No. 23-1212

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RACHEL SPIVACK,
Plaintiff-Appellant,

v.

CITY OF PHILADELPHIA AND LAWRENCE KRASNER,
IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY OF PHILADELPHIA,
Defendants-Appellees.

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

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INTRODUCTION

Rather than grapple with the requirements of the Free Exercise Clause, Defendants rely upon *Jacobson v. Massachusetts* to justify their religious discrimination. However, courts consistently refuse to apply *Jacobson* to free exercise claims, instead applying traditional free exercise analysis to COVID-19 cases generally and COVID-19 vaccination mandate cases specifically. Under traditional free exercise analysis, the DAO's vaccine mandate (the "Mandate") triggers strict scrutiny in four independent ways: 1) it provided opportunity for discretionary exemptions; 2) it exempted comparable employees for medical reasons; 3) it did not apply to comparable unionized employees, who received religious exemptions; and 4) it arose out of religious hostility. Defendants then fail to carry their burden of demonstrating that terminating Spivack's employment survives strict scrutiny, because the accommodations granted to others demonstrate that the Mandate was not narrowly tailored to serve a compelling interest. The District Court below erred in granting summary judgment to the Defendants.

ARGUMENT

I. A Modern Free Exercise Clause Analysis, Not *Jacobson*'s Substantive Due Process Analysis, Applies to Free Exercise Challenges to Vaccine Mandates.

Defendants rely on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), as granting *carte blanche* to impose vaccine mandates without religious exemptions,

notwithstanding the required analysis under the Free Exercise Clause. While *Jacobson* may retain utility in substantive due process challenges under the Fourteenth Amendment—as, indeed, *Jacobson* was—the Supreme Court has not looked to *Jacobson* in free exercise challenges to COVID-19 restrictions. As the Second Circuit noted:

> [T]he context of a public-health emergency does not change the result. The district courts, the motions panel of this Court, and the Governor relied on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), as support for the notion that courts should defer to the executive in the face of the COVID-19 pandemic. But this reliance on *Jacobson* was misplaced.
>
> In *Jacobson,* the Supreme Court upheld a mandatory vaccination law against a substantive due process challenge. *Jacobson* predated the modern constitutional jurisprudence of tiers of scrutiny, was decided before the First Amendment was incorporated against the states, and "did not address the free exercise of religion." *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015); *see Roman Cath. Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) ("*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction."). Indeed, the *Jacobson* Court itself specifically noted that "even if based on the acknowledged police powers of a state," a public-health measure "must always yield in case of conflict with any right which the Constitution gives or secures." 197 U.S. at 25.

Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 635 (2d Cir. 2020) (cleaned up).

Although some courts gravitated towards *Jacobson* in the early days of the COVID-19 pandemic, the Supreme Court, notably, did not rely on *Jacobson* in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam),

which did not mention *Jacobson* except in concurrence and dissent, and it did not cite *Jacobson* at all in *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam). Since these decisions, even courts that view *Jacobson* more favorably have acknowledged that the choice seems to be between whether *Jacobson* is abrogated or whether *Jacobson* is merely inapplicable in the free exercise context. *See, e.g.*, *Hopkins Hawley LLC v. Cuomo*, 518 F. Supp. 3d 705, 712 (S.D.N.Y. 2021) (collecting cases).

While Defendants cite examples where some courts found some vaccine mandates lacking religious exemptions to be constitutional, that does not mean that vaccine mandates without religious exemptions are *automatically* constitutional.[1] Rather, the constitutionality of a vaccine mandate lacking a religious exemption or accommodation depends on the application of free exercise analysis in each individual case. *See, e.g.*, *Lowe v. Mills*, 68 F.4th 706, 714–15 (1st Cir. 2023) (reversing dismissal of free exercise claims challenging Maine healthcare worker COVID-19 vaccine mandate because plaintiffs plausibly pled that medical exemptions are comparable to religious exemptions).[2] Simply put, *Jacobson* does

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[1] Notably, the primary cases defendants cite as examples actually involve vaccine mandates that contained religious exemptions, *see, e.g.*, *Nikolao v. Lyon*, 875 F.3d 310, 316 (6th Cir. 2017); *Phillips v. City of New York*, 775 F.3d 538, 543 (2d Cir. 2015). Another is unpublished. *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011).

