APL-2023-00079
APL-2023-00080

To be argued by:
JESSE A. TOWNSEND
30 minutes requested

Court of Appeals
State of New York

CHRISTINE O'REILLY,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

LUCIA JENNIFER LANZER,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

INGRID ROMERO,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

[*caption continued*]

BRIEF FOR RESPONDENTS

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December 6, 2023

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ELIZABETH LOIACONO,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

ATHENA CLARKE,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

CRYSTAL SALAS,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

RACHEL MANISCALCO,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

JOAN GIAMMARINO,

Petitioner-Appellant,

against

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Respondents-Respondents.

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PRELIMINARY STATEMENT

A year and a half into the COVID-19 pandemic, New York City's Department of Education (DOE) was able to resume full in-person instruction due to the approval of safe and effective adult vaccines. To protect staff, students, and communities, the City Health Commissioner required employees to submit evidence of vaccination. Following arbitration between DOE and the teachers' union over the requirement's implementation, an arbitral award authorized DOE to place teachers on leave without pay if they failed to provide proof of vaccination by a specific deadline.

The eight petitioners here were tenured teachers who were placed on leave without pay for failing to provide evidence of vaccination. They claim that DOE was required by statute to offer them a formal disciplinary hearing before doing so. They sued under CPLR articles 75 and 78 seeking vacatur of the arbitral award and reinstatement to their teaching positions. Four different justices of Supreme Court, New York County, dismissed the petitions, and two panels of the Appellate Division, First Department affirmed.

This Court should likewise affirm. Petitioners' article 78 claims fail under the Court's clear precedent. The Court has distinguished between matters involving *employee discipline*, which are subject to statutory hearing requirements, and those involving *qualifications of employment* unrelated to competence, job performance, or misconduct, which are not. The public-health requirement here plainly falls into the latter category. Nor did the requirement call for any individualized factual inquiry that would necessitate a formal hearing as a matter of constitutional due process.

Petitioners' article 75 claims fare no better. That effort to vacate the arbitral award is procedurally barred twice over. As teachers who were represented by the union in the arbitration, and who do not contend that the union breached its duty of fair representation, petitioners lack standing to challenge the arbitral award. They also failed to timely join their union, a necessary party. The challenges would also fail on the merits, as the grounds for vacatur of an arbitral award are narrow, and petitioners do not come close to meeting them.

QUESTIONS PRESENTED

1. Did the Appellate Division correctly affirm the denials of petitioners' article 78 claims, where (a) statutory hearing rights do not apply to actions taken as a consequence of noncompliance with a qualification of employment, and (b) petitioners were given notice and opportunities to be heard on their vaccination status that satisfy constitutional due process?

2. Did the Appellate Division correctly affirm the denials of the article 75 claims, where (a) petitioners attempt to vacate an arbitral award to which they were not a party, without alleging a breach of the duty of fair representation by their union and without joining the union in this suit, and (b) the arbitrator did not clearly exceed his authority or violate public policy in issuing the arbitral award?

STATEMENT OF THE CASE

A. The requirement that New York City public-school employees be vaccinated against COVID-19

1. The initial order requiring vaccination of public-school employees

COVID-19 is a highly infectious and potentially deadly disease that "has caused widespread suffering in the State, country, and world." *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 272 (2d Cir. 2021) (per curiam), *op. clarified*, 17 F.4th 368, 370 (2d Cir. 2021), *cert. denied sub nom. Dr. A. v. Hochul*, 142 S. Ct. 2569, 2569 (2022). New York City has been hit particularly hard, with more than 3.4 million cases and 45,000 deaths. N.Y.C. Dep't of Health, *COVID-19: Data, Trends and Totals, Totals*, https://perma.cc/DD77-DY2V (updated Nov. 30, 2023).

In March 2020, in response to the rapidly spreading pandemic, New York City's public schools closed to in-person instruction. *See N.Y.C. to Close Schools, Restaurants and Bars*, N.Y. Times (Mar. 15, 2020), https://perma.cc/AW3Q-3XXE. In-person instruction remained limited throughout the 2020-2021 school year. *See* Eliza Shapiro, *N.Y.C. Will Eliminate Remote Learning for*

Next School Year, N.Y. Times (updated Aug. 23, 2021), https://perma.cc/FSU9-GHMZ. But as the president of the teacher's union noted at the time, "[t]here [was] no substitute for in-person instruction." *Id.*

The eventual return to full-person instruction required the arrival of safe and effective vaccines. Indeed, public schools presented a particularly compelling need for vaccination, as children regularly have extended contact with countless people indoors. Per the Centers for Disease Control and Prevention (CDC), vaccination was "the most critical strategy to help schools safely resume full operations," and thus it recommended that educators and other school staff be "vaccinated as soon as possible" (*O'Reilly v. Bd. of Educ. of City Sch. Dist. of N.Y.* Appendix ("*O'Reilly* A") 400; *Clarke v. Bd. of Educ. of City Sch. Dist. of N.Y.* Appendix ("*Clarke* A") 378).

In August 2021, shortly after the first vaccine against COVID-19 received full regulatory approval for persons aged 16 or older, the Commissioner of the New York City Department of Health and Mental Hygiene (the "Health Commissioner") issued an order

requiring DOE employees to submit proof of vaccination before starting employment, or by September 27, 2021 (*O'Reilly* A444-47; *Clarke* A422-25). The order was subsequently rescinded and restated (*O'Reilly* A400-03; *Clarke* A378-381), and the restated order was then amended to extend the deadline to submit proof of vaccination to October 1, 2021, *see* Order of Comm'r of Health & Mental Hygiene (Sept. 28, 2021), https://perma.cc/Q65Z-WJEQ.[1] The City's Board of Health subsequently ratified the Health Commissioner's Order. *See* 24 RCNY 3.01(d) (authorizing Health Commissioner to take emergency action subject to later approval or rescission by Board of Health).

The Health Commissioner's original order was issued shortly before the City's public schools fully reopened for in-person

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[1] The New York City Charter grants the Department of Health and Mental Hygiene "jurisdiction to regulate all matters affecting health in the City of New York" and to "supervise the reporting and control of communicable and chronic diseases." N.Y.C. Charter § 556. And the City's Administrative Code grants the Department the power "to most effectively prevent the spread of communicable diseases" and to "take measures … for general and gratuitous vaccination." N.Y.C. Admin. Code § 17-109. This Court has determined that Administrative Code § 17-109 is "[p]lainly" "a legislative delegation of authority to adopt vaccination measures." *Garcia v. N.Y.C. Dep't of Health & Mental Hygiene*, 31 N.Y. 3d 601, 611 (2018). The Health Commissioner relied on these provisions, and related ones, in issuing the order that DOE employees submit proof of vaccination (*O'Reilly* A400-01; *Clarke* A378-79).

instruction for the 2021-2022 school year (O'Reilly A401; *Clarke* A379). *See* Shapiro, *supra* at 6. At the time that students returned to in-person schooling in September 2021, no vaccine had been fully approved for children under the age of 16; full regulatory approval for a vaccine for adolescents ages 12 through 15 came only in July 2022. *See* Pfizer, *Pfizer and BioNTech Announce U.S. FDA Approval of their COVID-19 Vaccine COMIRNATY® For Adolescents 12 through 15 Years of Age* (July 8, 2022), https://perma.cc/PV4W-PFLH.

As the Health Commissioner explained, "the City is committed to safe, in-person learning" in DOE schools, and DOE's student population includes students in areas "disproportionately affected by the COVID-19 pandemic and students who are too young to be eligible to be vaccinated" (*O'Reilly* A401; *Clarke* A379). Since the CDC advised that vaccination is an effective tool to prevent the spread of COVID-19 and benefits both recipients and those they come into contact with, and urged school teachers and staff to be vaccinated against the disease (*O'Reilly* A400; *Clarke* A378), the Health Commissioner concluded that a "system of

vaccination for individuals working in school settings … w[ould] potentially save lives, protect public health, and promote public safety" (*O'Reilly* A401; *Clarke* A379).

The order led to dramatically increased vaccination rates among public-school employees: by October 2021, around 95% of DOE personnel had been vaccinated. *See* Bernstein Decl. ¶ 5, *Kane v. de Blasio*, 623 F. Supp. 3d 339 (S.D.N.Y. 2022) (21-cv-07863), ECF No. 52. Building on this success, the Health Commissioner later required vaccination for all city employees. *See* Order of Comm'r of Health & Mental Hygiene 3 (Oct. 20, 2021), https://perma.cc/W2BQ-DX6E. The Health Commissioner also went on to order private employers to require their in-person employees to be vaccinated, subject to defined exceptions. Order of Comm'r of Dep't of Health & Mental Hygiene 3-5 (Dec. 13, 2021), https://perma.cc/9HU4-9NHC.

