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,
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

OPENING BRIEF FOR PLAINTIFF-APPELLANT AND JOINT APPENDIX VOLUME I OF II (Appx001–025)

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant filed this lawsuit under 42 U.S.C. § 1983 on April 12, 2022, claiming that Defendants-Appellees, a municipal government and an official of a municipal government, violated Plaintiff-Appellant's rights under the First Amendment's Free Exercise Clause. The district court had subject-matter jurisdiction over the claims under 28 U.S.C. § 1331 because this is a civil action arising under the laws and Constitution of the United States; under 28 U.S.C. § 2201 because Plaintiff-Appellant is seeking a declaration of the rights of the parties; and under 28 U.S.C. § 1343(a)(4) because Plaintiff-Appellant is seeking to recover damages under 42 U.S.C. § 1983, which is an Act of Congress that provides for the protection of civil rights.

On January 4, 2023, the district court denied Plaintiff-Appellant's motion for summary judgment and granted summary judgment and entered final judgment in favor of Defendants-Appellees. Appx025. Plaintiff timely filed a notice of appeal on February 1, 2023. Appx001. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred in holding that the Philadelphia District Attorney's Office's COVID-19 vaccine mandate was a neutral rule of general applicability. (Raised at Pl.'s Mot. Summ. J. 13–23, ECF No. 33; opposed

at Def. Krasner's Mem. of Law in Opp'n To Pl. Spivack's Mot. for Summ. J. 11–19, ECF No. 38; ruled on at Appx011–018).

2. Whether the district court erred in holding that terminating Plaintiff-Appellant's employment was narrowly tailored to further a compelling government interest. (Raised at Pl.'s Mot. Summ. J. 23–33, ECF No. 33; opposed at Def. Krasner's Mem. of Law in Opp'n To Pl. Spivack's Mot. for Summ. J. 19–21, ECF No. 38; ruled on at Appx019–022).

STATEMENT ON RELATED CASES

This case has not previously been before this Court, and Plaintiff-Appellant is unaware of any other case or proceeding that is in any way related, completed, pending, or about to be presented, before this Court or any other court or agency, state or federal.

STATEMENT OF THE CASE

In April 2021, Plaintiff-Appellant Rachel Spivack, a third-year law student looking forward to beginning a career as a trial prosecutor, accepted an employment offer to serve as an assistant district attorney at the Philadelphia District Attorney's Office ("DAO" or the "Office"). Appx039–042, 375.

Defendant-Appellee Lawrence Krasner is District Attorney of Philadelphia, an independently elected office. Appx161, 483. DAO employees are employees of Defendant-Appellee City of Philadelphia ("City"), but Krasner possesses broad

discretion to adopt employment policies and make managerial decisions. Appx161, 076, 235. Krasner appoints all DAO staff, who comprise both unionized and non-unionized employees. Appx085–087, 136.

The DAO adopted various polices related to COVID-19 over the course of the pandemic, *see, e.g.*, Appx047–050, 508–516, which were generally proposed by the DAO COVID-19 Safety Committee, approved by Krasner, and then distributed to DAO employees via email. Appx155–157, 234–235, 267. The DAO's September 2021 COVID-19 vaccination policy (the "Policy"), Appx051–053, was promulgated in this way and paralleled the City's vaccination policy. *See* Appx045, 164, 234–235, 400–403. The Policy allowed for religious, medical, and disability exemptions or accommodations, indicated that requests would be individually assessed and collaboratively discussed on a "case-by-case basis," and instructed employees with pending exemption or accommodation requests to double mask. Appx052–053.

On September 3, 2021, ten days before she began her employment, Spivack received an email informing her of the Policy and requesting that she either submit proof of vaccination or an exemption or accommodation request. Appx043, 045, 051–053, 362. As a devout Orthodox Jew, Spivack's religious beliefs prohibit her from receiving any vaccines, including the COVID-19 vaccine, and she previously received religious exemptions from school vaccination requirements. Appx054–057, 060–065. She submitted a request for religious exemption or accommodation to the

DAO along with a letter from her rabbi. Appx054–057, 362. She began her employment as scheduled on September 13, complied with the mask requirement, and worked for three months without response or incident. Appx043, 054, 169–170, 193.

On December 8, 2021, Spivack received an email requiring her to submit a form to support her religious exemption or accommodation request. Appx058, 297. The form required detailed explanation and substantiation of her religious beliefs, in addition to the letter she already submitted. *See* Appx060–064. She submitted the form and heard nothing for almost three more months. *Compare* Appx060 *with* Appx066.

In January 2022, Krasner began to review the exemption or accommodation requests, including the eight religious exemption or accommodation requests. Appx280, 478. He possessed and asserted "sole discretion" to grant any exemption request or make any accommodation, notwithstanding written policy or unwritten practice. Appx105, 184, 187, 200, 287–88, 299, 301. Krasner granted one medical exemption request and required that employee to comply with masking and cleaning accommodations to mitigate the risk she presented of spreading COVID-19. Appx190–191, 219–220, 289, 479.

Krasner denied all religious exemption or accommodation requests, because he believed he was not legally required to grant them. Appx173, 220–221, 310–311.

Krasner did not consider the relative risk of spreading COVID-19 that employees with religious exemptions or accommodations would pose when compared with other exempt or accommodated employees. Appx220–223, 309–311. Nor did Krasner consider whether to offer the religious objectors similar accommodations to those the employee with the medical accommodation received, even though such accommodations were feasible for the DAO to implement. Appx190–191, 221–223, 310–311, 316–317, 322. Krasner also did not consider the effectiveness of other policies, such as the City's, in making his decision. Appx310–311, 316–317. Despite Krasner's practice of denying all religious exemption or accommodations requests ("Practice"), he never rescinded or updated the Policy, which provided for religious exemptions and accommodations. Appx103–104, 176–178, 199, 274–275.

The Policy did not apply to unionized DAO employees, whose collective bargaining agreements provided for religious exemptions. Appx066, 080, 221–223, 252–253, 417, 422, 432, 477. As a result, ten unionized DAO employees received exemptions (nine religious and one medical) from the City. Appx206–211, 385, 478. Unionized staff worked together in the DAO's office with non-unionized employees, regularly interacting with other DAO staff, court personnel, and the public. Appx085–086, 221–222, 344. Although Krasner had the discretion to require the unionized, exempted employees to mask and test, he did not do so. Appx133–134, 135–140, 143, 146–149, 418, 423–424, 434. He also did not contact the City to

discuss any concerns associated with members of the DAO's unionized staff receiving exemptions. Appx143.

On March 7, 2022, DAO Deputy Chief of Staff Cecilia Madden called Spivack into a meeting and perfunctorily informed her without explanation or opportunity for discussion that the DAO denied her religious exemption or accommodation request. Appx094–095, 152, 201–203, 366. Madden also gave Spivack a form denial letter, which concluded without explanation that her religious exemption or accommodation request was not "credible" and claimed that providing her with a religious exemption or accommodation posed an "undue hardship," even though the Mandate did not apply to unionized employees and "reasonable accommodations" were available to others. Appx066–067. ("Mandate" refers to the DAO's requirement that employees be vaccinated against COVID-19, which the Policy and Practice collectively compose.) Confused, Spivack spoke with her supervisor and First Assistant District Attorney Robert Listenbee to ask if any accommodation, such as remote work, could be made to allow her to continue her employment without being forced to violate her religious beliefs. Appx095–096, 107–108, 368–369, 495. The DAO refused all accommodations.[1] Appx369, 495–

[1] After Spivack was fired and filed the present lawsuit, Krasner made a settlement offer to Spivack offering for her to work remotely as an appellate attorney in the Law Division, rather than the trial attorney position she requested and was slated to receive. Appx102, 107, 306, 375, 503. Krasner emphasized that he offered this

496. When she refused to violate her religious beliefs, the DAO placed Spivack on unpaid administrative leave and then terminated her employment on April 8, 2022. Appx068–069, 071.

Spivack filed suit on April 12, 2022, challenging her termination under the U.S. Constitution's Free Exercise Clause and the Pennsylvania Religious Freedom Protection Act. Appx033–036. After cross-motions for summary judgment, the District Court granted summary judgment to the Defendants on January 4, 2023. Appx025. Spivack timely appealed her Free Exercise Clause claim. Appx001.

SUMMARY OF THE ARGUMENT

The First Amendment's Free Exercise Clause requires that any government action that impacts religious practice be neutral towards religion and generally applicable. When the government action is not, the action is subject to strict scrutiny and will not be upheld unless the government demonstrates the action is narrowly tailored to further a compelling interest. Strict scrutiny also applies whenever a government official possesses discretion to grant exemptions.

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purely as a way of settling the litigation, not as a religious exemption or accommodation. Appx306. At the time it was made, this settlement offer was unacceptable because Spivack had already left the DAO's office and moved away from Philadelphia to work as a trial attorney. *See* Appx365, 497. While Spivack was employed at the DAO, she sought accommodations like this and was denied. Appx095–096, 107–108, 495–496.

The DAO requires its employees to be vaccinated, unless the employee is granted an exemption or accommodation or is a member of a union. Exemptions and accommodations are granted at Krasner's sole discretion. He granted one: a medical exemption. Of the DAO employees who are members of a union, ten are unvaccinated. These eleven unvaccinated employees work side-by-side with the vaccinated DAO employees and are not distinguishable in any way that impacts the spread of COVID-19.

Spivack sought a religious exemption or accommodation from the Mandate. Six months after she made her request, Spivack's request was denied when Krasner decided to summarily deny all religious exemption or accommodation requests. Krasner terminated Spivack's employment as a result, violating the Free Exercise Clause.

The Mandate is not neutral or generally applicable. Krasner possesses and asserts unilateral discretion to grant an exemption or accommodation for any reason. This discretion to provide individual exemptions alone renders the Mandate not generally applicable. But the Mandate is also not generally applicable because Krasner treated Spivack more harshly than similarly situated employees, who had secular reasons for being unvaccinated. Both union membership and medical exemption implicate Krasner's interest in reducing the spread of COVID-19 in the DAO to the same extent a religious exemption would. Moreover, the Mandate is not

neutral, because Krasner decided that religious reasons for being unvaccinated were simply not as important as secular reasons and did not need to be accommodated. As a result, the Mandate must satisfy strict scrutiny.