[2] Defendants rely heavily on *Does 1–6 v. Mills*, 16 F.4th 20 (1st Cir. 2021), but they omit that the First Circuit recently clarified that *Does 1–6* was constrained by its procedural posture. On May 25, 2023, the First Circuit considered the case again on

not grant Defendants license to ignore the Free Exercise Clause's requirements. Even in ruling for the Defendants, the District Court did not adopt their tenuous argument, *see* Appx010–011, and this Court should likewise reject it.[3]

II. The DAO's Denial of Spivack's Request for a Religious Exemption or Accommodation Is Subject to Strict Scrutiny Under Free Exercise Clause Analysis.

Defendants and the District Court assert that Krasner replaced the DAO's written August 2021 policy permitting religious exemptions or accommodations with a second policy eliminating all possibility of religious exemptions or accommodations. Whether this is true or not is a matter of genuine dispute, but, ultimately, regardless of whether the DAO implemented a new policy or not, the

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appeal from a Motion to Dismiss. *Lowe*, 68 F.4th at 713. The First Circuit explained that its decision in *Does 1–6*, which arose from the denial of Plaintiffs' motion for temporary restraining order and preliminary injunction, was grounded in its abuse of discretion standard of review on appeal. *Id.* at 712 n.10. Under *de novo* review in the case's subsequent appeal, the First Circuit held that, "A law is not generally applicable if it 'treat[s] any comparable secular activity more favorably than religious exercise.' . . . . Applying the Rule 12(b)(6) standard and drawing all reasonable inferences in the plaintiffs' favor, we conclude that it is plausible . . . that the Mandate falls in this category, based on the complaint's allegations that the Mandate allows some number of unvaccinated individuals to continue working in healthcare facilities based on medical exemptions while refusing to allow individuals to continue working while unvaccinated for religious reasons." *Id.* at 714 (internal cites and quotes omitted) (citing *Tandon*, 141 S. Ct. at 1296 and *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021)).

[3] While Defendant Krasner may have relied on *Jacobson* in refusing to accommodate Spivack, the Court owes no deference to his legal conclusions, as he seems to imply, *see* Appellee's Br. at 15; *Agudath Israel*, 983 F.3d at 635 ("[T]his reliance on *Jacobson* was misplaced.").

DAO's denial of Spivack's request for a religious accommodation to the vaccine mandate is subject to strict scrutiny under Free Exercise Clause analysis, and an entry of summary judgment in Plaintiff's favor is appropriate.

A. The Dispute as to Whether There Was or Was Not a New Policy Warrants at Least Remand for Trial, but either Characterization Is Subject to Strict Scrutiny.

Defendants and the District Court characterize the DAO's vaccine mandate as having two successive iterations: the written August 2021 policy, which allowed religious exemptions, and a January 2022 unwritten policy of denying all religious exemptions. Br. of Def.-Appellee Lawrence S. Krasner (hereinafter, "Appellee's Br.") at 17–18; Appx017. However, the evidence in the record is mixed, at best, as to whether the alleged "second policy" really was a superseding policy change that eliminated the written August 2021 policy. Defendants' own concessions highlight this factual dispute. Defendants concede that the DAO "did not issue a new written policy" when Defendant Krasner decided to reject religious accommodation requests, Appellee's Br. at 7, even though COVID-19 policy updates were typically circulated to staff by email, Appx155–157. Defendants also concede that the DAO denied exemption or accommodation requests using forms from the August 2021 policy, even though those forms did not accurately reflect a policy of categorically denying religious exemptions. Appellee's Br. at 9 n.2; *see* Appx327–329, 331. Additionally, First Assistant Listenbee testified that religious exemption or

accommodation requests were decided individually, which is consistent with the August 2021 policy, and that "[t]hat policy has not changed."[4] Appx123. Moreover, consistent with the August 2021 policy, Defendant Krasner formulated accommodations individually, anticipating that each person requesting an exemption would propose their own accommodations. *Compare* Appx053 ("The DAO will engage in an interactive dialogue with you to determine the precise limitations of your ability to comply with this mandatory vaccination policy and explore potential reasonable accommodations that could overcome those limitations. The DAO encourages employees to suggest specific reasonable accommodations.") *with* Appx298–301 (Defendant Krasner's testimony that he expected Spivack to propose specific accommodations). Evidence in the record supports the conclusion that Defendant Krasner decided each request case-by-case based on whether he generally felt it justified, not based on any formally articulated criteria. *See* Appx184–185, 187, 287–289, 297. Accordingly, whether Defendant Krasner was applying the