2. The arbitration award addressing the impact of the vaccination order on public-school teachers

After the Health Commissioner issued his initial order, DOE and the unions of its employees attempted to negotiate the impact

of the vaccination requirement on the terms and conditions of employment, including reasonable accommodation requests and the placement of unvaccinated employees on leave without pay (*O'Reilly* A413-18; *Clarke* A391-96). After negotiations failed to achieve consensus, the United Federation of Teachers (the "UFT") filed an impasse declaration with the Public Employment Relations Board under Civil Service Law § 209 (O'Reilly A404; *Clarke* A382). The board appointed a neutral mediator to mediate between DOE and UFT, and the parties then agreed to arbitrate before the same individual when they could not resolve all issues consensually (*O'Reilly* A57-59; *Clarke* A34-35).

The arbitrator's September 10, 2021, award (the "Impact Award") established a process for handling requests for religious and medical exemptions from the vaccination requirement (*O'Reilly* A55-73; *Clarke* A31-49). The Impact Award also provided that all unvaccinated employees who had not requested an accommodation, or who had requested and been denied one, would be placed on leave without pay on September 28, 2021 (*O'Reilly* A68; *Clarke* A44). As the Impact Award explained, "[p]lacement on leave without pay for

these reasons shall not be considered a disciplinary action for any purpose" (*O'Reilly* A68; *Clarke* A44). The award went on to offer enhanced separation and extended leave options for employees who had been placed on leave (*O'Reilly* A71-72; *Clarke* A47-48). Finally, the Impact Award stated that beginning in December 2021, DOE would seek to terminate employees who were on leave without pay and had not opted into either of the enhanced separation or leave options (*O'Reilly* A72; *Clarke* A48).

3. The multiple lawsuits that have unsuccessfully sought to stop the implementation of the vaccination requirements

Numerous public-sector unions and employees of DOE and the City unsuccessfully challenged the Health Commissioner's orders in state and federal court. For example, the Second Circuit has repeatedly rejected facial constitutional challenges brought by DOE and city employees, some of which also attempted to raise state-law arguments concerning a right to a hearing before being placed on leave. *See Broecker v. N.Y.C. Dep't of Educ.*, No. 23-655, 2023 U.S. App. LEXIS 30076, at *4-6 (2d Cir. Nov. 13, 2023)

(summary order); *Marciano v. Adams*, No. 22-570, 2023 U.S. App. LEXIS 11915, at *2-5 (2d Cir. May 16, 2023) (summary order), *cert. denied*, No. 23-144 (Oct. 10, 2023); *Keil v. City of N.Y.*, No. 21-3043, 2022 U.S. App. LEXIS 5791, at *3-4 (2d Cir. Mar. 3, 2022) (summary order); *Kane v. de Blasio*, 19 F.4th 152, 163-67 (2d Cir. 2021); *Maniscalco v. N.Y.C. Dep't of Educ.*, No. 21-2343, 2021 U.S. App. LEXIS 30967, at *1 (2d Cir. Oct. 15, 2021) (summary order), *cert. denied*, 142 S. Ct. 1668, 1668 (2022).[2] Federal district courts have also rejected attempts by public employees to require hearings before they were placed on leave or terminated, holding that the vaccination requirements were conditions of employment. *See Broecker v. N.Y.C. Dep't of Educ.*, 585 F. Supp. 3d 299, 314-18 (E.D.N.Y. 2022); *Garland v. N.Y.C. Fire Dep't*, 574 F. Supp. 3d 120, 127-29 (E.D.N.Y. 2021). The Second Circuit also noted that vaccination was a condition of employment while denying a challenge to a state vaccination requirement for healthcare workers. *We the Patriots USA*, 17 F.4th at 294.

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[2] The Second Circuit ordered the City to reconsider certain accommodation requests as a result of an as-applied constitutional challenge. *See Kane*, 19 F.4th at 167-70.

State courts also by and large rejected attempts to enjoin the implementation of the vaccination requirements. *See Police Benevolent Ass'n v. City of N.Y.*, 215 A.D.3d 463, 463 (1st Dep't 2023); *N.Y.C. Mun. Labor Comm. v. City of N.Y.*, No. 2022-00618 (1st Dep't Mar. 10, 2022), NYSCEF No. 7; *Police Benevolent Ass'n v. de Blasio*, No. 2021-07867 (2d Dep't Oct. 29, 2021 & Dec. 8, 2021); *Correction Officers' Benevolent Ass'n v. City of N.Y.*, Index No. 161034/21 (Sup. Ct. N.Y. Cnty. Aug. 1, 2022), NYSCEF No. 31; 76; *Detectives' Endowment Ass'n v. City of N.Y.*, Index No. 650656/22 (Sup. Ct. N.Y. Cnty. June 13, 2022), NYSCEF No. 27; *Ansbro v. de Blasio*, Index No. 159738/21 (Sup. Ct. N.Y. Cnty. Dec. 20, 2021); 76; *N.Y.C. Mun. Labor Comm. v. City of N.Y.*, Index No. 158368/21 (Sup. Ct. N.Y. Cnty. Oct. 19, 2021), NYSCEF No. 38. One outlying Supreme Court decision rejected the vaccination requirement for city employees, but it is stayed pending appeal. *Garvey v. City of N.Y.*, 77 Misc. 3d 585 (Sup. Ct. Richmond Cnty. 2022).

Finally, individual DOE and city employees have challenged the denials of their requests to be exempted from the vaccination requirements. Most such claims have been denied. *See, e.g.*, *Matter*

of Lee v. City of N.Y., No. 2023-01253, 2023 N.Y. App. Div. LEXIS 6032, at *1-2 (1st Dep't Nov. 21, 2023); *Matter of Lynch v. Bd. of Educ. of City Sch. Dist. of N.Y.*, No. 2023-01252, 2023 N.Y. App. Div. LEXIS 5761, at *1-4 (1st Dep't Nov. 14, 2023); *Matter of Farca v. Bd. of Educ. of City Sch. Dist. of N.Y.*, No. 2023-00313, 2023 N.Y. App. Div. LEXIS 5323, at *1-2 (1st Dep't Oct. 24, 2023); *Matter of Lebowitz v. Bd. of Educ. of City Sch. Dist. of N.Y.*, No. 2022-04896, 2023 N.Y. App. Div. LEXIS 5293, at *1-3 (1st Dep't Oct. 19, 2023); *Matter of Hogue v. Bd. of Educ. of City Sch. Dist. of N.Y.*, No. 2022-04898, 2023 N.Y. App. Div. LEXIS 4903, at *1-3 (1st Dep't Oct. 3, 2023); *Matter of Marsteller v. City of N.Y.*, 217 A.D.3d 543, 544-45 (1st Dep't 2023). But some DOE and City employees have succeeded on claims that they were entitled to an accommodation. *See Matter of Loiacono v. Bd. of Educ. of N.Y.*, Index No. 154875/2022, 2022 N.Y. Misc. LEXIS 5801, at *8-10 (Sup Ct. N.Y. Cnty. Sept. 2, 2022); *Deletto v. Adams*, Index No. 156459/2022, 2022 N.Y. Misc. LEXIS 5571, at *13 (Sup Ct. N.Y. Cnty. Sept. 13, 2022).

4. The policy's lifting in February 2023

The severity of the COVID-19 threat changed over time. While case and hospitalization rates have fluctuated, throughout 2023 neither measure has reached the alarming levels of late 2021 and early 2022. *See COVID-19: Data, Trends and Totals*, *supra*. And the rate of deaths from COVID-19 in the City has declined over the past year as well. *Id.*

The City's decision-makers have recognized and responded to the changing nature of the threat of COVID-19. On February 9, 2023, the City's Board of Health lifted the provisions of the Health's Commissioner's order requiring DOE staff to provide proof of vaccination to DOE. *See* Order of Bd. of Health 2 (Feb. 9, 2023), https://perma.cc/LBT6-WQEJ. It did so in part because, by February 2023, "99% of all DOE employees" and more than half of the City's school-age population had completed a primary series of vaccination against COVID-19. *Id.* at 1. The Board of Health recognized that "high vaccination rates correlate with lower rates of hospitalization and death" and that the City's high vaccination rate had "proven effective in lessening the burden of COVID-19 on

the City's healthcare system." *Id.* The Board of Health lifted several other vaccination requirements around the same time in recognition of the changing state of the pandemic in the City.

B. These petitions, which Supreme Court and the Appellate Division denied

1. The materially identical petitions, which did not dispute petitioners' failure to comply with the vaccination requirement

Petitioners were tenured DOE teachers (*see, e.g.*, *O'Reilly* A46; *Clarke* A22). They were all placed on leave without pay in October 2021 after failing to submit proof that they were vaccinated against COVID-19 (*O'Reilly* A74-76; *Clarke* A50-52). Their reasons for not submitting evidence of vaccination to DOE are not stated in this record. Five of these petitioners are plaintiffs in other lawsuits challenging the vaccination requirement on various grounds including the lack of pre-leave hearings. *See Broecker*, 2023 U.S. App. LEXIS 30076; *Keil*, 2022 U.S. App. LEXIS 5791; *Maniscalco*, 2021 U.S. App. LEXIS 30967.