To pass strict scrutiny, Krasner must demonstrate that requiring Spivack to be vaccinated against her religious convictions furthered a compelling government interest by narrowly tailored means. He cannot meet that burden. Compelling interests are interests of the "highest order." Where the government pursues its interests underinclusively, its interests are not compelling. While reducing the spread of COVID-19 may be an important interest, Krasner's erratic enforcement of the Mandate demonstrates that it is not truly compelling. He did not require exempted union members to comply with any restrictions, even though he could have. And he allowed Spivack herself to work without being vaccinated for six months while her request was considered.

However, even if Krasner's interests were compelling, he cannot show that refusing to accommodate Spivack's religious beliefs was narrowly tailored. Narrow tailoring requires that if there were any alternative means of accomplishing the government's goal that was less burdensome on Spivack's religious beliefs, the termination of her employment was unconstitutional. Alternatives abound. Krasner could have accommodated Spivack in the same way he accommodated the medically exempt employee, by requiring masking and cleaning. And he admitted that he could

have made accommodations for her, showing that a more narrowly tailored approach was available other than termination. Instead, Krasner refused to accommodate Spivack because he simply felt he did not have to. The Free Exercise Clause requires more. The decision of the District Court to grant summary judgment to Defendants-Appellees should be reversed.

STANDARD OF REVIEW

Because this appeal comes on cross-motions for summary judgment, Appx025, review is *de novo. Bruni v. City of Pittsburgh*, 941 F.3d 73, 82 (3d Cir. 2019) (A court "review[s] a district court's grant or denial of summary judgment de novo."); *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009) ("On an appeal from a grant or denial of summary judgment, our review is plenary and we apply the same test the district court should have utilized initially."). "Summary judgment is appropriate only when the record 'shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)). "A fact is material if—taken as true—it would affect the outcome of the case under governing law. And a factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 969 F.3d 120, 125 (3d Cir. 2020) (citations and internal quotation marks omitted). The evidence is viewed in the light most favorable to the non-moving party. *Id.* Summary judgment rules apply

with equal force to cross-motions for summary judgment. *Lawrence v. City of Phila.*, 527 F.3d 299, 310 (3d Cir. 2008).

ARGUMENT

"Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69 (2020) (Gorsuch, J., concurring) (citing *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 546 (1993)); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421–22 (2022) (The Free Exercise Clause prohibits government from burdening a plaintiff's "sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable' . . . unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.").[2] A rule that "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way" is not generally applicable, nor is a rule that "invites the government to consider the particular reasons for a person's conduct by providing a mechanism for

[2] The Defendants-Appellees do not challenge the sincerity of Spivack's religious beliefs. Appx006.

individualized exemptions." *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021) (internal quotation marks and alterations omitted). "A government policy will not qualify as neutral if it is 'specifically directed at religious practice,'" such as "if it discriminates on its face, or if a religious exercise is otherwise its object." *Kennedy*, 142 S. Ct. at 2422 (quoting *Emp't Div., Dep't of Hum. Res. of Ore. v. Smith*, 494 U.S. 872, 878 (1990) (ellipses omitted); *Lukumi*, 508 U.S. at 533 (alterations and quotation marks omitted)). Failing either neutrality or general applicability triggers strict scrutiny. *Id*. Here, the DAO's vaccination mandate is neither neutral nor generally applicable and fails strict scrutiny review.

I. The District Attorney's Office's COVID-19 Vaccination Mandate Is Not Neutral or Generally Applicable Under the Free Exercise Clause.

The DAO Mandate is neither neutral nor generally applicable for four independent reasons: 1) Krasner possessed absolute discretion in granting exemptions to the Mandate; 2) the Mandate did not apply to unionized DAO employees; 3) Krasner granted a medical exemption to the Mandate; 4) Krasner's decision to deny all religious exemption or accommodation requests derives from religious hostility. Any one of these is sufficient to trigger strict scrutiny.

A. The District Attorney's Office's COVID-19 Vaccination Mandate Is Not Generally Appliable Because It Is Subject to Discretionary Exemptions.

The Mandate is not generally applicable because "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for

individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (internal quotation marks and alterations omitted) (quoting *Smith*, 494 U.S. at 884). In *Fulton,* Philadelphia prohibited sexual orientation discrimination among City-contracting adoption and foster care providers. Philadelphia provided a mechanism, however, by which the Commissioner could, on his own discretion, grant an exception to this requirement. *Id.* at 1878. Philadelphia argued that the existence of a possible discretionary exemption was irrelevant because the Commissioner had never used that mechanism to grant an exemption and had no intention of ever using that mechanism to grant an exemption to the prohibition on sexual orientation discrimination. *Id* at 1878–79. The Supreme Court rejected this argument, noting that it "misapprehends the issue." *Id.* at 1879. The Supreme Court explained:

> The creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless whether any exceptions have been given, because it "invite[s]" the government to decide which reasons for not complying with the policy are worthy of solicitude, *Smith*, 494 U.S. at 884, 110 S. Ct. 1595—here, at the Commissioner's "sole discretion."

Id. (alteration in original).

Krasner, similarly, possessed and asserted "sole discretion" to exempt or accommodate DAO employees from the Mandate for any reason. Appx105, 184–187, 287–288, 299, 301. He employed no objectively defined criteria, deciding each request case-by-case based on whether he generally felt it justified. Appx184–187, 287–289, 297. He unilaterally decided to grant a medical exemption request.

Appx221–223, 287–289. Krasner also exercised his sole discretion to deny all religious exemption requests, notwithstanding the written Policy that provided for them. Appx051–052, 103–105, 200, 221–223, 286–287, 309–310. And he acknowledged he had the authority to grant exceptions outside the categories he unilaterally created:

> If [Spivack] had requested to be, to work remotely so she would not because of her decision not to vaccinate, she would not be placing others in significant danger, then despite the inconvenience and despite the existence of some danger due to the necessity of transferring documents from time to time, that is something that would have been seriously considered in retrospect; that is something that we would have granted[.]

Appx301. Because Krasner held discretion to grant exemptions from the Mandate (as, indeed, he did in one situation), the Mandate is not generally applicable and is subject to strict scrutiny. *Cf. City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).[3]

[3] "It is apparent that the face of the ordinance itself contains no explicit limits on the mayor's discretion. Indeed, nothing in the law as written requires the mayor to do more than make the statement 'it is not in the public interest' when denying a permit application. . . . To allow these illusory 'constraints' to constitute the standards necessary to bound a licensor's discretion renders the guarantee against censorship little more than a high-sounding ideal. The city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows." (citations omitted).

The District Court, confusingly, construes this argument as "attack[ing] a straw man": the unrepealed Policy that accepted requests for religious, medical, and disability exemptions or accommodations. The District Court considered Krasner's Practice of unilaterally denying all religious exemption or accommodation requests to be a new policy under which there could be no discretionary exemptions. Appx017. ("As I have discussed, however, the Policy's final version [that is, Krasner's Practice of denying all religious exemption or accommodation requests]—the end result of a gradual process involving Krasner's review of the applicable law and guided by Krasner's concern for public health—provides only a very limited medical exemption.").[4] But whether Krasner's Practice constitutes a second, superseding policy is irrelevant to whether he possessed the discretion to grant exemptions for any reason.[5] In fact, Krasner acknowledges being willing and able to make religious accommodations if the requestor proposed an accommodation to his liking. Appx301. Possessing such unilateral discretion, whether he ultimately used it to deny all the religious exemption or accommodation requests or not, *exemplifies* the individualized exemption mechanism that *Fulton* held renders a policy not generally applicable. It does not matter *whether* or *how* Krasner actually used that

[4] Put another way, the District Court reasoned that the outcome of Krasner's discretion makes the exercise of his discretion not discretionary.

[5] If Krasner's Practice is indeed a superseding policy, that policy's only content is that he has unilateral discretion. This cannot cure the Mandate's *Fulton* problem.

discretionary exemption power—in *Fulton* the Commissioner never used his authority to issue an exception and had no intention of ever doing so—what matters is that the authority *exists. Fulton*, 141 S. Ct. at 1878–79; *see also United States v. Stevens*, 559 U.S. 460, 480 (2010) ("But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."). Indeed, as this Court held in *Blackhawk v. Pennsylvania*,

> [A] system that permits individualized, discretionary exemptions provides an *opportunity* for the decision maker to decide that secular motivations are more important than religious motivations and thus to give disparate treatment to cases that are otherwise comparable. If anything . . . this concern is only further implicated when the government does not merely create a mechanism for individualized exemptions, but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection. . . . [A] law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the *opportunity* for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.

381 F.3d 202, 208–09 (3d Cir. 2004) (citations and quotation marks omitted, emphasis added) (citing *Lukumi*, 508 U.S. at 537; *Smith*, 494 U.S. at 884; and *Fraternal Ord. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364–65 (3d Cir. 1999)); *see also Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002). In other words, it is the *opportunity* for abuse that makes the Mandate not generally applicable and therefore subject to strict scrutiny.

The District Court attempts to avoid *Blackhawk* by pointing to the Second Circuit's decision in *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 288 (2d Cir. 2021). Appx017. But the portion of *We the Patriots* the District Court cited with respect to individualized exemptions merely stands for the mundane proposition that an express exemption for an objectively defined category of person is not an individualized exemption. That is not this case. Krasner acknowledges that he retained discretion to grant exemptions or accommodations for any reason, but he used that discretion to summarily deny all religious exemption or accommodation requests. Appx182–187, 301. Krasner's unilateral power to approve or deny accommodation or exemption requests is the very definition of an individualized, discretionary exemption process.

B. The District Attorney's Office's COVID-19 Vaccination Mandate Is Not Generally Applicable Because It Treats Religious Objectors Worse Than Other, Similarly Situated Employees.