[4] Although Defendants try to minimize the weight of Listenbee's testimony, see Appellee's Br. at 10 n.3, weighing the relative value of testimony to make factual determinations is a function of trial, not summary judgment. *See Waskovich v. Morgano*, 2 F.3d 1292, 1296 (3d Cir. 1993) ("Nor, of course, may [the district court] weigh the evidence submitted, judge the credibility of the witnesses who testified, or use the information it receives as a basis for making findings of fact, as all of these activities are incompatible with summary disposition of the case."). Listenbee's testimony also, at a minimum, demonstrates that a second policy was not clearly promulgated, which casts its existence into doubt.

written August 2021 policy or applying a new policy in denying Plaintiff's religious accommodation request is a matter of genuine factual dispute.

This case's procedural posture determines what consequence this factual dispute has. To grant summary judgment to the Defendants, the Court must view the evidence in the light most favorable to the Plaintiff. *See M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 969 F.3d 120, 125 (3d Cir. 2020). A reasonable fact-finder can conclude that Defendant Krasner was applying, not replacing, the written August 2021 policy when he denied Spivack's religious accommodation request. If a trial ultimately finds that Krasner did not issue a new policy, then the policy at issue is the written August 2021 policy, which facially provides for case-by-case exemptions, *see* Appx053, and the denial of Spivack's request is therefore subject to strict scrutiny—a standard that, for the reasons set forth *infra* at Section III, the denial of the religious accommodation request cannot pass, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (systems of individualized exemptions are subject to strict scrutiny). In granting summary judgment to the Defendants, however, the District Court accepted Defendant Krasner's characterization of the decision to deny religious accommodation requests as a second, superseding policy. The District Court, thus, viewed the evidence on this dispute in the light most favorable to the Defendants, not to the Plaintiff, in granting summary judgment to the Defendants. This is at least an error that warrants remand for trial. Plaintiff

asserts, however, that even under the "second policy," as Defendants characterize it, the denial of her religious accommodation request fails to pass constitutional muster, and summary judgment for the Plaintiff is appropriate.

B. Even Considering the Facts in the Light Most Favorable to Defendants, the "Second Policy" Is neither Neutral nor Generally Applicable.

Assuming for purposes of argument that Defendant Krasner's decision to deny religious exemption or accommodation requests was a second policy that superseded the written August 2021 policy and eliminated the religious exemption, that second policy violates the Free Exercise Clause. A rule is not neutral and generally applicable "whenever [it] treat[s] *any* comparable secular activity more favorably than religious exercise," *Tandon*, 141 S. Ct. at 1296; when 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); when it "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," *id.* (cleaned up, internal cites omitted); or when "official expressions of hostility to religion accompany laws or policies burdening religious exercise." *Kennedy*, 142 S. Ct. at 2422 n.1 (quotation omitted). Under this analysis, the DAO's policy is not neutral and generally applicable, because it 1) contemplated discretionary exemptions; 2) did not apply to unionized DAO employees; 3)

permitted medical exemptions; and 4) denied all religious exemption or accommodation requests because of a hostility to religion.