One petitioner applied for an accommodation (*see Loiacono v. Bd. of Educ. of City Sch. Dist. of N.Y.* Record on Appeal 43), and

eventually obtained reinstatement and backpay through another article 78 petition concerning her accommodation request. *Loiacono*, 2022 N.Y. Misc. LEXIS 5801. The other petitioners were subsequently dismissed from their employment at DOE (*see O'Reilly* A72; *Clarke* A48), though their dismissals happened months after they filed their petitions and are not referenced in them, and thus are not at issue in these suits.

Petitioners, represented by the same counsel, brought nearly identical petitions under CPLR articles 75 and 78, seeking orders annulling their placement on leave without pay and vacating the Impact Award (*see, e.g.*, *O'Reilly* A44-54; *Clarke* A20-30). They alleged that their placement on leave without pay was in derogation of Education Law §§ 3020 and 3020-a, the collective bargaining agreement (CBA) between DOE and the UFT, and due process (*O'Reilly* A49-52; *Clarke* A25-28). They did not dispute DOE's determination that they had failed to comply with the vaccination requirement or identify what other relevant facts a more extensive pre-leave process would have established, and none joined the UFT as a party. DOE cross-moved to dismiss the petitions, raising

standing, necessary-party, and merits arguments (*see O'Reilly* A462-66; *Clarke* A373-77).

2. The decisions of four Supreme Court Justices denying the petitions on procedural grounds and on their merits

Supreme Court denied all of the petitions. One court (Kotler, J.) consolidated the proceedings of petitioners Crystal Salas, Athena Clarke, Rachel Maniscalco, and Joan Giammarino for consideration and disposition in a single decision and order (*Clarke* A11). The court held that petitioners' article 75 claim failed for lack of standing and failure to join the UFT as a necessary party (*Clarke* A12-13). The court held that the article 78 claims should be dismissed for petitioners' failure to exhaust their administrative remedies by attempting to grieve being placed on leave without pay (*Clarke* A13-14). In the alternative, the court held that Education Law §§ 3020 and 3020-a apply only to acts of discipline, whereas the vaccination requirement was a qualification of employment, and thus that DOE had not committed an error of law by refusing to follow the procedures of Education Law §§ 3020 and 3020-a before placing the petitioners on leave without pay (*Clarke* A14-17).

The court likewise rejected the claim that the arbitrator exceeded his authority in issuing the Impact Award (*Clarke* A17-19).

Another court (Frank, J.) issued identical orders denying the petitions of petitioners Jennifer Lanzer and Ingrid Romero (*O'Reilly* A35-39). The court agreed that the petitioners lacked standing to challenge the Impact Award (*O'Reilly* A36). And the court held that the petitioners were not entitled to hearings because being placed on leave without pay was not disciplinary action (*id.*). The court noted the lack of evidence that petitioners attempted to comply with the provisions of the Health Commissioner's order or the Impact Award and denied the petitions (*id.*).

A third court (Bluth, J.) dismissed the petition of Christine O'Reilly (*O'Reilly* A29-34). The court agreed that the petitioner should have added the UFT as a necessary party (A33). On the merits, the court agreed that placement on leave without pay was not discipline, as Education Law § 3020-a uses the term, but rather a response to petitioner's refusal to comply with a condition of employment (*O'Reilly* A31-32). The court concluded that the petitioner had received both notice and opportunities to be heard

(*id.*). And the court noted that the petitioner had identified no issue of fact or any alleged misapplication of the Impact Award for trial (*O'Reilly* A32-33).

Finally, a fourth court (Love, J.) denied and dismissed the petition of Elizabeth Loiacono (*O'Reilly* A40-43). The court agreed that the petitioner lacked standing to challenge the Impact Award and that the UFT was a necessary party (*O'Reilly* A43). On the merits, the court held that the decisions of public-health officials to require vaccination were not arbitrary or an abuse of discretion (*O'Reilly* A42). And the court agreed that Education Law § 3020-a is not relevant, as hearings are not required in the context of enforcing employment qualifications or conditions, including the vaccination requirement (*id.*). The court also rejected the challenge to the Impact Award on the merits (*O'Reilly* A42-43). As noted, this petitioner subsequently obtained reinstatement and backpay in a separate article 78 proceeding. *Loiacono*, 2022 N.Y. Misc. LEXIS 5801. Loiacono's claims in this proceeding are thus moot as there is no further relief she could obtain.

3. The decisions of two panels of the First Department, each rejecting petitioners' claims

The First Department heard argument on the appeals of these eight petitions in two groups before two panels on two consecutive days. In two decisions issued on the same day, the panels affirmed the denials of the petitions (*O'Reilly* A5-28; *Clarke* A5-9).

Citing this Court's decisions in in *Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540 (2013), and *Matter of Felix v. New York City Department of Citywide Administrative Services*, 3 N.Y.3d 498 (2004), the panels held that COVID-19 vaccination was a qualification of employment at DOE (*O'Reilly* A7; *Clarke* A6), such that petitioners had no right to a formal hearing under Education Law §§ 3020 and 3020-a (*O'Reilly* A12-16; *Clarke* A7-8). The panels further concluded that DOE had provided the petitioners with constitutionally sufficient due process in determining whether they had complied with an employment qualification, in that they received notice and opportunities to be heard (*O'Reilly* A16; *Clarke* A8), and petitioners had identified no facts to be raised at a hearing

in any event (*O'Reilly* A16). One Justice on one panel dissented on the article 78 claims (*O'Reilly* A18-25).

The First Department unanimously rejected the petitioners' article 75 challenge to the arbitration award for lack of standing and failure to join the UFT, a necessary party (*O'Reilly* A11-12, 26; *Clarke* A7-8). The panels further held that the Impact Award did not exceed the arbitrator's power or violate public policy (*O'Reilly* A11-13; *Clarke* A7-8).

Both panels granted petitioners leave to appeal to this Court (*O'Reilly* A3-4; *Clarke* A3-4).

ARGUMENT

The Appellate Division's orders should be affirmed. Petitioners' article 78 claims fail because they cannot show that DOE violated their statutory rights or deprived them of due process when it placed them on leave without pay. And their article 75 claims fail because petitioners lack standing to attack the Impact Award and failed to join a necessary party, and in any case do not come close to meeting the exacting standard required to vacate the award.

POINT I

PETITIONERS' ARTICLE 78 CLAIMS WERE CORRECTLY DENIED

A. Disciplinary hearings were not mandated because the vaccination requirement was a qualification of employment.

Petitioners' article 78 claims lack merit. Binding precedent forecloses the assertion at the claims' heart—that DOE was statutorily required to hold a hearing before placing them on leave without pay (*O'Reilly* A49-52; *Clarke* A23-28). The statutes that petitioners invoke provide that the dismissal or other discipline of tenured teachers, *see* Educ. Law § 3020, shall be conducted according to a formal system of charges and hearings, *see id.* § 3020-a.[3] This Court has made clear that such requirements—whether under Education Law §§ 3020 and 3020-a, Civil Service Law § 75, or analogous CBA provisions—do not apply when employees face consequences for failing to meet a minimum qualification or

[3] Education law § 3020-a requires an extensive adversarial process, including a detailed written charging document, *id.* § 3020-a (2)(a), a hearing before a neutral hearing officer selected from a panel of labor arbitrators, *id.* § 3020-a (3)(a)-(b), and the rights to counsel and to subpoena and cross-examine witnesses, *id.* § 3020-a (3)(c)(i)(C). While this trial-like process continues, a tenured teacher is generally on leave with pay. *Id.* § 3020-a(2)(b).

eligibility requirement for employment. *See Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 558-59 (2013); *Matter of N.Y.S. Off. of Child. & Fam. Servs. v. Lanterman*, 14 N.Y.3d 275, 282 (2010); *Matter of Felix v. N.Y.C. Dep't of Citywide Admin. Servs.*, 3 N.Y.3d 498, 505-06 (2004).

Thus, while the cited hearing provisions apply to matters of *discipline*—relating to "job performance, misconduct, or competency," *Felix*, 3 N.Y.3d at 506 (quotation marks omitted)—they do not apply to noncompliance with *qualifications of employment* that are unrelated to those areas and thus are "plainly not disciplinary," *Lanterman*, 14 N.Y.3d at 282. The Court has applied this distinction, for example, to requirements that employees reside within a particular jurisdiction, *Beck-Nichols*, 20 N.Y.3d at 558; *Felix*, 3 N.Y.3d at 505, and to requirements that they hold specified credentials like a specialized teaching or counselor's certificate, *Lanterman*, 14 N.Y.3d at 280. Qualifications of employment, of course, remain subject to the requirements of constitutional due process, *see Beck-Nichols*, 20 N.Y.3d at 559; *Felix*, 3 N.Y.3d at 506, but they do not implicate statutory

requirements that mandate a formal adversarial hearing in matters of discipline.