Secondly, the Mandate is not generally applicable because it treats religious objectors worse than other similarly situated employees. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. The Supreme Court has repeatedly held that government action "lacks 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. This Court recognized the stringency of the Supreme Court's test in *Clark v. Governor of New Jersey*:

> In *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. at 63, and *Tandon v. Newsom*, 141 S. Ct. at 1294, the Court emphasized that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise," *Tandon,* 141 S. Ct. at 1296. This rule provided state officials with crucial guidance in shaping any future COVID restrictions, instructing them that such regulations must be neutral and generally applicable in all but the narrowest of circumstances.

53 F.4th 769, 780 (3d Cir. 2022) (emphasis in original). This means that the government must treat actions taken for religious reasons at least as well as it treats those actions when taken for secular reasons. *See Roman Cath. Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) ("[O]nce a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class.").

The District Court concluded that the Mandate was generally applicable by inaccurately describing the Mandate as "quite simple: all non-unionized DAO employees were required to be vaccinated." Appx006. But to arrive at this framing, the District Court disregarded eleven other DAO employees who, for secular reasons, were permitted to continue working in the DAO without being vaccinated: one non-unionized employee whose medical exemption or accommodation request

Krasner approved and ten other DAO employees who were exempted because they belonged to a union. Appx206–211, 221–223, 385, 478.

The medically exempt non-union employee and the ten exempt union members, nine of whom received religious exemptions, were direct comparators to Spivack, working in the same office and regularly interacting with other DAO staff, court personnel, and the public. Appx086–087, 220–222, 344. As the Supreme Court explained in *Tandon*, "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. . . . Comparability is concerned with the risks various activities pose, not the reasons why [the activities are done.]" 141 S. Ct. 1294, 1297 (2021) (per curiam) (citations omitted); *see Roman Cath. Diocese*, 141 S. Ct. at 67 (considering how the secular activities treated more favorably than religious worship "have contributed to the spread of COVID–19" or "could" have presented similar risks). Krasner asserted "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." Appx015, 116–120, 240–243. Mem. of Law in Supp. of Mot. for Summ. J. by Def. Lawrence Krasner 15, ECF No. 34-2. Each of these interests focuses on the spread and operational impact of COVID-19 within the DAO: the risk of COVID-19-related staffing shortages or DAO employees

transmitting COVID-19 to others. Appx116–120, 240–243.[6] A DAO employee who is unvaccinated for any reason poses the same risk to each of these interests, as Krasner and his staff acknowledged. Appx190–191, 219, 333. Spivack was fired for her religious objection to being vaccinated, while these eleven other DAO employees, for secular reasons, were permitted to continue working in the DAO without being vaccinated. Appx206–211, 385, 478. The presence of either one of these two categories of exempted employees renders the Mandate not generally applicable and, thus, subject to strict scrutiny. *See Tandon*, 141 S. Ct. at 1296.

1. The District Attorney's Office's Vaccination Mandate Does Not Apply to Unionized Employees

The District Court recasts the Mandate as generally applicable, ignoring a whole category of comparators because of an otherwise irrelevant employment classification. This misunderstands how free exercise analysis identifies secular comparators. Whether employees are comparators depends on an assessment of their impact on the DAO's interest in reducing the spread of COVID-19. *See Tandon*, 141 S. Ct. at 1296–97. Union membership does not grant COVID-19 immunity,

[6] "I have a chief in my office who lives with her ninety-five-year-old mother. I would like her to go home and not spread a deadly disease to her ninety-five-year-old mother. I have a chief of staff who has a young child, too young to be vaccinated even now. . . . I'm trying to make sure that he can go home to his family and his wife does not get Covid from this and his child, who's too young to be vaccinated, does not get Covid from this." Appx242.

Appx219, 222, and the Free Exercise Clause does not allow the Court to ignore these employees' impact on the government's interest.

Artificially redefining the pool of comparators to categorically exclude unionized employees is the exact form of semantic gerrymandering that the Supreme Court warned against in *Carson v. Makin. Carson* dealt with a Maine program providing tuition assistance for rural families to send their children to the school of their choice, so long as the schools were not religious. *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1993–94 (2022). When parents challenged this religious exclusion under the Free Exercise Clause, Maine attempted to redefine its program from providing "education" to instead providing a "secular education." *Id.* at 1999. The Supreme Court rejected this attempt to redefine the program's scope in a way that artificially excluded religious participation:

> Saying that Maine offers a benefit limited to private secular education is just another way of saying that Maine does not extend tuition assistance payments to parents who choose to educate their children at religious schools. But "the definition of a particular program can always be manipulated to subsume the challenged condition," and to allow States to "recast a condition on funding" in this manner would be to see "the First Amendment . . . reduced to a simple semantic exercise." *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 215, 133 S.Ct. 2321, 186 L.Ed.2d 398 (2013) (quoting *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001)); see also *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 696, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (Harlan, J., concurring) ("The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.") Maine's formulation does not answer the question in this case; it simply restates it.

Id. at 1999–2000 (ellipses in original); *see also id.* at 2000 ("But our holding in *Espinoza* [*v. Montana Dep't of Revenue*, 140 S. Ct. 2246 (2020),] turned on the substance of free exercise protections, not on the presence or absence of magic words. That holding applies fully whether the prohibited discrimination is in an express provision like [a statute] or in a party's reconceptualization of the public benefit."). The District Court's decision to disregard the unionized DAO employees is no different.

Ultimately, Spivack was denied a religious exemption or accommodation that was available to other DAO employees. The sole distinguishing characteristic between Spivack and the exempt union employees—union membership—related merely to her employment classification and not to any governmental interest. This situation cannot be characterized as anything but a "prohibit[ion on] religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877. Focusing on the extent of Krasner's authority over the unionized employees' exemptions misses the mark, because constitutional rights cannot depend on irrelevant classifications. *Cf., 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." (internal quotation marks omitted) (quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970))). Although collective bargaining agreements governed the union

members' exemptions rather than Krasner, Appx477, he was not free to ignore the union members' presence in the DAO and their impact on the spread of COVID-19 when formulating and applying the Mandate. Krasner's decisions as a policymaker are attributed to the City. *See Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 694 (1978); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); Appx023. As a result, the City is ultimately responsible for the treatment of all DAO employees, whether governed by collective bargaining agreements or Krasner's Mandate. That two different decisionmakers within the City manage different classifications of DAO employees is irrelevant to the Free Exercise Clause analysis, which looks to the impact on government interest rather than the identity of supervisor. COVID-19 does not respect the extent of Krasner's authority, and neither does the Free Exercise Clause. Accordingly, unionized DAO employees are proper Free Exercise comparators, and the Mandate is not generally applicable.

2. The District Attorney's Office's Vaccination Mandate Exempts Employees for Medical Reasons.

The existence of medical exemptions also renders the Mandate not generally applicable. To avoid this conclusion, the District Court invented a broader interest in "health and safety." Appx015–016. But Krasner actually asserted an interest in reducing the spread and operational impact of COVID-19 within the DAO. Appx015, 116–120, 240–243; Mem. of Law in Supp. of Mot. for Summ. J. by Def. Lawrence Krasner 15, ECF No. 34-2. However, even if Krasner *had* asserted "health

and safety" as his interest, such a broad, general interest cannot demonstrate general applicability. The First Amendment requires *particularity* in the government's interest precisely to avoid this sort of convenient gerrymandering. *See Carson*, 142 S. Ct. at 1999 ("The definition of a particular program can always be manipulated to subsume the challenged condition."); *Fulton*, 141 S. Ct. at 1881. Otherwise, the Court's Free Exercise decisions are "essentially meaningless," *Carson*, 142 S. Ct. at 2000, because defining broad interests like health and safety as the interest for general applicability purposes allows the government to cloak religious discrimination in a general assertion of the police power.[7] As a result, broadly formulated interests can no more demonstrate general applicability than they can demonstrate a compelling interest. *Id.* (explaining that the analysis must turn on the "substance of Free Exercise protections, not on the presence or absence of magic words" or a "reconceptualization" of the regulation's scope). The Circuit Court decisions that adopt a contrary position are not consistent with the decisions of either the Supreme Court or the Third Circuit, *see Dr. A. v. Hochul*, 142 S. Ct. 2569, 2570 (2022) (Thomas, J., dissenting from denial of certiorari), and the District Court erred in following them.[8]

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[7] *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (explaining that a city's police powers include the authority to "protect public health and safety").

[8] While the District Court claimed that "[e]very Court of Appeals that has considered the comparability of the risks associated with medical and religious exemptions from

Krasner recognized that the medical exemption undermined his interests in reducing the spread and operational impact of COVID-19, and he required the medically exempted non-unionized employee to mask, to clean surfaces she touched, and to work in a single courtroom. Appx190–191, 219–220, 289, 479. These restrictions would not be necessary if the medical exemption did not threaten the Mandate's interests. Moreover, Krasner made clear that he did not deny the religious exemption or accommodation requests because they posed a greater threat to his interests. Instead, Krasner conceded that they posed the same threat, but he simply asserted that he was not legally required to provide a religious exemption. Appx190–191, 196–197, 219–221, 309–311. This begs the question and is not enough to demonstrate that medical exemptions and religious exemptions are not comparable for Free Exercise purposes. *See Fraternal Ord.*, 170 F.3d at 365 ("[W]e cannot accept the Department's position that its differential treatment of medical exemptions and religious exemptions is premised on a good-faith belief that the former may be required by law while the latter are not."); *Lukumi*, 508 U.S. at 537–38 (rejecting a "test of necessity"); *Tenafly*, 309 F.3d at 172. Ultimately, this reasoning reflects the improper "value judgment that secular (i.e., medical)

COVID-19 vaccine mandates . . . has arrived at this same conclusion" that they are not comparable," this is not correct. *See, e.g.*, *U.S. Navy Seals 1-26 v. Biden*, 27 F.4th 336, 352 (5th Cir. 2022) (explaining that the Navy "granted temporary medical exemptions to 17 Special Warfare members, yet no reason is given for differentiating those service members from Plaintiffs[,]" who requested religious exemptions).

motivations . . . are important enough to overcome its general interest" in reducing the spread of COVID-19 "but that religious motivations are not." *Fraternal Ord.*, 170 F.3d at 366; *Tenafly*, 309 F.3d at 169. Accordingly, the Mandate is not generally applicable and must satisfy strict scrutiny.