1. The Mandate Is Not Generally Applicable Because It Is Subject to Discretionary Exemptions.

The Mandate is not generally applicable because it is subject to discretionary exemptions. Defendant Krasner's admission that "in retrospect" he would have "seriously considered" and granted Spivack an accommodation, Appx301, demonstrates that the "second policy," which Defendants claim did not allow religious exemptions, was subject to exemptions at Defendant Krasner's discretion.[5] Under *Fulton*, 141 S. Ct. at 1878–79, this renders the Mandate not generally applicable. To avoid this conclusion, Defendants distort Plaintiff's argument as referring to Krasner's ability as a policymaker to change policy. To be clear, a policymaker *can* create a neutral and generally applicable policy, but Defendant Krasner did not do so. The record reiterates time and again that Defendant Krasner decided exemption or accommodation requests in his "sole discretion." *See, e.g.*, Appx105, 187, 287–288. That is different than saying that he individually adjudicated whether exemption requests qualified under objective, previously-defined criteria. Even under the general exemption categories he claimed his second

[5] Krasner's admission that he would have in retrospect considered accommodating Spivack at the time, notwithstanding his decision to deny religious exemptions, Appx301, is distinct from his post-litigation settlement offer, which he disclaimed being an accommodation, Appx306.

policy allowed, Defendant Krasner decided each request case-by-case based on whether he generally felt it justified, not based on a specific, set slate of determinative criteria. Appx184–187, 287–291, 297. And most importantly, he was willing and able to consider granting individualized exceptions that did not fit within the exemption categories he articulated. *See* Appx301. Even if he never granted such an exemption, the opportunity is enough. *Fulton*, 141 S. Ct. at 1878–79; *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) ("[A] law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the *opportunity* for a facial neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.").

2. The Mandate Is Not Generally Applicable Because It Allowed Secular Exemptions While Denying Comparable Religious Exemptions.

The Mandate is not neutral and generally applicable because it allowed secular exemptions while denying comparable religious exemptions. "The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest." *Roman Cath. Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring); *see Kennedy*, 142 S. Ct. at 2421–22; *Lowe*, 68 F.4th at 714 ("A law that is not neutral or

generally applicable is subject to strict scrutiny. A law is not generally applicable if it treats *any* comparable secular activity more favorably than religious exercise." (emphasis in original, internal cites and quotations marks omitted)). The comparability of activities for purposes of free exercise analysis depends on the risks each activity poses to the government's interest, not the reason those activities are done. *Tandon*, 141 S. Ct. at 1296; *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."). Here, the record reflects Defendant Krasner's interest was in reducing the spread and operational impact of COVID-19 within the DAO. Appx116–120, 240–243. Any vaccine exemption undermines that interest, whatever the reason is for being exempt. Appx219, 333. As a result, either one of the two secular exemptions (medical and unionization) independently render the Mandate not neutral and generally applicable.[6]

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[6] Defendants misspeak when they assert that the Mandate contained "no provision for religious or secular exemptions," Appellee's Br. at 7, because the term "secular exemption" refers to any nonreligious exemption, including medical exemptions. *See, e.g.*, *Lowe*, 68 F.4th at 714–15.

a. The Mandate Is Not Generally Applicable Because It Provided Medical Exemptions.

The Mandate is not neutral and generally applicable because it allowed medical exemptions. Defendant's efforts to distinguish medical exemptions fail for several reasons.

First, Defendants misunderstand Plaintiff's point respecting the generality of Defendants' asserted interest. *See* Appellee's Br. at 23. Plaintiff's point is not that reducing the spread of COVID-19 has nothing to do with health or safety, but that where the record reflects that the Defendant asserted a specific interest in reducing the spread of COVID-19, he cannot later generalize (or rely upon the District Court's generalization of) his interest into the much broader and not particularized interest of "health and safety" in order to gerrymander the free exercise analysis. *See generally Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1999–2000 (2022) (rejecting Maine's attempt to avoid strict scrutiny by manipulating the specificity of its tuitioning program's purpose).

Second, Defendants attempt to dismiss the Supreme Court's flagship free exercise COVID-19 cases as inapposite, because those opinions considered COVID-19 requirements that burdened the free exercise of religion but did not consider COVID-19 *vaccination* requirements that burden the free exercise of religion. *See* Appellee's Br. at 26. But nothing in the language or the logic of *Tandon* or *Roman Catholic Diocese* in any way implies that such a distinction would make a difference,

and the very Circuit upon which Defendants substantially rely for this proposition applies these flagship Supreme Court cases when evaluating COVID-19 vaccine mandates. *See, e.g.*, *Lowe*, 68 F.4th at 714.