The COVID-19 vaccination requirement fit naturally within this Court's precedent on qualifications of employment, as the courts below and federal decisions have recognized. *See Broecker*, 585 F. Supp. 3d at 314-18; *Garland*, 574 F. Supp. 3d at 127-29; *see also We the Patriots USA*, 17 F.4th at 294. This is true for at least three straightforward and mutually reinforcing reasons.

First, the requirement served a purpose unrelated to individual teacher competence or conduct—here, the public-health goal of reducing the spread of a dangerous virus that, in the midst of a pandemic, threatened to rage through the public-school system upon the return to in-person instruction (*see O'Reilly* A401; *Clarke* A379).

Second, the requirement applied in the same way for all DOE employees (other than those entitled to an accommodation under federal, state, or city law), not just for those with teaching responsibilities. Indeed, analogous requirements applied to all city employees and even to private employees within the City.

And third, assessing compliance with the requirement involved no subjectivity or discretion, but rather was readily performed based on simple, objective documentation: employees either submitted proof of vaccination or they didn't. While distinguishing between disciplinary matters and employment qualifications may not always be easy, this case is not a close one.

1. This Court's precedent establishes that Education Law §§ 3020 and 3020-a do not apply to qualifications of employment.

The Appellate Division's decision is supported by a robust line of the Court's precedents. The Court first distinguished qualifications of employment from rules concerning conduct and competence in addressing the residency requirement upheld in *Felix*. The Court held that failing to meet an employment eligibility requirement "is separate and distinct from an act of misconduct by a municipal employee," and the latter is the type of issue to which statutory "civil service protections would apply." *Felix*, 3 N.Y.3d at 505. The Court explained that an employment eligibility requirement "has a different purpose than Civil Service Law § 75(1)"—that is, a purpose unrelated to the conduct or competence

of individual employees. *Id.* at 505-06. The Court quoted with approval the Fourth Department's earlier decision in *Mandelkern v. City of Buffalo*, 64 A.D.2d 279, 281 (4th Dep't 1978), which likewise upheld the government's imposition of a residency requirement without affording formal hearings under Civil Service Law § 75.

Later, in *Beck-Nichols*, the Court confirmed that the same analysis applies to tenured teachers, holding that a residency requirement defined "eligibility for employment" and was "'unrelated to job performance, misconduct or competency,'" such that noncompliant teachers were "not entitled to hearings complying with Education Law §§ 2509(2), 3020 and 3020-a, which deal with teacher discipline." *Beck-Nichols*, 20 N.Y.3d at 558-59 (quoting *Felix*, 3 N.Y.3d at 505). And it followed the same reasoning in holding that union employees were not entitled to a CBA disciplinary procedure before being dismissed for failure to maintain required credentials, such as a specialized teaching or counselor's certificate. *Lanterman*, 14 N.Y.3d at 280, 282-83.

Following this Court's decisions, the Departments of the Appellate Division have repeatedly held that statutory hearing rights do not apply when an employee is terminated for failing to maintain or meet minimum qualifications of employment, such as residency or licensing requirements. *Matter of Koutros v. Dep't of Educ. of N.Y.*, 129 A.D.3d 434, 435 (1st Dep't 2015); *Matter of O'Connor v. Bd. of Educ. of City Sch. Dist. of Niagara Falls*, 48 A.D.3d 1254, 1255 (4th Dep't 2008); *Matter of Sorano v. City of Yonkers*, 37 A.D.3d 839, 840 (2d Dep't 2007).

These consistent holdings make good sense. As this Court has explained, the tenure system for public-school teachers exists "to foster academic freedom … and to protect competent teachers from the abuses that might be subjected to if they could be dismissed at the whim of their supervisors," *Ricca v. Bd. of Educ. of City Sch. Dist. of N.Y.*, 47 N.Y.2d 385, 391 (1979), by prescribing rigorous procedural steps before an individual teacher may be disciplined for alleged misconduct or incompetency. On the other hand, widely applicable eligibility requirements that are "unrelated to job performance, misconduct or competency" serve a different purpose

and need not be enforced through the same procedurally exhaustive process. *Felix*, 3 N.Y.3d at 505-06 (quotation marks omitted). And as *Felix* noted, where a municipality may determine whether an employee has met an eligibility requirement by reference to official documents, the "adversarial testing of a hearing" is unnecessary. *Id.* at 506. In contrast, allegations of misconduct or incompetence by an individual employee often present fact-intensive questions that make them natural subjects for the formal adversarial process dictated by Education Law §§ 3020 and 3020-a.

The Appellate Division correctly applied this precedent in holding that a hearing was not required before petitioners were placed on leave without pay for failing to satisfy the COVID-19 vaccination requirement. The requirement served a different purpose from that served by the tenure laws—a public-health purpose, unrelated to job performance or any alleged misconduct (*see O'Reilly* A401; *Clarke* A379). As the Impact Award confirmed, leave without pay was the consequence for those comparatively few employees that declined to provide DOE with evidence of vaccination; it was not a "disciplinary act" (*Clarke* A44). Moreover,

compliance with the requirement was straightforward to establish, via submission of proof of vaccination, and thus did not require the "adversarial testing of a hearing." *Felix*, 3 N.Y.3d at 506. For all of these reasons, petitioners thus were not entitled to hearings under Education Law §§ 3020 and 3020-a before being placed on leave without pay (O*'Reilly* A13; *Clarke* A8).

2. Petitioners cannot evade the force of *Beck-Nichols* and *Felix*.

Beck-Nichols and *Felix* control petitioners' claims, and their efforts to escape those decisions' reach are unavailing (Br. for Appellants ("App. Br.") 33-43).

a. Petitioners' idiosyncratic parsing of *Beck-Nichols* does not save their claims.

To start, petitioners purport to divine a four-part "rule" from *Beck-Nichols* that this Court did not articulate and that is not supported by the Court's reasoning. The first and fourth of these amount to the same assertion: that a qualification of employment supposedly must be in place at the time of an employee's hiring (App. Br. 33-36). But *Beck-Nichols* did not say that, and no principle

of law would support such a rule. While the Court's decision noted that the residency requirement at issue was in place before the petitioners were hired, 20 N.Y.3d at 549-55, that fact was not relevant to the analysis. And the cases it drew from likewise focused on whether the challenged requirement related to misconduct or competence. *See Lanterman*, 14 N.Y.3d at 282-83; *Felix*, 3 N.Y.3d at 505-06; *Mandelkern*, 64 A.D.2d at 281. There is no logical connection between the stage of an employment relationship when a requirement is introduced, on the one hand, and the question whether the requirement serves a disciplinary purpose, on the other. It is thus clear that the time-of-hiring rule that petitioners propose doesn't exist.

Moreover, a time-of-hiring rule would be deeply problematic. Health and educational officials obviously cannot require employees to be vaccinated against a disease until that disease exists and poses a risk to its students and staff and until a vaccine against it is available. Thus, the COVID-19 requirement could not have arisen sooner than it did. Petitioners do not challenge the wisdom of the vaccination requirement in addressing a significant

public-health threat (*see* App Br. 6), but their rule requiring implementation only for new hires would handcuff an effective response to that threat.

In this instance, petitioners would force a state of affairs where a vaccination requirement would have been enforced for new employees, probationary teachers, and non-teaching employees, while members of the tenured teaching faculty—the group most likely to have extensive contact with unvaccinated DOE students—would have been left unvaccinated unless and until DOE announced formal charges against each of them, placed them on leave with full pay, and held adversarial hearings for each. This approach would have burdened DOE with likely thousands of absentee teachers for extended periods, and the prosecution of an equal number of hearings that involved no disputed facts, all to avoid COVID sweeping through DOE's schools as they reopened for full in-person instruction.

The remaining parts of petitioners' purported rule are also not found in *Beck-Nichols*. But in any event, the vaccination requirement would also pass muster under them if they were

present in the decision (*contra* App. Br. 34-36). For one, petitioners argue that a qualification of employment must serve a legitimate purpose for the municipality (App. Br. 34-35). The vaccination requirement serves such a purpose. Indeed, the purpose of the requirement was clear from the face of the Health Commissioner's Order: to establish a "system of vaccination for individuals working in school settings" that "w[ould] potentially save lives, protect public health, and promote public safety" as DOE reopened to full in-person instruction (*O'Reilly* A401; *Clarke* A379). This purpose is not only clear, but also wholly unrelated to individual employee performance.