C. Krasner's Practice of Summarily Denying All Religious Exemption or Accommodation Requests Was Not Neutral Towards Religion.

Finally, Krasner's Practice of summarily denying all religious exemption or accommodation requests was not neutral towards religion. A government action is not neutral if it "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. This is true whether the regulation "target[s] religiously motivated conduct either on its face or as applied in practice." *Blackhawk*, 381 F.3d at 209; *Lukumi*, 508 U.S. at 534 ("Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt."). As this Court explained in *Tenafly*:

> [T]he Free Exercise Clause's mandate of neutrality toward religion prohibits government from "deciding that secular motivations are more important than religious motivations." Accordingly, in situations where government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct.

309 F.3d at 165–66 (citation omitted) (quoting *Fraternal Ord.*, 170 F.3d at 365).

Krasner explains his reason for summarily denying religious exemptions as simply that he did not believe they were necessary, while the medical exemption was necessary. Appx269–282, 284–292, 309–311; *see* Appx219. But this rationale is a classic example of non-neutrality. *See Lukumi*, 508 U.S. at 537 ("Respondent's application of the ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."); *see Roman Cath. Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) ("The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular spaces. . . . *That* is exactly the kind of discrimination the First Amendment forbids."); *Tenafly*, 309 F.3d at 168 ("We believe that the Borough's selective, discretionary application of Ordinance 691 against the *lechis* violates the neutrality principle of *Lukumi* and *Fraternal Order of Police* because it 'devalues' Orthodox Jewish reasons . . . by 'judging them to be of lesser import than nonreligious reasons,' and thus 'single[s] out' the plaintiffs' religiously motivated conduct for discriminatory treatment.") (alteration in original).

Ultimately, Krasner's decision reflects the improper "value judgment that secular (i.e., medical) motivations . . . are important enough to overcome its general interest" in reducing the spread of COVID-19 "but that religious motivations are not." *Fraternal Ord.*, 170 F.3d at 366; *Tenafly*, 309 F.3d at 169 ("[G]overnment

cannot discriminate between religiously motivated conduct and comparable secularly motivated conduct in a manner that devalues religious reasons for acting."); *see* Appx307–325, 352–355. Krasner simply did not take religious objections seriously, and he viewed religious objectors with skepticism. For example, he 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. He also found it worth noting that he considered religious objections to medical treatment to be dangerous, unscientific, and selfish.[9] Appx349. Moreover, the December 2021 form requiring religious exemption or accommodation applicants to submit a detailed explanation and substantiation of their religious beliefs was designed, at least in part, to deter religious objectors from following through on their exemption request. Appx200, 285.

[9] "[I]t 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 court-rooms 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." Appx349.

Simply put, Krasner's reasoning for prioritizing medical concerns over religious convictions reflects the value judgment that religious convictions are less important. The First Amendment does not permit government to make such a judgment, which implicitly assumes that medical concerns are true in a way that religious concerns are not. Spiritual impact may be less tangible than medical impact, but to the religious person, it is no less serious. The Free Exercise Clause requires the government to take religious burdens as seriously as it takes secular burdens, regardless of whether it believes them to be true. *See Tenafly*, 309 F.3d at 172 (citing *United States v. Ballard*, 322 U.S. 78, 84–88 (1944)). Doing otherwise violates the Constitution's command that government refrain from targeting the religious for disfavored treatment. *See Lukumi*, 508 U.S. at 537. "The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." *Id.* at 547. As a result, Krasner's Practice of summarily denying religious exemptions was not neutral.

II. Terminating Spivack's Employment Does Not Satisfy Strict Scrutiny.

"Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'struct scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." *Roman Cath. Diocese*, 141

S. Ct. at 67 (citing *Lukumi*, 508 U.S. at 546). The government bears the burden of showing that their action is narrowly tailored to serve a compelling interest. *Tandon*, 141 S. Ct. at 1296–97.

A. Terminating Spivack's Employment Did Not Further a Compelling Interest.

"A government policy can survive strict scrutiny only if it advances 'interests of the highest order.'" *Fulton*, 141 S. Ct. at 1881. This "compelling interest" cannot be "broadly formulated" but instead must be a compelling interest in stopping "the asserted harm of granting *specific* exemptions to *particular* religious claimants." *Id.* (quoting *Gonzalez v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 431 (2006)) (emphasis added). In other words, Krasner must have had a compelling interest in requiring *Spivack herself* to be vaccinated. While "[s]temming the spread of COVID-19 is unquestionably a compelling interest," *Roman Cath. Diocese*, 141 S. Ct. at 67, "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)).

Although the District Court mischaracterizes Krasner's interest as "health and safety," Appx015, as explained *supra*, the court must consider only the actual goals or purpose for the action taken. *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) ("To be

a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' . . . and the legislature must have had a strong basis in evidence to support that justification"); Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 Vt. L. Rev. 285, 298 (2015) ("[S]trict scrutiny, properly conceived, only allows *actual* interests to be considered as possible justifications for government action.") (emphasis added). Merely reciting "a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975). As a result, the District Court erred in assessing an interest in "health and safety" rather than Krasner's actual interest of reducing the spread and operational impact of COVID-19 in the DAO.

Here, despite Krasner's assertions that he denied Spivack's religious exemption or accommodation request to reduce the spread of COVID-19, Krasner only erratically pursued his stated interests, causing "appreciable damage" to his claims that these were truly compelling interests in this case. Krasner did not require the full range of mitigating accommodations for unionized employees or express concern about exempted union personnel to the City. Appx133–140, 143. Krasner had the authority to require the ten exempted unionized DAO employees to mask and be tested. Appx135–136, 139–140. He did not. Appx133–140, 143, 251–257, 259–260, 343–350. If Krasner truly perceived any unvaccinated employee as a dire

risk, he would have explored every option to mitigate that risk. Additionally, and notably, Krasner allowed Spivack and the other eleven non-unionized DAO employees who requested exemptions or accommodations to work in person for over six months with masking accommodations. Appx043, 054, 071, 169–170, 193, 206–207, 365, 385, 478. Krasner identified no reason why masking sufficiently mitigated the risk of these eleven unvaccinated non-unionized employees from September 1, 2021, until March 6, 2022, but ceased adequately mitigating the risk on March 7, 2022. This haphazard approach indicates that Krasner's interests in forcing Spivack to be vaccinated were not truly interests "of the highest order."

Krasner also failed to show why the City was able to accommodate or exempt religious objectors, and unionized employees in the DAO could be accommodated, but Spivack could not be. Appx305–306, 309–310. As the Supreme Court noted in considering the analogous compelling interest test under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc–2000cc-5 ("RLUIPA"), analogous policies in other jurisdictions are relevant in determining whether there is a compelling interest. *Holt v. Hobbs*, 574 U.S. 352, 368 (2015). In *Holt,* a prison refused to exempt religious inmates from the prison's beard ban. Considering compelling interest, the Supreme Court noted that the government had not shown why most states and the federal government permit inmates to grow short beards but it could not. Similarly, Krasner did not explain, or even consider, why the City's

general policy of permitting religious exemptions or accommodations to the City's vaccination requirement would not work for the DAO's non-unionized employees. Appx316–317; *see* Appx121–122, 196–197, 301–302, 309–31.

B. Terminating Spivack's Employment Was Not Narrowly Tailored.

Finally, even if Defendants can demonstrate a compelling interest, refusing to accommodate Spivack's religious beliefs and ultimately terminating her employment were not narrowly tailored to achieve it. A government action is not narrowly tailored where "[t]he proffered objectives are not pursued with respect to analogous non-religious conduct, and those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Lukumi*, 508 U.S. at 546. "Conclusory defense[s]" of a policy's tailoring are insufficient, and a court may not simply defer to the government's determination that no alternatives are viable. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1279 (2022). Especially when other similarly situated governmental entities provide policies that accommodate religious exercise, a government "must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt*, 574 U.S. at 369. As the Supreme Court explained in *Tandon v. Newsom*:

> [N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is *more* dangerous than those activities *even* when the

> same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.

Tandon, 141 S. Ct. at 1296–97 (emphasis added). In sum, the First Amendment requires that "so 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.

While the District Court properly quotes the standard for narrow tailoring, it erred by conducting its analysis at a high level of generality rather than the particularity the First Amendment requires. Appx020–021; *see Fulton*, 141 S. Ct. at 1881 ("Rather than rely on 'broadly formulated interests,' courts must 'scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants.'" (quoting *O Centro*, 546 U.S. at 431)). That is, the District Court simply reiterates Krasner's overall rationales for implementing a vaccine mandate rather than some other policy. Appx020–021 But the question is not whether Krasner should have adopted an alternative to a vaccination mandate; the question is whether that vaccination mandate was narrowly tailored when it accommodated nonreligious exemption requests but not Spivack's religious one. *Tandon*, 141 S. Ct. at 1296–97; *Tenafly*, 309 F.3d at 172; *Fraternal Ord.*, 170 F.3d at 366.

As a result, Krasner's general conclusion that alternatives such as masking, testing, and remote work were not viable for a 600-person office is irrelevant. Rather, Krasner must demonstrate that alternatives were not viable for Spivack. *Fulton*, 141 S. Ct. at 1881. In this context, the accommodations Krasner afforded to the medically

exempt are determinative: if masking and cleaning were sufficient for the medically exempt, they are sufficient for religious objectors too. *Tandon*, 141 S. Ct. at 1296. And Krasner cannot demonstrate to the contrary, given that Spivack and the other eleven non-unionized employees who requested exemptions or accommodations worked in person for over six months with a masking accommodation, Appx043, 054, 071, 169–170, 193, 206–207, 365, 385, 478, and Krasner admitted he had no reason to believe Spivack would not comply with accommodation requirements, Appx352–353. *See Roman Cath. Diocese*, 141 S. Ct. at 67 ("Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services.").