Third, the Defendants misplace their reliance on the First Circuit's decision in *Does 1–6* to distinguish medical from religious exemptions. As discussed *supra* at footnote 2, *Does 1–6* was constrained by its procedural posture, and in its subsequent May 2023 opinion addressing Maine's COVID-19 vaccine mandate, the First Circuit held that medical exemptions are potential secular comparators to religious exemptions because of medical exemptions' potential for similarly impacting Maine's asserted interests in public health, increasing vaccination rates, preventing the spread of COVID-19, and safeguarding healthcare capacity:

> The availability of a medical exemption, like a religious exemption, could reduce vaccination rates among healthcare workers and increase the risk of disease spread in healthcare facilities, compared to a counterfactual in which the Mandate contains no exceptions, all workers must be vaccinated, and neither religious objectors nor the medically ineligible can continue working in healthcare facilities. . . . While excusing some workers from vaccination for medical reasons may protect Maine's "healthcare capacity" by making more workers available, authorizing a religious exemption plausibly could have a similar effect.

Lowe, 68 F.4th at 715. And the First Circuit specifically rejected the argument that medical exemptions are different than religious exemptions because the former aligns with the government's interest in protecting public health while the latter does not:

> [A] version of the Mandate that did not include a medical exemption could do an even better job of serving the State's asserted public health goals, and that the inclusion of the medical exemption undermines the State's interests in the same way that a religious exemption would by introducing unvaccinated individuals into healthcare facilities.

Id. For the same reasons, even a general interest in "public health" fails to distinguish the medical exemption from religious exemptions here. The record reflects that medical and religious exemptions are similarly situated. The medically exempt employee undermined the interests in stopping the spread of COVID-19 and was required to take precautions accordingly. Appx190–191, 196–197, 219–221, 309–311. And the DAO received a comparable number of medical and religious exemption requests: fewer than ten each in an office of over 600. Appx385, 484, 478.

Finally, Defendants confuse the significance of the medical exemption. *See* Appellee's Br. at 23. Where any unvaccinated individual threatens the government's interest, allowing medical exemptions while refusing religious exemptions reflects an improper "value judgment that secular (*i.e.,* medical) motivations . . . are important enough to overcome its general interest . . . but that religious motivations are not." *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999). This is true whether medical exemptions are subjectively or objectively determined, and it means that the Mandate is not neutral and generally applicable. *See id*.

b. The Mandate Is Not Generally Applicable Because Unionized DAO Employees Received Exemptions.

The Mandate is also not generally applicable because ten unionized DAO employees received exemptions. Unionized and nonunionized DAO employees are employees of the same employer (the City), *see* Appx088, 161, work in the same office (the DAO) fulfilling similar functions, Appx085–086, 221–222, 344, and pose the same risk of transmitting COVID-19, Appx219–222. Thus, in every way pertinent to free exercise analysis, unionized DAO employees are comparable to nonunionized DAO employees. *See Tandon*, 141 S. Ct. at 1296–97 (noting that comparability turns on actual risk). Defendants assert that Krasner's more limited (though not nonexistent)[7] authority over unionized employees permitted him to treat nonunionized religious objectors less favorably than similarly situated unionized religious objectors were treated. However, this approach is not consistent with the Free Exercise Clause and would permit arbitrary employment classifications to justify constitutional abuses.

The concept of general applicability means that religious objectors must receive the same treatment as the best-treated comparable group. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (noting that neutrality and general applicability under the Free Exercise Clause capture an equal

[7] Defendant Krasner appointed unionized DAO employees to their positions and exercised significant authority over them. Appx085–088, 135–136.

protection concept); *Roman Cath. Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring) (same); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1234 (9th Cir. 2020) ("In assessing neutrality and general applicability, courts evaluate both the text of the challenged law *as well as the effect in its real operation.*" (emphasis added, internal quotes and alterations omitted) (quoting *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015)). As explained above, it is undisputed that unionized and nonunionized DAO employees were treated unequally. "When the constitutional violation is unequal treatment," the cure comes "either by extending the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020) (considering remedies for a successful Free Speech claim). So, the government can remedy unequal treatment either by leveling up or leveling down: reducing the treatment of the best-treated group to the same treatment as the religious objectors or raising the treatment of religious objectors to that of the best-treated group. *See id.*; *Carson*, 142 S. Ct. at 2000 (noting that Maine could remedy the free exercise violation by allowing religious schools to participate in the school choice program or by eliminating the school choice program).

