "New York could constitutionally require all children to be vaccinated to attend public school"); *Workman v. Mingo Cty. Bd. of Educ.,* 419 F. App'x 348, 353 (4th Cir. 2011) (rejecting Free Exercise challenge to a compulsory school vaccination law that did not permit religious exemptions); *Whitlow v. Cal. Dep't of Educ.,* 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016) (upholding California law that removed religious exemption to school vaccination mandate, stating that "it is clear that the Constitution does not require the provision of a religious exemption to vaccination requirements . . ."); *Boone v. Boozman,* 217 F. Supp. 2d 938, 954 (E.D. Ark. 2002) (upholding compulsory vaccination law with medical exemption but no religious exemption against Free Exercise challenge), *appeal dismissed as moot,* 359 F.3d 1029 (8th Cir. 2004).

District Attorney Krasner specifically relied on this legal authority—*Jacobson* and some of the more recent decisions cited above—when he determined that a religious exemption was not constitutionally required in January 2022. Appx276-80; *see also* Appx014 ("the record shows without contradiction that [District Attorney] Krasner changed the DAO Policy to reflect his growing knowledge of both the law and the virus"). Yet Ms. Spivack does not even acknowledge, let alone discuss, this established precedent or District Attorney Krasner's reliance on this authority. This omission is telling and is emblematic of

Ms. Spivack's calculated distortions of the law and the record in her arguments to this Court.

II. The District Court Correctly Held that the DAO Vaccine Mandate Is a Neutral and Generally-Applicable Policy that Satisfies Rational Basis Review.

It is well-established that the right to free exercise of religion does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability." *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). Rational basis review is all that is required to uphold a policy that does not target, disapprove of, or single out religious groups or practices, even if the policy "proscribes (or prescribes) conduct that his [or her] religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quotation omitted); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice").

The DAO vaccine mandate is both generally applicable and neutral, and easily satisfies rational basis review. *See U.S. R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (a governmental action must be upheld under the rational review standard if the government presents "plausible reasons" supporting the challenged action).

A. The DAO Vaccine Mandate Is Generally Applicable.

A law is not generally applicable "if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions" or if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021).

Ms. Spivack claims that the DAO vaccine mandate is not generally applicable because: (1) District Attorney Krasner purportedly had "absolute discretion" in granting exemptions under the mandate; and (2) the mandate supposedly permitted secular conduct that undermined the DAO's asserted interests. Neither of these arguments has merit.

1. The DAO Vaccine Mandate Does Not Allow for Discretionary, Individualized Exemptions.

At the heart of Ms. Spivack's constitutional challenge is her false claim that District Attorney Krasner had "absolute discretion" to grant or deny individual religious exemption requests under the DAO vaccine mandate. The District Court appropriately calls out this distortion of the record in his memorandum decision:

> [Ms.] Spivack chooses to attack a strawman—the initial Office policy, not the final Policy pursuant to which she was fired. As I have discussed, however, the Policy's final version—the end result of a gradual process involving [District Attorney] Krasner's review of the applicable law and guided by [District Attorney] Krasner's concern for public health—provides only a very limited medical exemption.

Appx018.

On appeal, Ms. Spivack argues that it is "irrelevant" whether District Attorney Krasner changed the policy in January 2022, on the theory that his authority to set DAO policy means that he always retains absolute discretion to grant or deny individual exemptions. *See* At. Br. at 15 n.5 ("If [District Attorney] Krasner's Practice is indeed a superseding policy, that policy's only content is that he has unilateral discretion."). This argument is nonsensical and intentionally conflates District Attorney Krasner's policymaking authority as an independently-elected official with the policy itself. Ms. Spivack cites no authority to support her contention that the authority to set policy means that all policies issued under that authority are inherently discretionary.