Moreover, Krasner's failure to consider the City's policy and explain why it was not sufficient for the DAO undermines narrow tailoring as well. *See Roman Cath. Diocese*, 141 S. Ct. at 67. The City's policy allowed religious accommodations and implemented masking and testing requirements for exempted employees "without concern." Appx133–134, 141, 143–145. Failing to consider this alternative is especially egregious because ten unionized DAO employees who received religious exemptions under the City's policy worked in the DAO without Krasner objecting or exercising his option to enforce the City's masking or testing requirement. Appx137–140, 143, 148–149. If the City's policy was good enough for

some DAO employees, why was it not good enough for the rest? Answering that question is Krasner's burden, and he fails to carry it. In fact, the record reflects that he did not bother to even consider the question, although accommodations were feasible. Appx121–122, 190–191, 196–197, 219–222, 301, 309–311.

Finally, Krasner admits that, notwithstanding his decision to deny religious exemptions or accommodations, he could have granted Spivack's request for a remote-work accommodation, conceding that a less restrictive means of serving his interests was possible. Appx095–096, 107–108, 295, 301, 495–496. Indeed, Krasner did make a post-litigation settlement offer of remote work, which the District Court mischaracterizes as an accommodation. Appx007, 295, 301. But this settlement offer was made after Spivack was fired and moved away from Philadelphia for a new job. Appx365, 497. Spivack's declining Krasner's post-litigation settlement offer does not support the District Court's characterization that she refused a timely accommodation. *See* Appx306 ("That was not accommodation; that was a discussion about a way to resolve litigation. It would never have included granting that religious exemption."). At the very least, the District Court erred in relying on this settlement offer to grant summary judgment to Defendants rather than interpreting the evidence in the light most favorable to Spivack as the non-movant. *Susquehanna*, 969 F.3d at 125. And although Krasner faults Spivack for not proposing specific accommodations in her exemption or accommodation request, Appx299, 301, that

burden is Krasner's, not Spivack's. *Tandon*, 141 S. Ct. at 1296 ("[N]arrow tailoring requires *the government* to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID.") (emphasis added). Accordingly, the Mandate is not narrowly tailored.

* * *

Because the Mandate is not neutral or generally applicable and does not serve a compelling interest through narrowly tailored means, it violates the Free Exercise Clause and summary judgment is appropriate to Spivack.

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 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: April 12, 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 9,027 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 SentinelOne 22.2.5.806, and that no virus was indicated.

6. That, on April 12, 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: April 12, 2023

/s/ Lea E. Patterson
Lea E. Patterson

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,
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

JOINT APPENDIX VOLUME I of II
Appx001–025

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April 12, 2023

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RACHEL SPIVACK ***Plaintiff***, v. CITY OF PHILADELPHIA and LAWRENCE S. KRASNER *in his official capacity as the* *District Attorney of Philadelphia*, ***Defendants***.	:	**CIVIL ACTION NO. 2:22-cv-01438**

NOTICE OF APPEAL

Notice is hereby given that Plaintiff in the above-named case hereby appeals to the United States Court of Appeals for the Third Circuit from the January 4, 2023 Order denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motions for Summary Judgment. (A copy of the Court's Order dated January 4, 2023 is attached hereto and marked as "Exhibit A").

Dated: February 1, 2023

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RACHEL SPIVACK, **Plaintiff**	:	
v.	:	**Civ. No. 22-1438**
CITY OF PHILADELPHIA, **LAWRENCE S. KRASNER,** **Defendants.**	:	

Diamond, J. **January 4, 2023**

MEMORANDUM

I must determine whether the City of Philadelphia and its District Attorney impermissibly infringed on the religious liberty of an employee who was fired after she refused COVID-19 vaccination for religious reasons. I conclude that they did not and so will grant summary judgment in their favor.

I. FACTUAL BACKGROUND

I have set out the facts that are undisputed, resolved all factual disputes in Plaintiff's favor, and construed the resulting record in the light most favorable to her. See Hugh v. Butler Cnty. Fam. YMCA, 418 F.3d 265, 267 (3d Cir. 2005). At the same time, I have kept in mind the urgent concerns and confusion that arose as COVID caused widespread sickness and death. Cf. South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (Mem) (2020) ("Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad.") (Roberts, C.J., concurring) (internal quotations and citations omitted); Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 78 (2020) ("The nature of the epidemic, the spikes, the uncertainties, and

the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges.") (Breyer, J., dissenting).

The Parties

In the Fall of 2021, Defendant Philadelphia District Attorney Lawrence Krasner appointed Plaintiff Rachel Spivack to serve as an Assistant District Attorney. (Doc. No. 33-1, Pl. Statement of Material Facts (SMF) ¶¶ 1, 2.) Defendant City of Philadelphia is a Pennsylvania municipal government established by the Philadelphia Home Rule Charter. (Doc. No. 35-2 at 3.) All District Attorney's Office staff are City employees. (Id.; SMF ¶ 2.) The District Attorney, who is an independently elected City official, has discretionary authority to promulgate DAO employment policies that differ from the City's. (Doc. No. 35-2 at 3; see also Doc. No. 33-6 (Krasner Dep.) at 233:3-18, 234:10-22.) Mr. Krasner's authority over his staff is unusual in that the DAO has both: "(1) represented employees (i.e., union employees), whose terms and conditions of employment are controlled by a collective bargaining agreement or arbitration proceedings; and (2) exempt and non-represented employees (like Plaintiff [Rachel Spivack]) who are not part of bargaining units and can be subject to the [DAO's] mandated terms and conditions of employment." (Doc. No. 35-2 at 4; SMF ¶ 12; see also Krasner Dep. at 233:3-18, 234:10-22.)

DAO Initial Response to Pandemic

Krasner makes all significant DAO managerial decisions, including hiring and firing. (See, e.g., Krasner Dep. at 6:6-10; 10:11-25; 221:15-25.) The record thus shows that Krasner amended the DAO Policy several times to conform to growing knowledge of both the virus and the Office's legal obligations. (Id. at 9:17-25; 10:1-7; 13:13-24; 20:17-34; 107:2-25; 108:1-13.)

In August 2021, the City announced its COVID-19 vaccine mandate, which included

medical, disability, and religious exemptions. (Doc. No. 35-2 at 4.) Krasner understood that he could adopt the City's policy, but chose instead to promulgate a separate DAO policy. (Id. at 3; Krasner Dep. at 10:8-11:5; 112:19-115:24.) The DAO's COVID-19 Safety Committee thus drafted an initial version of the Office Policy, referring it to Krasner for his review. (Krasner Dep. at 7:20-10:7.) Krasner approved the Policy—which mirrored the City's—"as a key part of [the DAO's] overall strategy to maintaining a safe workplace in light of [the COVID-19] pandemic." (Doc. No. 34-3; SMF ¶ 5; Doc. No. 38-1, Def. Krasner's Resp. to Pl. Statement of Material Facts (RMF), ¶ 5.)

The Policy Changes

As Krasner explained, the Vaccination Policy applied only to the Office's numerous exempt and non-represented DAO staff. (Doc. No. 34-2 at 12 n.5.) In its initial version, the Policy required these employees, as a "condition of [their] continued employment," either "to provide proof of vaccination or apply for an exemption by September 1, 2021." (Doc. No. 34-3.) Staff were provided with a "Request for Exemption from Vaccination Policy Form." (Id.) Like the City's Policy, the DAO's Policy included three categories of exemption requests and accommodations:

- a "Religious Exemption or Accommodation (that could be afforded to "employees with verifiable, sincerely held religious beliefs . . . that conflict with getting vaccinated);
- an "Exemption for Medical Reasons" (that could be afforded to an employee with any "medical condition that is a contraindication to the COVID-19 vaccine"); and
- a "Disability Accommodation" (that could be afforded to an employee whose disability necessitates "an accommodation regarding this [vaccination mandate]").

(Id.) The Office was to "make[] determinations about requested accommodations and exemptions on a case-by-case basis considering various factors and based on an individualized assessment in each situation." (Id.)

In the ensuing months, however, the DAO Policy changed significantly, eventually providing for only an extremely limited medical exemption and no religious exemption—thus giving rise to this lawsuit. When the COVID-19 Omicron variant surged nationwide, Krasner, fearing the consequences of allowing a significant number of staff exemptions, consulted with counsel to determine the DAO's legal obligations. (Krasner Dep. at 127:13-128:11.) He explained that it was his "legal imperative . . . an imperative of [his] oath" to "stop the spread of disease." (Id. at 94:3-13.) He testified that the DAO's "north star was public safety; it was to protect lives." (Id. at 140:16-17). Accordingly, in early January 2022, having reviewed the law, Krasner concluded that the Office was not obligated to offer religious exemptions. (Id. at 127:13-24.) He thus changed the Policy, eliminating them. (Id.)

Krasner did not eliminate medical exemptions, as he "was not inclined to kill somebody to have that person vaccinated." (Id. at 140:17-19.) He limited them significantly, however: he would "make exceptions only when [] truly necessary . . . to save as many peoples' lives as possible." (Id. at 94:3-13.) He thus granted a single medical exemption—indeed, the only staff exemption of any kind—to an employee, who:

> simply by being vaccinated faced a very significant risk of death. It was a very specific medical history she had. . . [S]he had medical certification from a treating doctor whose credentials were legit, saying that she was in far more danger or, at least, she was in more danger of death and debilitating or serious injury if she was vaccinated than the danger she faced from contracting COVID.

(Id. at 136:8-24.) Of the ten employees who sought medical exemptions, she was "the only one that had a letter saying that the vaccination had a greater danger of death and serious injury." (Id. at 138:6-9.)

Krasner allowed the possibility of disability "accommodations" for non-union employees. Because he received no disability accommodation requests, however, he "didn't have to look at

[the legal requirements] as closely." (Krasner Dep. at 127:24-128:6.) The DAO Vaccination Policy as finally determined by Krasner was thus quite simple: all non-union DAO employees were required to be vaccinated. Medical exemptions were limited to those for whom vaccination could pose a significant health risk. There was no provision for religious or disability exemptions or accommodations.