Defendants' argument with respect to Krasner's reduced authority over the unionized employees demonstrates only that Krasner had one avenue, rather than two, to resolve the unequal treatment between unionized and nonunionized

employees. Just because Krasner lacked authority to implement his preference of leveling down by removing the union members' religious accommodations does not mean that he could refuse to "level up" by providing a religious exemption to nonunionized employees. Because unionized employees worked in the DAO and were similarly situated to nonunionized employees in every way relevant to the risk of spreading COVID-19, Defendant Krasner could not ignore their presence when formulating his policy.

Defendants' assertion that arbitrary employment classifications isolate the protection of fundamental rights within each employment category, even when there is no actual distinction between them relevant to those fundamental rights, would create a constitutional loophole permitting governments to freely discriminate by simply manipulating employee organizational charts. But general applicability analysis cannot be pigeonholed by relying on mere formalistic distinctions to elide functional comparability. *See Carson*, 142 S. Ct. at 2000 (application of the Free Exercise Clause "turn[s] on the substance of free exercise protections, not on the presence or absence of magic words"); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 105 (1996) (government-imposed burdens that impact fundamental rights cannot "visit[] different consequences on two categories of persons" (quotation omitted)). Otherwise, with careful authority delegation and employee classification, an agency

could intentionally discriminate against otherwise similarly situated employees with little chance of recourse. In that world, "generally applicable" has no meaning.

The unpublished case Defendants cite, *Denver Bible Church v. Polis*, No. 20–1391, 2022 WL 200661 (10th Cir. Jan. 24, 2022), is not instructive. That case rejected a facial challenge to the Colorado law that authorized the governor to declare a disaster and issue executive orders related to the COVID-19 pandemic. *Id.* at *7. The plaintiffs in that case essentially argued that the law authorizing the governor to issue pandemic-related executive orders was unconstitutional because it authorized only certain kinds of executive orders. *Id.* at *8–*9. But the specific orders issued pursuant to that law contained religious exemptions and were not at issue in the litigation. *Id.* at *5. This case might be analogous if Plaintiff were challenging Defendant Krasner's authority to issue *any* COVID-19 policies because he has authority over the DAO rather than the entire City. But Plaintiff isn't challenging Defendant's authority to adopt policies; Plaintiff is challenging Defendant's failure to ensure that similarly situated DAO employees received the equal treatment the Free Exercise Clause requires.

For these reasons, unionized DAO employees are proper comparators that make the DAO's Mandate not generally applicable.

3. The Mandate Is Not Neutral.

Finally, the Mandate is not neutral. The Free Exercise Clause "forbids even subtle departures from neutrality," including regulations resulting from attitudes that "devalue[]" religious beliefs.[8] *Lukumi*, 508 U.S. at 534, 537. For example, deeming religious practices unnecessary or nonessential is a form of religious hostility. *See id.* at 537; *Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (10th Cir. 2002). Thus, paternalistic condescension towards those holding certain religious beliefs is as constitutionally problematic as outright animus.

The record reflects that Defendant Krasner simply did not take religious objections to vaccination seriously, and he viewed religious objectors with skepticism. For example, Krasner suggested without any justification that religious objectors would be less likely to comply with masking requirements or other accommodations, while the medically exempt would be more likely to comply. Appx352–355; *see Tandon*, 141 S. Ct. at 1297 ("The State cannot assume the worst when people go to worship but assume the best when people go to work." (quotation omitted)). Defendants minimize as "out of context" Defendant Krasner's discussion of how he thought religious objections to vaccination are "unscientific" and selfish,

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[8] As explained *supra*, cases need not involve vaccine mandates to provide binding legal authority.