This is not a case like *Fulton* where the challenged policy expressly "incorporates a system of individualized exemptions" that permit "the government to grant exemptions based on the circumstances underlying each application." *See Fulton*, 141 S. Ct. at 1877 (where the City's foster care services contract prohibited agencies from rejecting prospective foster parents based on sexual orientation but allowed for exceptions "at the sole discretion" of the commissioner);[6] *see also Smith*,

[6] There was no evidence in *Fulton* that the City had granted any discretionary exemption under that provision—either religious or secular—from the City's antidiscrimination law. *See id*. at 1879.

494 U.S. at 884 (holding that unemployment compensation eligibility requirements created "a mechanism for individualized exemptions" because they allowed exceptions for "good cause"). Here the DAO vaccine mandate contains no "formal mechanism" that "invites the government to decide which reasons for not complying with the policy are worthy of solicitude."[7] *Fulton*, 141 S. Ct at 1879.

The only exemption to the DAO vaccine mandate is a limited and objective medical exemption. Courts evaluating this type of objective exemption have held it does not create a "mechanism for individualized exemptions." *See Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (holding that "an exemption is not individualized simply because it contains express exemption for objectively defined categories of persons"); *303 Creative LLC v. Elenis*, 6 F. 4th 1160, 1187 (10th Cir. 2021) (cautioning against the conflation of an "individualized exemption" with "individualized adjudication"); *We the Patriots USA v. Hochul*, 17 F. 4th 266 (2d Cir. 2021), *reaff'd by We the Patriots USA v. Hochul*, 174 17 F. 4th 368 (2d Cir. 2021) (characterizing this type of limited medical exemption as "an objectively defined category of people to whom the vaccine requirement does not apply"). As

[7] District Attorney Krasner's post-litigation offer to reinstate Ms. Spivack and give her a fully-remote job writing briefs in the Law Division (a job she demeaned as akin to "mopping the floors" and categorically rejected (Appx395-396)) is not evidence, as she now claims, that the DAO vaccine policy allowed for individualized exemptions.

the District Court held: "[It] takes some degree of individualized inquiry to determine whether a person is eligible for even a strictly defined exemption," and that this "kind of limited inquiry is qualitatively different" from the undefined exemptions in *Smith*, and in *Fulton*." Appx018.

Ms. Spivack does not address or distinguish any of these cases and relies instead on an inapposite Supreme Court case, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988). *Lakewood* involved a newspaper's First Amendment challenge to an ordinance that regulated the placement of news racks on public property. *Id*. at 753-55. Among other things, the newspaper asserted that the ordinance was unconstitutional because it gave the mayor "unbridled discretion" to regulate the circulation of newspapers. Although the ordinance placed no limits on the mayor's discretion in granting or denying a permit, the City of Lakewood asked the Supreme Court "to presume that the mayor will deny a permit application only for reasons related to the health, safety or welfare" of community residents. The Supreme Court refused to do so, stating that any such "presumption" was not supported by the text of the ordinance or past practice (*id*. at 770), and holding the ordinance to be unconstitutional because it gave the mayor "unfettered discretion" (*id*. at 772).

The *Lakewood* case has no bearing on the issues presented here because: (1) District Attorney Krasner eliminated religious exemptions in January 2022, because

they are not constitutionally required (Appx172-173, 276-80, 304, 309, 486-487); (2) this decision caused the denial of all religious exemption requests without any discretionary, individualized consideration (Appx175, 178); and (3) the DAO no longer accepts religious exemption requests (Appx312). These undisputed facts foreclose Ms. Spivack's claim that the DAO vaccine mandate, as implemented, gives the District Attorney unfettered discretion.

2. The Mandate Does Not Treat Religious Objectors Worse Than Other Similarly-Situated Employees.

A law may also "lack[] general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877; *see also Lukumi*, 508 U.S. at 544-45. In *Lukumi*, the City of Hialeah adopted ordinances that prohibited animal sacrifice, a practice of the Santeria faith, claiming that the ordinances were necessary, in part, to protect public health. *Id.* at 544. The ordinance did not, however, regulate other conduct that posed a similar public health risk (e.g., hunters' disposal of their kills and garbage disposal by restaurants). For this reason, the Supreme Court held that the ordinance was "underinclusive" and not generally applicable. *Id.* at 544-46.