So too as to the remaining part of petitioner's proposed four-part test: the purported requirement that a qualification of employment must be unambiguous (App. Br. 35-36). The Court in *Beck-Nichols* noted that the residency requirement there was clear, but it did not announce a clear-statement rule. In any case, the vaccination requirement was amply clear. Petitioners object that the Health Commissioner did not use the precise words " conditions or qualifications of employment" (App. Br. 35-36; *see also id.* at 28,

43-47).[4] But no incantation of that phrase is needed under this Court's precedent; in *Beck-Nichols*, for example, the respondent school district's policy "state[d] simply that" it "require[d]" its employees to be residents. 20 N.Y.3d at 558 (quotation marks omitted).

The requirement here was at least as clear as that identified in *Beck-Nichols*. As stated above, the Health Commissioner required all DOE employees to submit evidence of vaccination by a specific date, and the Impact Award confirmed that failure to do so would result in being placed on leave without pay. These petitioners have never asserted that they misunderstood what was expected of them.

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[4] Petitioners mistakenly claim that the Health Commissioner's order was not an employment requirement because, in their view, it required proof of vaccination only to enter DOE buildings (App. Br. 6, 47). For DOE employees, the order was not limited to entry to buildings, but required all DOE employees to submit proof of vaccination (*O'Reilly* A401; *Clarke* A379). Petitioners' argument appears to conflate this with the order's separate requirement that *city* (i.e., non-DOE) employees and contractors who worked in DOE buildings provide proof of vaccination (*O'Reilly* A401; *Clarke* A379).

b. Petitioners' attempts to distinguish *Felix* are also unavailing.

Petitioners likewise fail to distinguish *Felix* (*contra* App. Br. 38-42). While they emphasize that the residency requirement there was announced for new employees (App. Br. 38), nothing in this Court's opinion turned on that fact, just as in *Beck-Nichols*. In some circumstances, policy considerations may favor imposing new requirements only for new employees. But as discussed, there is no legal mandate to adopt that approach, and doing so here would have made no sense.

Petitioners further contend that this case is unlike *Felix* because, in their view, they received no process at all (App. Br. 39, 42). But as discussed below, petitioners received notice and opportunities to be heard—and thus received all the process that this Court held in *Felix* was required.

Moreover, although petitioners note that *Felix* involved the Civil Service Law, which differs somewhat from the Education Law (App. Br. 39-40), the two contain parallel hearing requirements, and *Beck-Nichols* treated *Felix* as controlling in addressing the Education Law. *See* 20 N.Y.3d at 558-59. Petitioners' digression

into Education Law § 3020-a(2)(d), which strips a hearing right from tenured teachers convicted of certain crimes (App. Br. 41), is misguided, as it addresses a form of misconduct. And since, as petitioners note, *Felix* addressed the Civil Service Law rather than the Education law, it is not clear why this provision of the latter would alter *Felix*'s analysis of the former. And in any event, the provision did not influence the Court's decision in *Beck-Nichols*, which did address the Education law.

Finally, petitioners mistakenly claim that the requirement in *Felix* was more clearly stated than the vaccination requirement, asserting that the record on appeal does not specify the consequences for failing to comply with the vaccination requirement (App. Br. 42). In fact, the Impact Award clearly stated that failure to submit evidence of vaccination would lead to being placed on a non-disciplinary leave without pay (*O'Reilly* A68; *Clarke* A44), and petitioners had opportunities to show that they had complied (*O'Reilly* A74-76; *Clarke* A50-52).

c. Petitioners' remaining arguments do not help their claims either.

Petitioners' remaining arguments also do not undermine the First Department's reliance on *Felix* and *Beck-Nichols*. For example, although petitioners object to the court's citation of a federal decision that, in turn, cited Supreme Court's decisions in these cases, *see Broecker*, 585 F. Supp. 3d at 317, the Appellate Division's reasoning relied on this Court's precedent—namely *Felix* and *Beck-Nichols*—rather than the federal courts' (*see O'Reilly* A7, 12-13; *Clarke* A6-9).

And while petitioners attempt to recast their claims as involving mandamus to compel (App. Br. 52-54, 59), their claims would fail under that framing too. As explained above, a qualification of employment may be enforced without reference to the protections of Education Law §§ 3020 and 3020-a, so DOE was under no nondiscretionary duty to provide petitioners with a hearing before placing them on leave without pay.

Lastly, petitioners also argue that failing to comply with the vaccination requirement amounts to "insubordination" calling for discipline (App. Br. 46-47). But that argument, which could equally

have been made in *Beck-Nichols* or *Felix*, is simply inconsistent with this Court's uniform treatment of the failure to adhere to employment requirements as not triggering disciplinary protections. *Beck-Nichols*, 20 N.Y.3d at 558-59; *accord Felix*, 3 N.Y.3d at 505-06. As the Court's holdings reflect, a teacher's choice not to comply with a qualification of employment, if made openly, is not misconduct. An employer may set terms of continued employment (subject to limitations in a collective bargaining agreement), and the employee may decide not to continue working on those terms.

3. The Appellate Division's decision does not conflict with the law governing tenure.

Contrary to the petitioners' argument (App. Br. 22-32) and the opinion of the dissenting Justice below (*O'Reilly* A19-21), the First Department's decisions do not conflict with this Court's decisions in *Matter of Mannix v. Board of Education of New York*, 21 N.Y.2d 455 (1968), *Ricca*, 47 N.Y.2d 385, *Matter of Gould v. Board of Education of Sewanhaka Central School District*, 81 N.Y.2d 446 (1993), and *Matter of Springer v. Board of Education of City School District of*

New York, 27 N.Y.3d 102 (2016). All but one of these decisions pre-dated not just *Beck-Nichols*, but also *Felix*, and thus cannot be understood to control over the more recent rulings. And the tenure cases do not conflict with those later decisions in any event. They address the processes by which a teacher acquires or loses tenure. *See Springer*, 27 N.Y.3d at 107-08; *Gould*, 81 N.Y.2d at 451; *Ricca*, 47 N.Y.2d at 390; *Mannix*, 21 N.Y.2d at 458-59. They do not speak to general employment qualifications separate from tenure requirements, which is the dispositive issue for these petitions.

Mannix, for example, considered whether a school district could grant tenure conditionally, "subject to the conditions" that had been recommended when the teacher was licensed, which included the completion of additional hours of graduate coursework that the teacher had not completed as of the time of the grant of tenure. 21 N.Y.2d at 458. This Court rejected the school district's attempt to dismiss the teacher for then failing to complete the required coursework, holding that Education Law § 2573 required a final tenure decision at the end of the teacher's probationary service. *Id.* at 457. The Court based its analysis on that statute,

suggesting that the district's approach had extended the probationary period beyond the statutory limit. *Id.* at 457-59. In that context, the Court noted that if the teacher's failure to complete the coursework after a grant of tenure affected her competency, she could have been charged with incompetence and removed after a hearing. *Id.* at 458.

Mannix thus concerns the requirements for making final decisions about tenure under Education Law § 2573, such as the length of the permissible probationary period. *See* Educ. Law § 2573(1)(a). That issue is not presented here. To the extent that petitioners read *Mannix* as holding that after the grant of tenure, there is no method of terminating a teacher without a hearing, *see* 21 N.Y.2d at 457, 459-60, this Court subsequently made clear in *Beck-Nichols* that no such proposition holds. As disussed, *Beck-Nichols* squarely instructs that hearings are not necessary when enforcing a general employment qualification. 20 N.Y.3d at 558-59. In any event, *Mannix* is no longer good law even for the point it addressed, since it was abrogated by amendments to the Education Law. Those amendments provide that in a school district with more

than 400,000 residents (i.e., the school district for the City of New York), teachers may not receive tenure until the completion of all educational requirements, even if teacher's probationary period expires before completion. Educ. Law § 2573(1)(a)(i); *see Matter of Ahrens v. Bd. of Educ. of N.Y.*, 57 A.D.2d 925, 925 (2d Dep't 1977). And these appeals, unlike *Mannix*, are not about a teacher's professional credentials in any case.[5]

The remaining cases that petitioners cite also dealt with a school district's administration of the tenure process, rather than the application of a general employment qualification. This Court held in *Ricca* that a school district could not lengthen the period of probationary employment before a tenure decision beyond the period the Education Law allows. 47 N.Y.2d at 388, 90-91.

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[5] Also off point is an earlier case that *Mannix* cited, *People ex rel. Murphy v. Maxwell*, 177 N.Y. 494, 497-98 (1904), which concerned a school district by-law that deemed female teachers to have vacated their positions upon marriage. *Murphy* applied provisions of the 1897 New York City Charter and the Consolidation Act of 1882, not Education law §§ 3020 or 3020-a, and thus is irrelevant to petitioners' claims that those latter statutes were violated.

Even if that were not so, the by-law would likely be rejected on different grounds today, either as a violation of equal protection or as arbitrary and capricious or both. But to the extent that *Murphy* can be read to stand for the proposition that the exclusive way to terminate a teacher is for cause after a hearing, that aspect of the case is no longer sound after *Beck-Nichols*.