Plaintiff Seeks an Exemption, But Refuses an Accommodation

When Ms. Spivack, an Orthodox Jew, started work in September 2021 as a non-union DAO employee in the Office's Trial Division. (SMF ¶¶ 1, 8.) She submitted a letter from her rabbi as notice that she would be seeking a religious exemption from the Office Vaccine Mandate. (Doc. No. 33-8.) Rabbi Yitzchok Chayempour wrote that his entire "congregation categorically opposes [the COVID-19] vaccine as a matter of religious tenet." (Id.) He explained that congregation members are forbidden from: (1) benefitting from the live dissection of animals; (2) using hybridization technologies; (3) "self-flagellating"; (4) exposing themselves to unnecessary risk (Spivack's "natural immunity" to the virus made vaccination unnecessary); and (5) injecting a product whose precise ingredients are undisclosed. (Id.) Neither Krasner nor the City disputes that Spivack's sincerely holds her religious beliefs. (RMF ¶ 3.)

In December 2021 (*before* Krasner eliminated the religious exemption), Spivack—along with seven other non-union DAO employees—submitted an "Application to Support Request for Religious Exemption from COVID-19 Vaccination." (SMF ¶¶ 8, 9.)

On March 4, 2022 (some two months *after* Mr. Krasner had eliminated religious exemptions), Spivack and the other applicants learned that their requests had been denied. (Compl. ¶ 18; RMF ¶ 13.) Three days later, Spivack received a form denial stating that her "[e]xemption request should be DENIED for failing to meet legal requirements"; that a "religious exemption is

not warranted under the law based on the information presented"; and that she "d[id] not present a credible claim that [her] opposition to the vaccine was based on [her] religious beliefs." (SMF ¶ 13; Doc. No. 33-15.) The accompanying form letter further provided: "Based on the continued impact of the COVID-19 pandemic, the DAO, City of Philadelphia, and many other partner agencies in the criminal justice system determined that vaccinations are an essential tool in reducing community spread of COVID-19." (Doc. No. 33-15.) The letter advised that Spivack would be placed on "Unvaccinated Leave" beginning on March 21 if she was unable to "complete a COVID-19 vaccination schedule or obtain at least one dose of a two-part COVID-19 vaccination, by noon on March 18, 2022." (Id.)

Spivack never requested an accommodation—such as working remotely—that would have allowed her to refuse vaccination and keep her job. (Krasner Dep. 151:12-13.) On April 8, 2022, she was fired because she refused the COVID-19 vaccination. (SMF ¶ 26.) A short time later, the DAO offered her an accommodation even though she had not requested one: a position in the Law Division, which would allow her to work remotely on appellate litigation. (Krasner Dep. 151:3-7.) She refused the position. (Id. at 151:9-18.)

II. LEGAL STANDARDS

Upon motion of any party, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). I may thus grant summary judgment if the movant shows that "there exists no genuine issue of material fact that would permit a reasonable jury to find for the nonmoving party." Miller v. Indiana Hosp., 843 F.2d 139, 143 (3d Cir. 1988). An issue is "genuine" if a reasonable jury could possibly hold in the nonmovant's favor with regard to that

issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" only if it could affect the result of the suit under governing law. Id.

In deciding whether to grant summary judgment, I "must view the facts in the light most favorable to the non-moving party," and make every reasonable inference in that party's favor. Hugh, 418 F.3d at 267. If, after viewing all reasonable inferences in favor of the non-moving party, I determine that there is no genuine issue of material fact, summary judgment is appropriate. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

The opposing party must support each essential element with concrete record evidence. Celotex Corp., 477 U.S. at 322-23. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249–50 (internal citations omitted). This requirement promotes the "underlying purpose of summary judgment [which] is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense." Walden v. Saint Gobain Corp., 323 F. Supp. 2d 637, 641 (E.D. Pa. 2004) (restating Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir.1976)).

On cross motions for summary judgment, the same standards and burdens apply. See Applemans v. City of Phila., 826 F.2d 214, 216 (3d Cir. 1987). Denying a cross-motion does not necessarily mean that the competing cross-motion is meritorious. Transportes Ferreos de Venezuela II CA v. NKK Corp., 239 F.3d 555, 560 (3d Cir. 2001) (citing Rains v. Cascade Indus., Inc., 402 F.2d 241, 245 (3d Cir. 1968)).

III. PROCEDURAL BACKGROUND

Seeking injunctive, compensatory, and declaratory relief, Spivack proceeds under the First Amendment and related state law. 28 U.S.C. §§ 1331, 1343, and 1367(a). Spivack alleges that:

the DAO vaccination requirement is a "systemic effort" by the City and Krasner "to flagrantly violate federal and state law." (Compl. ¶ 1); see U.S. Const., amend I; 71 Pa. Stat. Ann. §§ 2401-07. She alleges that "Krasner . . . denied [all religious exemptions] solely on the basis of his hostility to religion." (Compl. ¶ 22.) Krasner's "hostility to religion" is demonstrated by "the numerous medical and administrative exemptions" he purportedly has approved. (Id. at ¶ 27.) Spivack thus bases her suit on this "disparate treatment of medical and administrative requests versus religious requests for exemption and accommodation." (Id. ¶ 36.) Shortly after initiating this suit, Spivack filed a Motion for Temporary Restraining Order and Preliminary Injunction, which I denied. (Doc. Nos. 7, 20).

Krasner and Spivack have cross-moved for summary judgment. (Doc. Nos. 33, 34.) Each opposes the other's Motion. (Doc. Nos. 36, 38.) The City has also moved for summary judgment, urging that it "should not be a party to this lawsuit because it played no role in [Spivack's] alleged harm," that Spivack cannot demonstrate municipal liability for decisions made in Krasner's sole discretion, and that City is not a "necessary party" to the action. (Doc. No. 35-2 at 6.) Spivack has responded only to the City's municipal liability contention. (See Doc. No. 39.)

The matters have been fully briefed.

IV. DISCUSSION

The record provides scant support for Spivack's heated contentions. There is no evidence of a "systemic effort" by the City and Krasner "to flagrantly violate federal and state law." Nor has Spivack shown that Krasner is "hostile" to religion, or that he approved "numerous medical and administrative [vaccine] exemptions." Moreover, it is difficult to discern which iteration of the DAO Vaccination Policy Spivack challenges. She apparently recognizes that Krasner himself promulgated all versions of the Office's Policy, including the final version which allows only an

extremely limited medical exemption and no religious or disability exemption. (Doc. 33 at 14; SMF ¶ 15-16.) Yet, she directs her analytic fire largely at the shortcomings of the Office's initial—August 2021—version of the Policy, which provided for religious, disability, and medical exemptions. That analysis is belied by her own lawsuit, which she bases on the elimination of any religious exemption—*i.e.*, on the Policy's final version. (See, e.g., Doc. No. 33 at 8, 9, 13, 15.) It thus appears that Spivack invokes the Policy version that works to her best advantage, any resulting contradiction notwithstanding.

Although the record is sometimes unclear as to the Policy's precise contours at any particular time, it is quite clear that Spivack was fired because she did not comply with the Policy's final version. Accordingly, it is that final version of the Policy that I will address. The undisputed evidence shows that this Policy 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. There is no evidence of any "hostility to religion." In fact, Spivack was offered an accommodation, which she refused.

In these circumstances, the DAO Policy, whether subject to rational basis or strict scrutiny review, is permissible.

A. First Amendment Claim

The Constitution's Free Exercise Clause, applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const., amend. I; see Fulton v. City of Phila., 141 S. Ct. 1868, 1876 (2021). The "free exercise of religion" includes not only "the right to believe and profess whatever religious doctrine one desires," but also the right to act and abstain from acts for religious reasons. Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990).

Not all laws that burden this right offend the Constitution, however. Id. at 878. Nor do such laws inevitably trigger heightened review. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). Only a law that is not neutral respecting religion or not generally applicable must pass strict scrutiny, and so "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." Id. A neutral law of general applicability is subject only to rational basis review, even if it incidentally burdens a religious practice. Id. "Neutrality and general applicability are interrelated": satisfying the former requirement likely means that the latter has also been satisfied. Id.

Neutrality

The government "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." Fulton, 141 S. Ct. at 1876. At a minimum, the neutrality principle requires that on its face, a law or policy not single out religious exercise by "refer[ring] to a religious practice without a secular meaning discernable from the language or context." Lukumi, 508 U.S. at 533-34. Here, the DAO Policy is facially neutral. It applies to all non-union staff. (Doc. No. 34-3.) It does not "single out employees who decline vaccination on religious grounds." See We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 281 (2d Cir. 2021).

A facially neutral law may nonetheless infringe neutrality if it "targets religious conduct for distinctive treatment": "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt." Lukumi, 508 U.S. at 534. Accordingly, I must "survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." Id. at 534 (quoting Walz v. Tax Comm'n of New York City, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). Such circumstances include "the historical background of the

decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." Id. at 540.

The circumstances here confirm that Krasner's DAO Vaccination Policy arose from a "deep concern for public health, which is a religion-neutral government interest." See We the Patriots, 17 F.4th at 284. When a COVID vaccine first became available, Krasner promulgated a policy very much like the City's. He allowed staff to request religious exemptions because he did not yet know whether he was legally required to provide them. (Krasner Dep. at 122:19-24 ("This is a document that was done before we had looked carefully at the United States Supreme Court case law[,] before we had full consultation with various attorneys and what that U.S. Supreme Court case signifies.").) With COVID's continuing spread, Krasner eliminated the religious exemption after reviewing the law, consulting with counsel, and weighing exemption-created risks—particularly to the immunocompromised and to children, for whom the vaccine was not yet available. (Id. at 9:2-10:7.) Only then did Krasner review all the exemption requests, which he felt confirmed the wisdom of limiting exemptions. (Id. at 132:12-20.) Cecilia Madden (DAO Deputy Chief of Staff) and Robert Listenbee (First Assistant District Attorney) similarly described these circumstances and Krasner's neutral motivation in first allowing and then eliminating a religious exemption. (See, e.g., Doc. No. 32-3 (Listenbee Dep.) at 35:22-36:24; Doc. No. 33-4 (Madden Dep.) at 62:5-63:9.)

Spivack does not dispute this sequence of events. She nonetheless urges that the Policy "demonstrate[s] a hostility to those who refuse certain medical interventions . . . for religious reasons." (Doc. No. 33 at 7.) Spivack believes that the religious accommodation process was "illusory and insincere" and a "façade," by which Krasner "put forth a process and procedure for

employees to apply for religious exemptions but then systematically and routinely den[ied] every such application." (Id. at 8.)