Ms. Spivack claims that the DAO vaccine mandate is underinclusive and unconstitutional under *Lukumi* because it treats religious objectors worse than two categories of purportedly similarly-situated DAO employees: (a) employees who

cannot be vaccinated safely; and (b) union employees. Neither the facts nor the law supports her position.

a. DAO employees who cannot be vaccinated safely are not comparable to DAO employees who object to vaccination on personal, political, philosophical, or religious grounds.

It is undisputed that the DAO vaccine mandate applies equally to employees who object to vaccination on personal, political, philosophical and/or religious grounds. Nonetheless Ms. Spivack asserts that the DAO vaccine mandate is not generally applicable because it provides a limited "secular" exemption for employees who cannot be vaccinated without risking serious illness or death (only one employee qualified for this exemption).

In comparing religious versus secular conduct, "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Applying this standard, the District Court correctly held that medical and religious exemptions do not regulate "comparable" conduct.

> [District Attorney] Krasner asserts that the Policy he finalized serves the following interests: preventing the spread of Covid within the Office, minimizing staffing disruptions caused by workplace illness, and protecting medically-vulnerable employees, family members and participants in the criminal justice system. ***It is plain that the medical and religious exemptions, when judged against these interests, do not regulate "comparable" conduct: a stringent medical exemption***

> ***promotes health and safety; a religious exemption threatens health and safety***.

Appx015 (citing *Mills*, 16 F.4th at 30 (emphasis added).

In challenging the District Court's analysis, Ms. Spivack first asserts that District Attorney Krasner did not "actually" consider "health and safety" in connection with his decision to impose a vaccine mandate. At. Br. at 23. The record unequivocally demonstrates otherwise. *See*, *e.g.*, Appx051 (the DAO mandate is intended to set "a higher standard of health and safety due to the nature of our work, which requires many of us to work indoors and to interface with the public on a regular basis in our roles as public servants"). She then asserts that any concern over "health and safety" renders the DAO vaccine mandate not generally applicable because it opens the door to subjective judgments. *See* At. Br. at 24 ("defining broad interests like health and safety as the interest for general applicability allows the government to cloak religious discrimination in a general assertion of police power"). This argument intentionally conflates the interests underlying the policy with the terms of the policy. As discussed above, the objective medical exemption at issue here (individuals for whom vaccination is contraindicated as certified by a medical professional) does not leave room for subjective judgments. *See supra* p. 12.

The First Circuit's analysis in *Does 1-6 v. Mills* is exactly on point. In that case, healthcare workers challenged a Maine regulation that required all healthcare

workers to be vaccinated against COVID-19. 16 F.4th 20 at 24. Like the DAO vaccine mandate, the Maine regulation had a medical exemption but no religious exemption. *Id.* at 30 (employees were exempted from Maine's mandate only if a healthcare provider certified that vaccination was "medically inadvisable"). In denying injunctive relief for the plaintiffs, the First Circuit explained that this limited medical exemption does not undermine Maine's stated interests.

> Providing a medical exemption does not undermine any of Maine's three goals, let alone in a manner similar to the way permitting an exemption for religious objectors would. Rather, providing healthcare workers with medically contraindicated vaccines would threaten the health of those workers and thus compromise both their own health and their ability to provide care. The medical exemption is meaningfully different from exemptions to other COVID-19-related restrictions that the Supreme Court has considered. In those cases, the Supreme Court addressed whether a state could prohibit religious gatherings while allowing secular activities involving everyday commerce and entertainment and it concluded that those activities posed a similar risk to public health (by risking spread of the virus) as the prohibited religious activities. In contrast to those cases, Maine CDC's rule offers only one exemption, and that is because the rule itself poses a physical health risk to some who are subject to it. Thus carving out an exception for those people to whom that physical health risk applies furthers Maine's asserted interests in a way that carving out an exemption for religious objectors would not.