Similarly, *Gould* concerned tenure by estoppel, holding that if a school district does not take the steps the Education Law requires to grant or deny tenure by a specific date, tenure may be granted by operation of law. 81 N.Y.2d at 451. Finally, *Springer*, the only cited case to post-date *Felix* and *Beck-Nichols*, held that a teacher must strictly comply with the regulations concerning withdrawing his resignation in order to be reinstated with tenure. 27 N.Y.3d at 107-08. The facts of these cases thus are far afield, unlike the on-point decisions in *Felix* and *Beck-Nichols*.

Petitioners rely on other other cases involving tenure requirements that are also irrelvant here. For example, although *Steele v. Board of Education of New York* held that changes to "tenure areas" must be prospective (*see* App. Br. 27), it made clear that this phrase refers to the subject matter in which a teacher had gained tenure. 40 N.Y.2d 456, 462-63 (1976). It did not hold or suggest that all changes to a teacher's employment must be prospective. Far from it: the Court acknowledged that a school district "may abolish teaching and staff positions, even where this

requires discharging an employee tenured for that position." *Id.* at 462.

Likewise, in *Winter v. Board of Education for Rhinebeck Central School District*, 79 N.Y.2d 1, 6-7 (1992), this Court addressed whether a certified teacher could be reassigned to a subject area in which he was not certified, and by that act be turned into an unqualified teacher. Petitioners do not challenge individual reassignments; instead, the policy that petitioners challenge here was a universal one for all DOE employees regardless of their assignment or role at DOE. Similarly, *Lynch v. Nyquist*, 41 A.D.2d 363, 365 (3d Dep't 1973), *aff'd*, 34 N.Y.2d 588, 590 (1974), concerned a school district's attempt to avoid the statutory seniority provisions involved when a school district abolishes a teaching position, something not at issue here. Petitioners misread *Lynch* as requiring school districts to treat failures to comply with certification requirements as incompetence (App. Br. 31), when this Court has squarely held that a failure to maintain required credentials for employment is not incompetence or misconduct,

Lanterman, 14 N.Y.3d at 282-83. In any event, as noted above, this is not a case about professional credentials.

So too, cases about a teacher's alleged physical and mental disabilities (App. Br. 31) are irrelevant here. Alleged disabilities that relate to a teacher's competency implicate individualized judgments about such competency, and present individualized questions of proof. Thus, imposing employment consequences for alleged disability reasonably falls under the provisions of Education Law § 3020-a concerning charges of "alleged incompetency." As already explained, the vaccination requirement was unrelated to teacher performance or competency, and thus did not trigger the Education Law's provisions. *See Beck-Nichols*, 20 N.Y.3d at 558-59.

No more sound is petitioners' (and the dissenting Justice's) contention that only the Legislature may add qualifications for teaching (*see* App. Br. 28-30; *O'Reilly* A20). *Beck-Nichols* itself refutes this claim, as the residency requirement there was not imposed by the Legislature, but rather by the local board of education. 20 N.Y.3d at 558. And neither the Education Law nor any principle of law imposes a rule that qualifications of

employment may come only from the Legislature. To be sure, if the Education Law otherwise dictated a hearing in this instance, only the Legislature could create an exception to that rule. But as we have shown, the Education Law did not require a hearing here under the Court's precedents, and thus no action of the Legislature was needed.

The dissenting Justice rooted his position about sole legislative prerogative in *Mannix* (*see O'Reilly* A20), but as explained above, that case addressed whether the school district had complied with express statutory requirements concerning the granting of tenure, not whether it had the authority to impose a general eligibility requirement on all employees. Here, there simply is no conflict with the Education Law.

The same point dooms petitioners' arguments rooted in the Education Law (App. Br. 28-29). The statute does not state that all qualifications of employment must come from the Legislature and in fact it contradicts that assertion. The Legislature has expressly authorized a school district to impose "additional or higher qualifications for the persons employed" as teachers, beyond the

minimum qualifications spelled out in the Education Law, *see* Educ. Law § 2573(9), thus refuting petitioners' assertion that state law sets out an exclusive list of qualifications.

Here, the Health Commissioner ordered all employees of DOE—including its teaching staff—to submit proof of vaccination when employees started their positions or by the end of September 2021 (*O'Reilly* A401; *Clarke* A379). The Board of Health later ratified that order. And the Impact Award confirmed that failure to comply would result in non-disciplinary placement on leave without pay (*O'Reilly* A68; *Clarke* A44). This was a lawful, and urgently needed, employment qualification, critical to DOE's ability to resume in-person operations and instruction. Nothing in the tenure cases or the Education Law precluded the imposition of that qualification.

B. Petitioners received sufficient due process.

Because the vaccination requirement did not trigger the Education Law's statutory hearing protections, the only remaining question is one of constitutional due process. As this Court has held, such principles at most required that petitioners receive "notice and

some opportunity to respond" before being placed on leave without pay. *Beck-Nichols*, 20 N.Y.3d at 559; *see Matter of Prue v. Hunt*, 78 N.Y.2d 364, 366 (1991) (public employee facing termination entitled to "pretermination notice and a minimal opportunity to respond," and an opportunity for post-termination review). The "opportunity to respond" need not be a formal, evidentiary hearing. *Prue*, 78 N.Y.2d at 370. While petitioners claim that they received no process at all (App. Br. 38, 42), that contention is mistaken. They received all the process due them under the Constitution.

First, petitioners received notice of the impending requirement multiple times. In late August 2021, the Health Commissioner initially issued his order that DOE employees submit proof of vaccination by the end of September 2021 (*O'Reilly* A445; *Clarke* A473). Thus, petitioners were given notice of the vaccination requirement more than a month before it was effective. Then, on September 10, 2021, the arbitrator issued the Impact Award, thereby giving UFT members notice that failure to submit proof of vaccination or request an exemption by the end of

September would result in placement on leave without pay (*O'Reilly* A55-73; *Clarke* A31-49).

Thus, petitioners should have been aware—and they do not dispute that they were aware—well in advance of being placed on leave without pay in October 2021 (*O'Reilly* A74-76; *Clarke* A50-52) that they needed to submit proof of vaccination or apply for an exemption from the requirement for religious or medical reasons. Other courts that have considered due process challenges to the implementation of the Health Commissioner's order have reached the same conclusion. *See, e.g.*, *Broecker*, 2023 U.S. App. LEXIS 30076, at *5-6.

Next, petitioners had multiple opportunities to be heard. As this Court has explained, the opportunity to be heard in this context need be only the opportunity to contest the "charge" that the employee is not compliant with the employment qualification, and to present documents from which the employer can determine whether they are in fact compliant. *Felix*, 3 N.Y.3d at 506. Thus, the Health Commissioner's order itself provided petitioners with their first opportunity to be heard: the submission of proof of receipt

of a vaccination dose, which would confirm that they were compliant with the requirement (*O'Reilly* A401; *Clarke* A379).

The Impact Award then created additional opportunities for individual employees to be heard, including a process to apply for an exemption from the requirement before the end of September 2021 (*O'Reilly* A61-68; *Clarke* A37-43). This was a second opportunity for petitioners to "present their side of the story" concerning the reasons they could not comply with the requirement. *Prue*, 78 N.Y.2d at 369.

Finally, petitioners were alerted that they were being placed on leave without pay (*O'Reilly* A74-76; *Clarke* A50-52). When so warned, they were advised of multiple ways to submit evidence of vaccination, including a web portal and physically showing proof of vaccination at their school (*O'Reilly* A74; *Clarke* A50). They were also directed to technical assistance if they could not upload the evidence themselves (*O'Reilly* A74; *Clarke* A50). Finally, even after being placed on leave without pay, they could submit proof of vaccination and be promptly restored to active status (*O'Reilly* A68, 76; *Clarke* A45, 52).

Petitioners thus had multiple opportunities to "demonstrate either that" they "satisfied" the criterion of being vaccinated "or that the criter[ion] should not be applied" to them due to religious or medical reasons. *Ezekwo v. N.Y.C. Health & Hosps. Corp.*, 940 F.2d 775, 785 (2d Cir. 1991). The First Department therefore correctly held that DOE provided sufficient due process to petitioners (*O'Reilly* A16-17; *Clarke* A8). Contrary to petitioners' argument (App. Br. 62-63), they had opportunities to be heard, but simply did not avail themselves of them—other than one petitioner who has since been reinstated precisely because she pursued her opportunities to be heard and ultimately prevailed on her article 78 claim regarding her request for a religious accommodation. *Loiacono*, 2022 N.Y. Misc. LEXIS 5801, at *9-10.

Petitioners also had the opportunity for post-leave article 78 review. *See Locurto v. Safir*, 264 F.3d 154, 175 (2d Cir. 2001). The fact that petitioners' article 78 claims were dismissed below does not mean that a post-deprivation remedy was unavailable (*contra* App. Br. 62-63). Their claims fail on the merits, not for any lack of available remedies.