see Appellee's Br. at 31, so the full statement is below. When asked why he did not agree with City's accommodation policy, Defendant Krasner responded:

> Because it presents yet another public safety health obstacle in the middle of an international pandemic within the walls of my office because it increases the urgency of as many other people in the office as possible being fully vaccinated. I don't agree with it. I think that it is very unfortunate that nationally, I'm not, I don't want to throw any rocks at the city for this, they are dealing with a lot, but it is true across the country that there are some people who are just flat-out unscientific and there are some people who are not as concerned as they really should be for their fellow human beings and, so, we find ourselves in a situation where we have, basically, people who are denying science and are endangering others and it's wrong. One of the things you may not know from my career is that I have sat in courtrooms where parents refused to provide medical care for their children and whose children then died, have been convicted of crimes and sent to jail for that and the law thinks that that's right and the law thinks that that's correct. Their basis for denying medical care in some instances to more than one child after another who died, one child after another, was their religious beliefs. Rights are not completely unlimited. They can't be completely unlimited and those children lost their lives because their parents were utterly unscientific in what they were doing. Government has a role and that role is to respect, observe and elevate rights, but it is not to do so in a way that annihilates the population and kills people.

Appx348–350. Defendants advocate a generous interpretation of his statements, focusing on the only arguably-neutral sentence in the paragraph, but the full context of Defendant Krasner's statement establishes the paternalistic devaluing of religious beliefs that the Free Exercise Clause forbids.

III. The DAO's Denial of Spivack's Religious Accommodation or Exemption Request Fails Strict Scrutiny.

Defendants fail to carry their burden of meeting strict scrutiny by demonstrating that terminating Spivack's employment serves a compelling interest using narrowly tailored means. *Tandon*, 141 S. Ct. at 1296; *Kennedy*, 142 S. Ct. at 2421–22.

First, the bulk of Defendants' argument defends the general policy choice of a vaccine mandate over other options. *See* Appellee's Br. at 33–34. This argument might be suited to a rational basis standard, but it does not suffice for strict scrutiny, which requires a particularized showing towards the Plaintiff, not a general interest in Defendant's choice of policy.[9] *Fulton*, 141 S. Ct. at 1881; *see Ramirez v. Collier*, 142 S. Ct. 1264, 1279–80 (2022).

Second, Defendants try to characterize the risk of spreading COVID-19 as something unique to junior trial attorneys, *see* Appellee's Br. at 34–35 (noting indoor office work, work in the courtroom, and the handling of paper files), but these functions are part of "many" DAO employees' work, not just junior trial attorneys. Appx487 (asserting "the unique nature of the DAO's work, which requires many of its employees to work indoor and interface with the public on a regular basis and

[9] It is also worth noting that the Plaintiff is not challenging a vaccine mandate policy generally; she is challenging the DAO's refusal to accommodate her religious beliefs.

also requires the constant use and transfer of paper files"); *see* Appx085–086, 221–222, 289, 344, 479 (generally describing the functions of unionized employees and the medically exempt attorney as involving indoor, in-person office work; work in a courtroom; and handling paper files). In addition, Defendant Krasner did not distinguish Spivack's exemption request from the medically exempt attorney's request because they performed different functions; he only distinguished them because of the reason they requested an exemption. *See* Appx220–222 (noting that the only difference in providing accommodations between the medical and religious exemption requests was the belief that granting religious exemption requests was not legally required).

As much as Defendants would like to wish away the relevance of the exempt union members and the medically exempt, their presence is fatal to Defendants' argument, both as to compelling interest and narrow tailoring. Defendant Krasner's behavior towards exempted unionized DAO employees undermines his asserted compelling interest. Although the unionized employees posed a risk to Defendant Krasner's asserted interests, he failed to take the steps within his authority to ensure they mitigated the risk of spreading COVID-19. He had the authority and opportunity to address with the City any concerns he had about the risk of exempted unionized employees spreading COVID-19. Appx143. He could have requested additional precautions or enforced the precautions contained in the union arbitration