Spivack largely relies on a small part of Krasner's lengthy deposition, where he described his experience as a civil rights lawyer, when parents "for religious reasons" "refused to provide medical care for their children and whose children then died." (Id. at 7 (citing Krasner Dep. at 231:7-232:8.).) He explained that those parents were subsequently "convicted of crimes." (Id.) Spivack also offers Madden's deposition testimony that the DAO's request for religious exemption applications was "not purposeless" because a number of employees who had intended to request such exemptions "were strongly motivated by the barrier of having to complete that form to go ahead and get vaccinated." (Id. at 8 (citing Madden Dep. at 84:2-15.).)

Spivack has distorted the record. Krasner's deposition responses that Spivack plucks out of context relate to his understanding (based on his professional experience) that "[r]ights are not completely unlimited." (Krasner Dep. at 231:25.) Madden's retrospective reflection on the beneficial effect of the application process only confirms that the DAO sought to encourage vaccination. (See Doc. No. 34-2 at 15.) 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 Krasner's Policy decisions were motived by anti-religion animus. Lukumi, 508 U.S. at 533 (emphasis added); compare M.A. on behalf of H.R. v. Rockland Cty. Dept. of Health, 53 F.4th 29, 37 (2d Cir. 2022) (jury could reasonably find that Emergency Declaration barring unvaccinated children from places of public assembly was designed "to target religious objectors to the vaccine requirement because of their religious beliefs," where policymaker expressed that there is "no such thing as a religion exception" and characterized "anti-vaxxers" as "very ignorant") with We the Patriots USA, 17 F.4th at 283-84

(New York Governor's "personal opinion" that no religious exemption was necessary respecting requirement that healthcare facilities mandate COVID-19 vaccination for certain "personnel," and statement that she was "not aware of" any "sanctioned religious exemption from any organized religion" insufficient to show the plaintiffs' likelihood of success in demonstrating non-neutrality).

Nor could a jury reasonably infer hostility simply because Krasner initially asked employees to apply for a religious exemption that he then eliminated. As I have discussed, the record shows without contradiction that Krasner changed the DAO Policy to reflect his growing knowledge of both the law and the virus itself. He eliminated the religious exemption only after he was convinced that it was not required legally, and that mandating vaccination was essential to the health of his staff and the many people who came into contact with his staff. This was permissible. Cf. We the Patriots USA, 17 F. 4th at 282 ("The absence of a religious exception to a law does not, on its own, establish non-neutrality.") Government officials may revise policies upon gathering additional information, especially when confronting a dangerous and potentially tragic situation. See id. at 281-83 (no evidence of non-neutrality where State "independently promulgated a new Rule" after "extensive process" through which rulemaking body concluded "that the vaccine requirement should apply to a broader set of healthcare entities . . . and should not contain a religious exemption").

In sum, Spivack offers no evidence that Krasner's exemption changes "stemmed from religious intolerance, rather than an intent to more fully ensure that employees at [the DAO] receive the vaccine in furtherance the State's public health goal." Id. at 283.

General Applicability

A law is not "generally applicable" (1) if it prohibits religious conduct but permits comparable secular conduct; or (2) "if it invites the government to consider the particular reasons

for a person's conduct by providing a mechanism for individualized exemptions." Fulton, 141 S. Ct. at 1877 (internal quotation marks and alterations omitted).

Comparable Secular Conduct—First, I must consider whether an exemption for a single medical reason and an exemption for religious reasons regulate "comparable" conduct—*i.e.*, whether a policy can be generally applicable if it allows the former and precludes the latter. "[W]hether 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). "Comparability is concerned with the risks various activities pose." Id. A law or policy is not generally applicable if it burdens religious conduct, but does not burden secular conduct that undermines the asserted government interest in a similar way. Fulton, 141 S. at 1877.

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. (Doc. No. 34-2 at 15.) 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. Every Court of Appeals that has considered the comparability of the risks associated with medical and religious exemptions from COVID-19 vaccine mandates (albeit at the preliminary injunction stage) has arrived at this same conclusion. As the First Circuit explained:

> [E]xempting from vaccination only those whose health would be endangered by vaccination does not undermine Maine's asserted interests here: (1) ensuring that healthcare workers remain healthy and able to provide the needed care to an overburdened healthcare system; (2) protecting the health of the those in the state most vulnerable to the virus–including those who are vulnerable to it because they cannot be vaccinated for medical reasons; and (3) protecting the health and safety

of all Mainers, patients and healthcare workers alike.

Does 1-6 v. Mills, 16 F.4th 20, 30-31 (1st Cir. 2021). See also We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 285 (2d Cir. 2021) ("applying the vaccination requirement to individuals with medical contraindications and precautions would not effectively advance" State's interests "to prevent the spread of COVID-19 in healthcare facilities among staff, patients, and residents," "protect[] the health of healthcare employees to ensure they are able to continue working," and "reduce the risk of staffing shortages that can compromise the safety of patients and residents even beyond a COVID-19 infection"); Doe v. San Diego Unified Sch. Dist., 19 F.4th 1173, 1178 (9th Cir. 2021) ("Limitation of the medical exemption in this way serves the primary interest for imposing the mandate—protecting student 'health and safety'—and so does not undermine the District's interests as a religious exemption would.").

Spivack urges that "[i]t is the law in the Third Circuit that the rejection of a religious exemption while maintaining a medical exemption fails general applicability therefore triggering strict scrutiny." (Doc. No. 36 at 7-8 (citing Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999)).) She is mistaken.

In Fraternal Order of Police, the Third Circuit considered the Newark Police Department's policy requiring all its officers to be clean-shaven. Id. at 360, 365. Significantly, the Department's interest purportedly underlying the policy was "fostering a uniform appearance" among its officers. Id. at 366. Because the Court determined that "allow[ing] officers to wear beards for medical reasons undoubtedly undermines the Department's interest" in much the same way as does allowing officers to wear beards for religious reasons, it ruled that the policy was not a neutral rule of general applicability. Id. That is not so here, where the medical exemption *furthers* the DAO's interest in promoting health and safety.

Individualized Exemptions— Rules that permit "individualized, discretionary exemptions" may not be generally applicable. Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004). The Second Circuit has clarified this principle:

> As other Circuits have noted . . . "an exemption is not individualized simply because it contains express exceptions for objectively defined categories of persons."
>
> * * * *
>
> The "mere existence of an exemption procedure," absent any showing that secularly motivated conduct could be impermissibly favored over religiously motivated conduct, is not enough to render a law not generally applicable and subject to strict scrutiny.

We the Patriots, 17 F.4th at 288 (internal quotations and citations omitted). The Supreme Court has thus concluded that an unemployment compensation statute basing an applicant's benefits eligibility on "good cause" for the applicant's unemployment was not generally applicable because the statute allowed administrators, in their discretion, to refuse exemptions to applicants who could not work for religious reasons, but to grant exemptions to applicants who could not work for secular reasons. Smith, 494 U.S. at 872. Similarly, in Fulton v. City of Philadelphia, the Supreme Court distinguished generally applicable laws from an anti-discrimination provision in municipal contracts with adoption service providers that similarly gave City officials wide discretion to grant broad-based exceptions. 141 S. Ct. 1868, 1878-79 (2021).

Having ignored this authority, Spivack chooses to attack a straw man—the initial Office Policy, not the final Policy pursuant to which she was fired. (See Doc. No. 36 at 9 (arguing that "Defendant's COVID-19 Vaccine Mandate is not generally applicable because it creates a formal mechanism for granting religious exemptions").) As I have discussed, however, the Policy's final version—the end result of a gradual process involving Krasner's review of the applicable law and guided by Krasner's concern for public health—provides only a very limited medical exemption.

Based on this exemption, Spivack argues that the Vaccination Policy is not generally applicable because "Krasner considered 'a number of factors' in determining medical exemptions." (Id. at 8 n. 7 (quoting Krasner Dep. at 138:20-139:4).) Courts have recognized, however, that "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. Axson-Flynn v. Johnson, 356 F.3d 1277, 1298 (10th Cir. 2004); see also 303 Creative LLC v. Elenis, 6 F. 4th 1160, 1187 (10th Cir. 2021) (cautioning against the conflation of an "individualized exemption" with "individualized adjudication"). Once again, the medical exemption Krasner finally approved was for an objectively and narrowly defined category of persons: non-union DAO employees for whom a vaccination could be life-threatening. This is not the kind of exemption that undermines the Policy's general applicability.

Because the DAO Policy as actually implemented is both neutral and generally applicable, it need pass only rational basis review. In an abundance of caution, however, I will also subject the Policy to strict scrutiny.

Rational Basis Review

Spivack address only strict scrutiny. (See generally Doc. Nos. 33, 36.) Presumably, this is because the Office Policy so plainly passes rational basis review, which "requires merely that the [challenged] action be rationally related to a legitimate government objective." Tenafly Eruv Ass'n v. Tenafly, 309 F.3d 144, 165 n. 24 (3d Cir. 2002). The DAO Policy certainly meets this requirement. The Office's interests in "preventing the spread of Covid within the office, minimizing staffing disruptions caused by workplace exposures, and protecting medically-vulnerable employees, family members, and participants in the criminal justice system" are

legitimate. (Doc. No. 34-2 at 15); see Roman Catholic Diocese, 141 S. Ct. at 67. The Policy is rationally related to achieving that goal.

Strict Scrutiny

Strict scrutiny requires that the DAO narrowly tailor its Policy to serve a compelling interest. Roman Cath. Diocese of Brooklyn, 141 S. Ct. at 67. It does.