Id. at 31 (citations omitted); *cf. FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 259, 265 (3d Cir. 1999) (rejecting Free Exercise challenge where religious and medical exemptions to the Newark police department's no-beard requirement undermined the stated policy interest—uniformity in grooming—in exactly the same way).

It is for this reason that courts have long held that vaccine mandates with a medical exemption but no religious exemption are constitutional. *See supra* p. 14; *see*, *e.g.*, *Jacobson*, 197 U.S. at 38 (compulsory smallpox vaccination laws with only medical exemptions do not violate any federal constitutional right); *Mills*, 16 F.4th at 30 (COVID-19 vaccine mandate with only medical exemption did not violate the Free Exercise Clause); *Nikolao,* 875 F.3d at 316 (reiterating, under *Jacobson*, mandatory vaccination laws with only medical exemptions do not violate any federal constitutional law); *Phillips,* 775 F.3d at 543 (rejecting Free Exercise challenge to mandatory student-vaccination requirement that did not permit religious exemptions); *Workman,* 419 F. App'x at 353 (rejecting Free Exercise challenge to a compulsory school vaccination law that allowed medical but not religious exemptions); *Whitlow v. Cal. Dep't of Educ*., 203 F. Supp. 3d 1079, 1084 (S.D. Cal. 2016) (holding that "it is clear that the Constitution does not require the provision of a religious exemption to vaccination requirements"). Ms. Spivack does not address or distinguish this established authority.[8]

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[8] In a footnote, Ms. Spivack suggests in passing that the Fifth Circuit has reached "a different conclusion" regarding the comparability of medical and religious exemptions under the First Amendment. *See* At. Br. at 25 n.24 (citing *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 352 (5th Cir. 2022)). To the contrary, in *U.S. Navy Seals*, the Fifth Circuit analyzed the plaintiff service members' right to injunctive relief from the Navy's COVID-19 vaccine mandate under the federal Religious Freedom Protection Act, not under the First Amendment. *Id*. at. 350-53. The Religious Freedom Protection Act, provides "greater protection for religious exercise that is available under the First Amendment" and requires "strict scrutiny"

Instead, she relies on cases that do not involve vaccine mandates at all. *See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-68 (2020) (addressing the constitutionality of a New York emergency order that restricted worship but permitted larger groups to gather at businesses such as "acupuncture facilities, camp grounds, [and] garages"); *Tandon*, 141 S. Ct. at 1297 (addressing the constitutionality of a California emergency order that restricted worship but permitted larger groups to gather in "hair salons, retail store, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurant"); *FOP Newark Lodge*, 170 F.3d at 265 (addressing the constitutionality of the police department's no-beard policy that was adopted to promote uniform appearance and permitted medical but not religious exemptions). None of these cases addresses the unique "comparability" issue presented in vaccine mandate cases where one of the primary goals is to promote health and safety but the vaccine itself compromises health and safety for a small number of people. In these circumstances, as the First Circuit held in *Mills*, a medical exemption is "meaningfully different" from other exemptions and is not "comparable." 16 F.4th 20 at 31.

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in all cases where the government substantially burdens an individual's exercise of religion. *Id*. at 350. Nothing in the *U.S. Navy Seals* decision relates to the issue presented here: whether the DAO vaccine mandate is a neutral and generally applicable policy that satisfies rational basis review.

b. DAO union employees are not comparable because the terms of their employment cannot be controlled by District Attorney Krasner.

Ms. Spivack's claim that the DAO vaccine mandate treats union employees more favorably fails for the simple reason that District Attorney Krasner does not have any authority to set the terms of employment for union employees. *See Fulton*, 141 S. Ct. at 1877 (a law lacks "general applicability if it ***prohibits*** religious conduct while ***permitting*** secular conduct that undermines the government's asserted interests in a similar way.") (emphasis added). Ignoring this undisputed fact, Ms. Spivack wrongly suggests that this lack of authority is somehow the legal equivalent of a secular exemption.