agreements, such as routine testing. Appx133–140, 143, 146–149, 343–350. He did none of these things. *See* Appx138, 143, 345. If Defendant Krasner's asserted interest is indeed compelling, he should have taken measures available to him to contain the risk. Moreover, if Defendant Krasner believed Spivack posed so dire a risk, one would expect him to move more quickly to remove her from the workplace rather than allow her to work for over six months in person with a masking accommodation while he made up his mind. *See* Appx043, 169–170, 193, 206–207, 385, 478. As the Court in *Lukumi* noted, "[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (internal quotation marks omitted) (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in judgment) (citation omitted) (alteration in original)). And Defendants point to no evidence that her lack of vaccination during that time caused an outbreak of COVID-19 or undermined the DAO's operational efficiency. For all these reasons, Defendant Krasner cannot show that refusing Plaintiff an exemption accomplishes a compelling interest. *See Lukumi*, 508 U.S. at 547.

Next, terminating Spivack's employment was not narrowly tailored to the government's interest. "[S]o long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881. If

masking and enhanced cleaning protocols satisfactorily addressed the risk of the medically exempt employee spreading COVID-19, there is no reason why such measures would not work for the Plaintiff. *See id.* at 368 ("[T]he Department failed to show . . . why the vast majority of States and the Federal Government permit [lesser restrictive methods], either for any reason or for religious reasons, but it cannot."); *Tandon*, 141 S. Ct. at 1296. The over six months Plaintiff worked while her accommodation request was pending also reinforces that masking worked as a more narrowly tailored alternative to denying her an accommodation. *See* Appx052–053, 066. Krasner also admitted that remote work would have allayed his concerns. Appx301. Despite Defendants' contention to the contrary, Spivack followed up with her supervisors after her exemption request was refused to see if any accommodation, including a remote position, could be made to allow her to remain employed at the DAO. Appx095–096, 107–108, 368–369, 495. The response she received was unequivocal: no accommodations of any kind would be made. Appx369, 495–496. Defendants' only response is to suggest that she did not really mean it when she asked for remote options. But that she ultimately decided not to accept a settlement offer of reinstatement after being fired and seeking other job opportunities is not evidence that she would have refused remote work, as she

requested, had it been granted at the time.[10] *See Lohman v. Duryea Borough*, 574 F.3d 163, 167 (3d Cir. 2009) (noting that under Federal Rule of Evidence 408, "evidence of settlement negotiations is inadmissible to prove the merit or lack of merit of a claim").

Finally, the record also reflects that the DAO had other steps available (and took them) to address the operational concerns about a COVID-19 spike, including allowing assistant district attorneys to work a hybrid remote model. Appx121–122, 484 ("[M]ost of the DAO's approximately 300 assistant district attorneys and the non-union DAO employees worked remotely from March 2020 until the vaccine became widely available in spring 2021.").

In short, the record reflects many feasible accommodation options short of terminating Spivack's employment. Accordingly, Defendants cannot show that terminating Spivack's employment survives strict scrutiny.

CONCLUSION

For the foregoing reasons, the Court should REVERSE the District Court's denial of summary judgment to Plaintiff-Appellant, REVERSE the District Court's

[10] To the extent a factual dispute exists regarding the circumstances of the settlement offer and Spivack's decision to decline it, we agree that this Court need not resolve that dispute. Even accepting Defendants' characterization of the timeline surrounding the post-litigation settlement offer, all it demonstrates is that Plaintiff received Defendant Krasner's settlement offer roughly contemporaneously with the offer for her now-current job. That is not evidence that she would have refused a remote position when she was still employed at the DAO.

grant of summary judgment to Defendants-Appellees, and REMAND this case to the District Court for entry of summary judgment in favor of Plaintiff-Appellant and for such further proceedings as are warranted.

Dated: July 31, 2023

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, the undersigned, hereby certify the following:

1. That I am a member of the Bar or the United States Court of Appeals for the Third Circuit.

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,120 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

4. That the text of the electronic and paper versions of the foregoing brief are identical.

5. That a virus check was performed on this brief using Windows Defender 1.393.508.0, and that no virus was indicated.

6. That, on July 31, 2023, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered users.

Dated: July 31, 2023

/s/ Lea E. Patterson
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