Petitioners nonetheless suggest that, even if the statutory protections of the Education Law did not apply, they were entitled as a matter of constitutional due process to full evidentiary hearings before being placed on leave (App. Br. 60-65). As already explained, *Felix* holds otherwise. Moreover, it is a basic principle of due process that a hearing is not required before an employee is terminated when, given the nature of the determination, there are no facts in dispute that a hearing could resolve. *Matter of Mathew v. Coler Goldwater Specialty Hosp. & Nursing Facility*, 103 A.D.3d 567, 567 (1st Dep't 2013); *Matter of Moogan v. N.Y.S. Dep't of Health*, 8 A.D.3d 68, 69 (1st Dep't 2004); *Naliboff v. Davis*, 133 A.D.2d 632, 633 (2d Dep't 1987). And due process does not protect a "right to appear in person only to argue that the [governmental decision-maker] should show leniency and depart from [its] own regulations" where there is no dispute about the factual basis for the decision. *Dixon v. Love*, 431 U.S. 105, 114 (1977).

Here, there is no factual issue that a pre-leave evidentiary hearing was needed to resolve, as it is undisputed that petitioners offered no evidence that they were vaccinated against COVID-19

(and only one had applied for an exemption from the requirement). Despite petitioners' extended argument that they should have had hearings to determine factual issues (App. Br. 60-65), their petitions never specified what issue a pre-leave hearing would have even considered (*O'Reilly* A16). They did not, for example, allege that they were vaccinated but unable to upload proof of vaccination or that they submitted proof of vaccination that DOE did not believe to be genuine—suggestions in their brief notwithstanding (App. Br. 62-63).

The absence of disputed material facts distinguishes petitioners' cases from those they cite involving DOE employees who were alleged to have submitted fraudulent proof of vaccination (*id.* at 63 (citing *Kambouris v. N.Y.C. Dep't of Educ.*, 78 Misc. 3d 260 (Sup. Ct. Kings Cnty. 2022))). That case involved an assertion of misconduct, one that could carry serious consequences for the employees' future employment prospects. *See Kambouris*, 78 Misc. 3d at 266 ("Submission of fraudulent Vaccination Cards could

clearly be characterized as misconduct, if not a crime.").[6] And in that case, where the petitioners "maintain[ed] that they [had], in fact, complied with the mandate," *id.*, a hearing was appropriate to resolve factual and credibility disputes. Here, on the other hand, petitioners never explain what hearings would have achieved, and their choice not to comply with an employment qualification did not carry similar consequences for future employment. On the other hand, scheduling and holding such hearings would have slowed down the implementation of a vital public-health measure in the midst of a global pandemic. Fortunately, due-process principles did not require them.

[6] The other cases petitioners cite (App. Br. 63) also involve clear examples of alleged misconduct, from drug dealing to inappropriate relationships with students. *See City Sch. Dist. of N.Y. v. McGraham*, 17 N.Y.3d 917 (2014); *Morgan v. Bd. of Educ. of N.Y.*, 201 A.D.2d 482 (1st Dep't 1994).

POINT II

PETITIONERS' ARTICLE 75 CLAIMS ARE PROCEDURALLY FORECLOSED AND MERITLESS

A. Petitioners' article 75 claims have two fatal procedural flaws.

The petitioners' Article 75 claims suffer from two dispositive threshold infirmities: lack of standing and failure to join a necessary party. While each would be a sufficient ground to dispose of the claims, these errors reinforce each other, further demonstrating the procedural defectiveness of the petitions.

1. Petitioners lack standing to challenge the Impact Award.

Petitioners' first impediment to vacating the Impact Award under CPLR 7511 is a lack of standing. This Court's settled precedent generally prevents employees from seeking to vacate arbitration awards between their employers and the unions representing them. *Chupka v. Lorenz-Schneider Co.*, 12 N.Y.2d 1, 6 (1962); *Matter of Soto*, 7 N.Y.2d 397, 399-400 (1960). A disappointed employee may pursue a claim for breach of fiduciary duty against

the union instead. *Soto*, 7 N.Y.2d at 400; *see also Katir v. Columbia Univ.*, 15 F.3d 23, 24-25 (2d Cir. 1994).

Petitioners do not allege that the union that represented all teachers at the arbitration, the UFT, breached its duty of fair representation (*see, e.g.*, Clarke A22-29), and as discussed below, they did not name the UFT as a party to these suits. Because they have not alleged that the UFT breached its duty of fair representation, they are barred from challenging the Impact Award, the result of UFT's representation of its teacher members, under article 75. The First Department thus correctly and unanimously held as much below (*O'Reilly* A11-12, 26; *Clarke* A7).

Petitioners' response is to claim that CPLR 7511 gives them standing to challenge the Impact Award (App. Br. 75). But they misread the statutory language giving "parties" that did not "participate[] in the arbitration" the right to seek vacatur of an arbitration award. CPLR 7511(b)(2). Petitioners' claim falters because they were not "parties" to the arbitration within the meaning of the cited provision. CPLR 7511(b)(2) is thus perfectly consistent with the cited decisions of this Court. Those cases hold

that individual employees are not non-participating "parties," but instead non-parties to the arbitration, and therefore cannot claim standing to challenge its outcome under CPLR 7511. *See Wilson v. Bd. of Educ. of N.Y.*, 261 A.D.2d 409, 409 (2d Dep't 1999); *Alava v. Consol. Edison Co.*, 183 A.D.2d 713, 714 (2d Dep't 1992).

Nor do the authorities that petitioners cite (App. Br. 75-77) help them escape this limit to their standing. In *Matter of Case v. Monroe Community College*, 89 N.Y.2d 438, 442 (1997), the Court held that when a union representative appears on behalf of a union member at a grievance arbitration, service of the award on the representative is deemed to be service on the employee. This Court recognized that the individual grievant is not foreclosed from pursuing further proceedings if the union representative declines to do so on her behalf. *Id.* at 442-43. But the petitioners here were not grievants in the arbitration that led to the Impact Award—indeed, they have stated that they have not brought grievances about the vaccination requirement at all (*O'Reilly* A48, 52; *Clarke* A23, 28). And the individual petitioners could not have been grievants here in any event, as the arbitration that led to the

Impact Award was about resolving a unionwide dispute rather than a complaint about how specific employees had been treated. Thus, *Case* does not help petitioners establish the standing required to attack the Impact Award.

Nor does Civil Rights Law § 15 provide petitioners with standing. Petitioners, like all citizens, have the right to petition legislative or other public bodies "for the redress of grievances" (App. Br. 76 (quoting Civ. Rights Law § 15)). But that general right is not a guarantee that any individual may bring a claim about any issue they choose. If it did, the concept of standing would not exist in American jurisprudence. But it does exist, and as explained, petitioners cannot meet its requirements.

2. Petitioners did not join the UFT, a necessary party for their article 75 claims.

Petitioners also failed to join the UFT, which is a necessary party, in their petitions. It is a straightforward provision of civil procedure that an "action is subject to dismissal if there has been a failure to join a necessary party." *City of N.Y. v. Long Island Airports Limousine Serv. Corp.*, 48 N.Y.2d 469, 475 (1979). A

necessary party is one either that is needed for "complete relief" for the parties or that might "be inequitably affected by a judgment." CPLR 1001(a). In these proceedings, the UFT is a necessary party under both definitions of the term.

The UFT's presence is necessary to award complete relief because, as explained above, petitioners need to show that the union failed in its duty of fair representation to overcome their standing problems. And an employee's union is a necessary party where it is alleged to have violated its duty of fair representation to that employee. *See Mahinda v. Bd. of Collective Bargaining*, 91 A.D.3d 564, 565 (1st Dep't 2012). Without naming the UFT as a defendant and alleging that it breached its duty, petitioners cannot overcome this threshold impediment to their claims.

The UFT could also be inequitably affected by a judgment in this matter. Petitioners explicitly seek the vacatur of the Impact Award (*O'Reilly* A53; *Clarke* A29), which was the result of an arbitration that the UFT both initiated and participated in (*O'Reilly* A57-61, 404-18; *Clarke* A33-37, 382-96). Moreover, the Impact Award created specific processes for UFT members to apply

for exemptions from the vaccination requirement, as well as enhanced separation and leave options for UFT members who were not vaccinated (*O'Reilly* A61-68, 71-72; *Clarke* A37-44, 47-48). Vacating the Impact Award would raise numerous questions affecting thousands of employees, more than two years later. In light of the sweeping relief petitioner seeks, the UFT could be affected by these proceedings and is a necessary party, as the First Department held unanimously (*O'Reilly* A12, 26; *Clarke* A8).

Petitioners never grapple with how the UFT and its members would be impacted if petitioners achieved the vacatur of the Impact Award to which the UFT is a party. They never explain how they could overcome their standing impediment without joining the UFT. Instead, they first simply argue that the Impact Award could be vacated only as to themselves (App. Br. 78)—contrary to the relief sought in their petitions (*O'Reilly* A53; *Clarke* A29) and to the clear import of any vacatur.