The Tenth Circuit addressed this issue in *Denver Bible Church v. Polis*, No. 20-1391, 2022 U.S. App. LEXIS 1994, at *23 (10th Cir. Jan. 24, 2022), *cert. denied* 142 S. Ct. 2753 (2022). In *Denver Bible Church*, Colorado enacted legislation in response to the COVID-19 pandemic that authorized the governor to declare a disaster emergency and issue executive orders to combat the pandemic. *Id.* at *21-22. In rejecting a Free Exercise Clause challenge, the Tenth Circuit held that the legislation was "generally applicable" even though it included a provision that the governor could not take action that would affect the jurisdiction or responsibilities of "police forces, fire-fighting forces, or units of the armed forces of the United States." *Id.* at *22. In so holding, the Tenth Circuit explained this provision did not create an exemption for these groups because the governor did not have the authority

to control them. *Id*. at *23. Ms. Spivack's claim that the DAO vaccine mandate is not generally applicable fails for the same reason: the mandate does not "exempt" union employees because District Attorney Krasner does not have the authority to set the terms of their employment.

The case upon which Ms. Spivack principally relies, *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987 (2022), is distinguishable for the same reason. In *Carson*, Maine enacted a tuition assistance program that limited program benefits to nonsectarian schools. *Id*. at 1993. The Supreme Court held that this limitation violated the Free Exercise Clause because it disqualified "otherwise eligible schools" from a public benefit "on the basis of their religious exercise." *Id*. at 2002. There was no question that the Maine legislature could have extended the program benefits to sectarian schools but chose not to do so. *See id*. at 1994. Here, in contrast, there is no question that District Attorney Krasner could ***not*** have extended the DAO vaccine mandate to union employees.

Ms. Spivack does not dispute, nor can she, that District Attorney Krasner is the final policymaker with regard to COVID-19 policy for DAO employees under his control. Indeed it is precisely on this basis that she seeks to impute liability to the City. *See* At. Br. at 23 (asserting that District Attorney Krasner's decisions "as a policymaker" are attributable to the City under *Monell v. Dep't of Soc. Servs*., 436 U.S. 658 (1978) and *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986)). Under

Pembaur, on the facts presented here, municipal liability attaches only to the extent that "***the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered***." 475 U.S. at 464 (emphasis added). Yet despite this clear language, Ms. Spivack asserts that the limits on District Attorney Krasner's policymaking authority as "the decisionmaker" are somehow "irrelevant" and that the constitutionality of the DAO vaccine mandate must be analyzed as if the City rather than District Attorney Krasner was the final policymaker. *See* At. Br. at 23 (claiming that "the City is ultimately responsible for the treatment of all DAO employees whether governed by collective bargaining agreements or [District Attorney] Krasner's Mandate"). She cites no authority for this paradoxical proposition and there is none. The constitutionality of District Attorney Krasner's independent decision as the "final policymaker" must be analyzed on its own terms. Accordingly, union employees are not "comparators" for the purpose of determining whether the DAO vaccine mandate is generally applicable.

B. The DAO Vaccine Mandate Is Neutral.

"[A] law or policy is 'neutral if it does not target religiously motivated conduct either on its face or as applied in practice.'" *Combs v. Homer-Center Sch. Dist.,* 540 F.3d 231, 241 (3d Cir. 2008)) (quoting *Blackhawk v. Pennsylvania,* 381 F.3d 202, 209 (3d Cir. 2004)); *see also Fulton*, 141 S. Ct. at 1877 ("The Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or

restricts practices because of their religious nature."); *Lukumi*, 508 U.S. at 533 ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral[.]").

Ms. Spivack claims that the DAO vaccine mandate is not "neutral" because the lack of a religious exemption purportedly reflects a "value judgment" that religious reasons for objecting to vaccination are less important than "secular (i.e., medical) motivations." At. Br. at 27. Neither the law nor the record supports this claim.