As I have discussed, Krasner promulgated the DAO Policy to "prevent[] the spread of Covid within the office" and to "protect[] medically-vulnerable employees, family members, and participants in the criminal justice system." (Doc. No. 34-2 at 15.) "Stemming the spread of COVID–19 is unquestionably a compelling interest." Roman Cath. Diocese, 141 S. Ct. at 67; see also Mills, 16 F. 4th at 32 ("Few interests are more compelling than protecting public health against a deadly virus."). Yet, where, as here, the state regulation is challenged under the First Amendment, I may not rely exclusively on "broadly formulated interests." Fulton, 141 S. Ct. at 1881 (quoting Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 431 (2006)). Rather, I must also undertake "a more precise analysis" and "scrutinize[] the asserted harm of granting specific exemptions to [the] particular religious claimant[]." Id. I thus consider "not whether the [DAO] has a compelling interest in enforcing its [Policy] generally, but whether it has such an interest in denying an exception" to Spivack. Id.

As a prosecutor in the Office's Trial Division—to which she was assigned from the outset—Spivack was required to meet regularly with her coworkers and the general public. (Krasner Dep. at 149:21- 24.) Because she started in the Juvenile Diversion Unit, where the high-volume paper discovery required staff's physical presence, she could not work remotely. (Id. at 150:2-16.) She was slated to be transferred to the Municipal Court Unit, where she would again have to be physically present in different courtrooms every day and share an office and work space

with other employees. (Doc. No. 38 at 15.) Refusing Spivack an exemption from the Vaccine Mandate thus furthered the DAO's interest in protecting its staff and the public from the spread of the deadly virus. Cf. Fulton, at 141 S. Ct. 1881-82 (no compelling interest where refusal to grant exemption *jeopardized* the government's asserted interests).

Moreover, the Policy was narrowly tailored to serve that interest. "[N]arrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID." Tandon v. Newsom, 141 S. Ct. at 1296-97. Accordingly, the government must show that it considered less restrictive alternatives and ruled them out for good reason. Bruni v. City of Pittsburgh, 824 F.3d 353, 370 (3d Cir. 2016).

Here, the record establishes that the DAO closely considered every alternative to mandatory vaccination. Krasner was convinced that vaccinations were the only effective way to prevent the spread of COVID. (Krasner Dep. at 206:1-3 ("Q: Are there other ways to mitigate the risk of [COVID infection] other than vaccination? A [Krasner]: Not good ones in my opinion.").) He had rejected daily testing because it was both unreliable and cost-prohibitive:

> We considered early-on testing and rejected it and said we're not going to do testing. It only provides a snapshot for a particular moment unless you're going to do it every hour. Even then, you have gaps during the hour when you wouldn't know what the result is. It's very easy to fake.
>
> * * * *
>
> [Testing] does not make any sense to me because it is woefully inadequate as compared to vaccination. Any medical doctor will tell you that.
>
> * * * *
>
> I have already explained … what a catastrophe it was before there were vaccinations…. That's where you could end up if… we're going to act like testing is a substitute for vaccination. It's not remotely a substitute for vaccination.

(Krasner Dep. at 210:3-23; 212:8-11; 217:8-25. See also id. at 208:17-23 ("Q: How is testing expensive? A [Krasner]: "You've got to buy a lot of kits and we have six-hundred people,

approximately, in an [sic] facility that is not medical and we have hundreds of people who are not our employees who are coming in and out all the time.").)

Similarly, he concluded that a masking policy was not a viable alternative to mandatory vaccination. Even if masking were at all effective in preventing the spread of the virus, it would require each employee's full and continuous compliance, something that the DAO could neither monitor nor ensure:

> It's really easy to say you are going to wear a mask and then not do it. Masking can be unpleasant. So, particularly for people who do not feel that they are in medical danger, the likelihood of their complying is lower than for someone who does on a minute-by-minute basis feel like they may be injuring themselves by lowering their mask. I remember that being part of our discussion.

(Id. at 249: 4-13.)

Finally, remote work was not possible for many employees, whose physical presence was required in the office or in court. (See Krasner Dep. 170:3-5 ("[Krasner] A: Is there any way to safely accommodate a trial attorney with respect to the Covid-19 vaccine policy?").) Once again, remote work was not viable for Spivack, whose position required her physical presence at the office and in courtrooms. Although she never requested an accommodation, when she was offered one—reassignment to the Law Division, allowing her to do appellate work remotely—she refused "because she wants to do trial work." (Id. at 151:14.)

The DAO thus "seriously considered substantially less restrictive alternatives" in the hope that they could achieve the Office's compelling interest—trying "to keep people as safe as we can." (Id. at 77:7); see Bruni, 824 F.3d at 357. Concluding that these alternatives were inadequate, the Office required vaccinations for all non-union employees save one.

In these circumstances, the DAO Vaccine Policy survives strict scrutiny review.

Because the Policy thus passes constitutional muster as a matter of law, I will grant

Krasner's Motion for Summary Judgment on Spivack's First Amendment claim, and I will deny Spivack's cross motion against Krasner as to that claim.

B. State Law Claim

Spivack asks me to exercise jurisdiction over her supplemental state law claim under the Pennsylvania Religious Protection Freedom Act. 71 Pa. Stat. Ann. §§ 2401-07. As she has failed to comply with the statute's notice requirement, however, I cannot. See Webb v. City of Phila., No. 05-cv-5238, 2007 WL 576313 at *3 (E.D. Pa. Feb. 20, 2007) ("Because compliance with a statutory notice provision is a prerequisite to jurisdiction, the failure to comply with such a provision renders the court unable to hear the claim.").

The PRFPA was "enacted in order to provide more protection to the exercise of religious beliefs than that currently afforded by the Free Exercise Clause of the First Amendment to the Federal Constitution." Brown v. City of Pittsburgh, 586 F.3d 263, 285 (3d Cir. 2009). It thus provides that a local government agency may not substantially burden a person's free exercise of religion, including any burden that results from a rule of general applicability, unless the burden is both in furtherance of the agency's compelling interest and the least restrictive means of furthering that interest. 71 Pa. Stat. Ann § 2404(a) and (b). Yet, "a person may not bring an action in court to assert a claim under this act unless, at least 30 days prior to bringing the action, the person gives written notice to the agency by certified mail." Id. § 2405(b). The Act provides four exceptions to this notice requirement:

> **(c) Exception.** A person may bring an action in court without providing the notice required by subsection (b) if any of the following occur:
>
> (1) The exercise of governmental authority which threatens to substantially burden the person's free exercise of religion is imminent.
>
> (2) The person was not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide notice.

> (3) The provision of the notice would delay an action to the extent that the action would be dismissed as untimely.
> (4) The claim or defense is asserted as a counterclaim in a pending proceeding.

Id. § 2405(c).

Spivack concedes that she failed to comply with the PRFPA's notice requirement. She nonetheless contends that the first exception applies: that the threat to her free exercise of religion was "imminent" when she filed her lawsuit. (Doc. No. 36 at 6.) This is simply untrue. By the time Spivack commenced litigation, "the exercise of governmental authority which threaten[ed] to substantially burden [her] free exercise of religion" was not "imminent"—it had already taken place. Spivack was terminated from her position four days *before* she initiated the instant lawsuit. Moreover, Spivack testified that she had consulted with counsel in December 2021 (months *before* her April 2022 firing) because she knew that she might be terminated "over the vaccination issue." (Doc. No. 32-16, Spivack Dep., at 159.) She thus had ample notice and opportunity to comply with the PRFPA notice requirement.

As Spivack has failed to comply with the 30-day notice provision and because no exception applies, this Court lacks jurisdiction to hear her state-law claim. Webb, 2007 WL 576313 at *3. Accordingly, I will grant summary judgment on Spivack's state law claim in favor of Defendants, and I will deny Spivack's cross motion against Krasner on that claim.

C. The City's Liability

Because I will grant Krasner's Motion for Summary Judgment, Spivack cannot as a matter of law prevail in her claims against the City, whose Monell liability is predicated on Krasner's liability. C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 202 (3d Cir. 2000) (citing Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978)). I will thus grant the City's Motion for Summary Judgment.

V. CONCLUSION

As I discussed at the outset, evaluating government actions taken in response to COVID necessarily requires consideration of the concerns and confusion the pandemic triggered. Although these cannot justify unconstitutional action, the context they provide helps explain the reasons for the actions that were taken. It is apparent that there was no "systemic effort . . . to violate federal and state law." Mr. Krasner was most concerned about the health and safety of his staff and the public. Accordingly, he required employee vaccinations. He limited exemptions to promote that same concern for health and safety, allowing an exemption only when the COVID vaccine could be shown significantly to threaten an employee's health. There is absolutely nothing in the record suggesting that anti-religious bias figured in his decisions. To the contrary, Ms. Spivack refused the DAO's offer of an accommodation, which would have allowed her to keep her job and remain unvaccinated (in accordance with her religious beliefs). In these circumstances, Ms. Spivack's constitutional rights were not violated.

I will thus grant Mr. Krasner's and the City's Motions for Summary Judgment. I will deny Ms. Spivack's Motion for Summary Judgment against Defendant Krasner.

An appropriate Order follows.

January 4, 2023

Paul S. Diamond, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RACHEL SPIVACK,	:	
Plaintiff	:	
	:	
v.	:	**Civ. No. 22-1438**
	:	
CITY OF PHILADELPHIA,	:	
LAWRENCE S. KRASNER,	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 4th day of January, 2023, upon consideration of Defendant Krasner's Motion for Summary Judgment (Doc. No. 34), Plaintiff's Motion for Summary Judgment against Defendant Krasner (Doc. No.33), Defendant City of Philadelphia's Motion for Summary Judgment (Doc. No. 32), Defendant City's Motion to Amend/Correct Motion for Summary Judgment (Doc. No. 35), and all related submissions (Doc. Nos. 36, 38, 39, 41), it is hereby **ORDERED** that:

- Defendant Krasner's Motion for Summary Judgment (Doc. No. 34) is **GRANTED**;
- Plaintiff's Motion for Summary Judgment against Defendant Krasner (Doc. No. 33) is **DENIED**;
- Defendant City's Motion to Amend/ Correct Motion for Summary Judgment (Doc. No. 35) is **GRANTED**; and
- Defendant City's prior Motion for Summary Judgment (Doc. No. 32) is **DENIED as MOOT**.
- Judgment is entered in favor of Defendants and against Plaintiff. The Clerk of Court shall close this case.

AND IT IS SO ORDERED.

Paul S. Diamond

Paul S. Diamond, J.