First, none of the "neutrality" cases upon which Ms. Spivack relies involves a vaccine mandate. *See FOP Newark Lodge*, 170 F.3d at 365 (grooming policy); *Lukumi*, 508 U.S. at 531-32 (ordinance prohibiting animal sacrifice); *Roman Cath. Diocese*, (emergency order limiting occupancy); *Tenafly, Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 178 (3d Cir. 2002) (ordinance banning installations on utility poles).

Second, as discussed at length above, vaccine mandates with medical exemptions but no religious exemptions have long been held to be constitutional. *See supra* p. 14; *see*, *e.g.*, *Mills*, 16 F.4th at 30-32; *Nikolao,* 875 F.3d at 316; *Phillips,* 775 F.3d at 543; *Workman,* 419 F. App'x at 353; *Whitlow*, 203 F. Supp. 3d at 1084. Accordingly, that the DAO vaccine mandate provides a limited and objective

medical exemption is not itself evidence of any hostility to religious beliefs or practices.

Third, there is no factual basis for Ms. Spivack's claim that the DAO issued the vaccine mandate with the intent to target religious beliefs or conduct. Although Ms. Spivak points to certain comments District Attorney Krasner and Ms. Madden made at their depositions as supposed "evidence" of hostility to religion, these comments, viewed in context, do not support her claim. *See* Appx013-014.[9] Ms. Spivack herself admits that no one at the DAO ever said anything to her that suggested that District Attorney Krasner was hostile towards religion or that her exemption request was denied for that reason. Appx368. As the District Court correctly found, the circumstances surrounding District Attorney Krasner's decision to adopt a mandate without a religious exemption demonstrate that he acted "from a 'deep concern for public health, which is a religion-neutral government interest.'" Appx012.

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[9] As the District Court observed: (1) "[Ms.] Spivack has distorted the record. [District Attorney] Krasner's deposition responses that [Ms.] Spivack plucks out of context relate to his understanding (based on his professional experience) that "[r]ights are not completely unlimited" (*see* Appx013, 349); (2) "[Ms.] Madden's retrospective reflection on the beneficial effect of the application process only confirms that the DAO sought to encourage vaccination" (*see* Appx013, 200); and (3) "The challenged deposition testimony—which, in any event, is not a 'contemporaneous statement[] made by members of the decisionmaking body'—does not create a factual dispute as to whether [District Attorney] Krasner's Policy decisions were motivated by anti-religion animus" (*see* Appx013).

C. The DAO Vaccine Mandate Satisfies Rational Basis Review.

A governmental action must be upheld under the rational review standard if the government presents “plausible reasons” supporting the challenged action. *U.S. R. Retirement Bd*, 449 U.S.at 179; *see also Tenafly*, 309 F.3d at 165 n.24 (rational basis review “requires merely that the [challenged] action be rationally related to a legitimate governmental objective”). The District Court correctly held that the DAO vaccine mandate meets this standard, emphasizing that DAO’s “interests in preventing the spread of covid within the office, minimizing staffing disruptions caused by workplace exposures, and protecting medical-vulnerable employees, family members, and participants in the criminal justice system” are legitimate, governmental interests. Appx018-019. Ms. Spivack does not argue otherwise on appeal.

III. In the Alternative, the DAO Vaccine Mandate Satisfies Strict Scrutiny.

For all the above reasons, the DAO vaccine mandate qualifies as a neutral rule of general application that satisfies rational basis review. But even if this Court were to apply strict scrutiny review, it should affirm because the District Court correctly held, in the alternative, that the DAO mandate is justified by compelling governmental interests and is narrowly tailored to those interests. Appx019-021; *see*

Roman Cath Diocese, 141 S. Ct. at 67 (strict scrutiny requires that a policy be narrowly tailored to serve a compelling governmental interest).

There is no question that the DAO has a compelling interest to safeguard DAO employees and vulnerable family members (as well as other participants in the criminal justice system) from the risk of COVID-19. "Few interests are more compelling than protecting public health against a deadly virus." *Mills*, 16 F.4th at 32; *see also Roman Cath. Diocese*, 141 S. Ct. at 67 ("stemming the spread of COVID-19 is unquestionably a compelling interest"). The DAO also has an independent but equally compelling interest to maintain DAO staffing and operations at the levels needed to fulfill its constitutional responsibilities in the criminal justice system.

It is also undisputed that the DAO experienced multiple, disruptive COVID-19 outbreaks throughout the pandemic. Appx248-250; *see also* Appx119-120 (describing COVID-19 outbreaks in the municipal court and trial units). In these circumstances, District Attorney Krasner reasonably concluded, based on recommendations of the CDC and the City Health Commissioner, that vaccination is the most effective and least restrictive measure available in light of the medical data and the DAO's limited resources.

> Masking and testing, individually or together are not acceptable substitutes for vaccination in the DAO. Masking is not an acceptable substitute because it is not feasible to prevent persons from using masks that are or have become insufficient, or are not worn correctly (tight fit

> and covering nose and mouth) or at all. Testing is not an acceptable substitute because it does not disclose that a person has been exposed and presents a risk to others, but the virus has not yet been detected, nor is it constant.

Appx486; *see also* Appx020-021. The District Attorney's conclusion is well-founded. *See, e.g., Mills*, 16 F.4th at 33 (rejecting masking and testing as acceptable alternatives to vaccination for similar reasons). In any event, courts agree that it is the prerogative of the policymaker "to choose between opposing theories within medical and scientific communities in determining the most effective . . . way" to address health threats. *Doe v. Zucker*, 2021 WL 619465, *21 (N.D.N.Y. 2021). As Chief Justice Roberts recently emphasized: it is "when officials undertake[] to act in areas fraught with medical and scientific uncertainties" that their latitude must be especially broad." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) (internal quotations omitted); *see also Jacobson*, 197 U.S. at 30 ("It is no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease").

Vaccination is also the most effective and least restrictive measure as applied to Ms. Spivack specifically. Although Ms. Spivack had been working in a non-barred attorney position in the juvenile diversion unit, she was slated to start work as a junior assistant district attorney in the municipal trial unit in April 2022. Appx365, 489. It is undisputed that junior assistant district attorneys assigned to

trial units work long hours in close quarters handling physical paper files, both in court and in the office. Appx487, 490. It is also undisputed that Ms. Spivack had no interest in working in a remote, non-trial unit role. Appx007, 021, 374-375.[10] For this reason, as an unvaccinated junior assistant district attorney, Ms. Spivack would have had a heightened risk of contracting COVID-19 and a heightened risk of transmitting the virus to others, which in turn would jeopardize the DAO's ability to maintain attorney staffing in the trial unit to which she was assigned.

That one DAO attorney received a medical exemption does not change the exposure and transmission risks unique to junior trial attorneys like Ms. Spivack. Appx487. Nor does the fact that the DAO could not mandate vaccines for ten union employees (six clerks and four police officers) change this risk calculus. Appx385. For all these reasons, the District Court correctly concluded that the DAO vaccine mandate as applied to Ms. Spivack survives strict scrutiny review. Appx019-021.

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[10] There is no genuine issue of material fact that Ms. Spivack would not have accepted a fully-remote non-trial position—her deposition testimony is clear and unequivocal on this point. To the extent that Ms. Spivack now suggests otherwise (based on her false assertion that she rejected District Attorney Krasner's post-litigation offer to reinstate her to a fully-remote non-trial position in the Law Division only "after she had moved away from Philadelphia for a new job"), that suggestion is not supported in the record and is untrue. *See supra* n. 2.

CONCLUSION

For all the foregoing reasons, this Court should affirm the District Court's grant of summary judgment in favor of District Attorney Krasner and against Ms. Spivack.

Respectfully submitted,

May 30, 2023

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/s/ David Smith

Attorney for Defendant-Appellee
Lawrence S. Krasner

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I hereby certify that on May 30, 2023 I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the CM/ECF system, which served notice upon all counsel of record.

/s/ David Smith

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