Beyond that, petitioners simply assert that their petitions could have no impact on the UFT (App. Br. 78). They do not explain how that could be so in light of the efforts the UFT undertook to

obtain the award (*O'Reilly* A404-18; *Clarke* A382-96), and the benefits that have flowed to union members from it, including the extended leave and separation options that existed only because of the award (*O'Reilly* A71-72; *Clarke* A47-48).

While petitioners repeatedly refer to the Second Circuit's *Kane* decision (App. Br. 77-78), that decision did not vacate the Impact Award. Rather, in addressing a challenge to aspects of the Impact Award's process for evaluating accommodation requests, *Kane* merely gave the litigants an additional and more expansive accommodation process on top of the one the Impact Award provided. *See* 19 F.4th at 170. The vacatur of the Impact Award, on the other hand, would take away the benefits UFT members received, rather than expand upon them.

It is too late now to join the UFT as a party. Petitioners' article 75 claims had a 90-day limitation period. *See* CPLR 7511(a). And the statute of limitations began to run when the Impact Award was delivered to their union. *Case*, 89 N.Y.2d at 443. As petitioners allege that the award was delivered on September 10, 2021 (*O'Reilly* A48; *Clarke* A24), they had until December 9, 2021, to join

the UFT. They failed to do so before that time or before their petitions were dismissed. Their failure to join this necessary party is a defect that cannot now be remedied.

B. Petitioners have not met the heavy burden required to vacate the Impact Award between DOE and the UFT.

Procedural bars aside, petitioners' article 75 claims are no more successful on the merits than their article 78 claims. Under article 75, petitioners "bear[] a heavy burden and must establish a ground for vacatur by clear and convincing evidence." *Matter of Bd. Of Educ. Of Yonkers City Sch. Dist. V. Yonkers Fed'n of Tchrs.*, 185 A.D.3d 811, 812 (2d Dep't 2020). And they may do so only by proving one of the narrow grounds that CPLR 7511 provides—that the award "violates public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Matter of N.Y.C. Transit Auth. V. Transp. Workers Union of Am., Local 100*, 14 N.Y.3d 119, 123 (2010) (quotation marks omitted). But when considering whether an arbitrator exceeded an enumerated contractual limitation, it is "not for the courts to

interpret the substantive conditions of the contract or to determine the merits of the dispute." *Id.* at 124 (quotation marks omitted).

Petitioners cannot carry their heavy burden of showing that the Impact Award should be vacated under this exacting standard, whether because petitioners believe the award redefined "discipline" or because it otherwise avoided petitioners' rights under Education Law §§ 3020 and 3020-a or the CBA (*contra* App. Br. 70-74). As already explained, Education Law § 3020 governs the process of removing tenured teachers for misconduct or incompetence, not a process concerning noncompliance with a general qualification of employment. *Beck-Nichols*, 20 N.Y.3d at 558-59. Thus, the Impact Award could not have conflicted with Education Law §§ 3020 or 3020-a in elaborating on the consequences for noncompliance with the employment qualification at issue here.

Nor are petitioners correct in arguing that DOE and the UFT used the arbitration process to improperly renegotiate tenure protections (App. Br. 54-55, 58). As already explained, Education law §§ 3020 and 3020-a do not govern employment qualifications

unrelated to individual teacher competence and conduct, and so the arbitration and eventual award did not implicate them.

Petitioners' assertions that the Impact Award somehow violated the CBA (App. Br. 70, 73-74) demonstrate a misunderstanding of the role of the arbitration here. The Impact Award exists because DOE and the UFT agreed to arbitrate their disagreement about the impact of the Health Commissioner's order on the terms and conditions of DOE employment under Civil Service Law § 209(3)(a) and (d) (*O'Reilly* A59-60; Clarke A35-36). This arbitration came out of the UFT's invocation of the Public Employment Relations Board's authority under that statute in response to DOE's alleged failure to negotiate in good faith (*O'Reilly* A404-05; *Clarke* A382-83). That duty applies "when the parties' dispute is outside the terms of the CBA, but *not* when the condition of employment in question is expressly provided for in the parties' agreement." *Matter of Roma v. Ruffo*, 92 N.Y.2d 489, 494 (1998). Indeed, the Public Employment Relations Board lacks jurisdiction over disputes concerning subjects expressly settled in a CBA. *Id.* at 495.

Thus, DOE's obligation to bargain in good faith, and the authority of the Public Employment Relations Board because of the alleged failure to do so, existed only because the CBA did not address the impact of the Health Commissioner's order on the terms and conditions of employment at DOE. Rather than citing the text of the existing CBA to resolve their dispute, the parties turned to a form of arbitration meant to "establish future rights" about "basic terms and conditions of employment not previously agreed upon." *Matter of City of Newburgh v. Newman*, 69 N.Y.2d 166, 170-71 (1987); *see also Matter of N.Y.C. Transit Auth. V. Transp. Workers Union of Am., Local 100*, 99 N.Y.2d 1, 8 (2002) (noting that arbitrations between employers and unions are "part and parcel of the collective bargaining process itself" (quotation marks omitted)). In other words, the fact that the parties were arbitrating the matter at all demonstrates that the CBA did not address whether placement on leave without pay in this circumstance was "discipline" (*contra* App. Br. 70-72).

Petitioners' argument that the parties to the arbitration somehow violated Civil Service Law § 209(3)(f) is unpreserved, as

they did not raise it in Supreme Court. *See Clement v. Durban*, 32 N.Y.3d 337, 340 n.1 (2018) (arguments not raised in Supreme Court are unpreserved). And it is also incorrect. That subsection, and the subsection it limits, Civil Service Law § 209(3)(e), involve labor disputes resolved through a fact-finding board appointed by the Public Employment Relations Board; but here the parties proceeded to arbitration instead of using that procedure. *See* Civ. Serv. Law § 209(3)(d)(ii).

Similarly, petitioners are mistaken in suggesting that the Appellate Division inappropriately cited Civil Service Law § 209 (App. Br. 56-58), given that the UFT expressly invoked the provision when it initiated the process leading to arbitration (*O'Reilly* A404). The First Department thus correctly held that the "arbitrator's authority did not arise from the terms of the existing CBA or from provisions of the Education Law," but rather from that invocation of the Civil Service Law (*O'Reilly* A8; *Clarke* A7).

Nor did the arbitrator violate public policy, whether found in the CBA or the Education Law, by not providing for pre-leave hearings (*contra* App. Br. 73-75). The arbitrator did not issue a

decision "contrary to" the CBA or applicable statutes in ruling that noncompliant DOE employees would be placed on leave without pay, and that this leave would not be considered a disciplinary action (*O'Reilly* A68; *Clarke* A44). The CBA addresses hearings for "disciplinary charges" (*O'Reilly* A226-39; *Clarke* A202-15), covering topics of individual teacher behavior such as misconduct and incompetence (*O'Reilly* A229-30; *Clarke* A205-06). The requirement that employees be vaccinated against COVID-19, on the other hand, was an qualification of employment adopted for public-health reasons (*O'Reilly* A400-01; *Clarke* A378-79), unrelated to discipline of individual teachers. *See Beck-Nichols*, 20 N.Y.3d at 558-59. As explained above, the same reasoning dooms petitioners' claims that the award is contrary to Education Law §§ 3020 and 3020-a; those provisions do not reach non-disciplinary actions taken for noncompliance with an employment qualification or eligibility requirement (*see* Point I.A, *supra*).

Even if there were some room to disagree with the foregoing interpretation of the terms of the Education Law or the CBA, this Court cannot "interpret the substantive conditions of the contract"

when determining whether petitioners have met their burden of showing that the Impact Award should be vacated. *Transp. Workers Union*, 14 N.Y.3d at 124 (quotation marks omitted). At the very least, given the judicial decisions that have agreed that vaccination against COVID-19 is a non-disciplinary qualification or eligibility requirement for employment, *see, e.g.*, *Broecker*, 585 F. Supp. 3d at 314-18, the arbitrator did not "clearly exceed" the terms of the CBA, *Transp. Workers Union*, 14 N.Y.3d at 123 (quotation marks omitted), in reaching the same conclusion and in not ordering DOE to provide hearings before placing noncompliant employees on leave without pay.

Petitioners' remaining attacks on the Impact Award (at App. Br. 69-70) are unpreserved, as petitioners did not claim in Supreme Court either that the Impact Award's accommodation process was suspect or that it violated Education Law § 3108, which prohibits conditioning payment of a teacher's salary upon the execution of a general waiver or release. None of the petitions claimed that petitioners applied for accommodations, and one petitioner has

separately litigated her objections to that process in a distinct proceeding. *See Loiacono*, 2022 N.Y. Misc. LEXIS 5801.

Lack of preservation aside, the Second Circuit's decision in *Kane*, which petitioners attempt to rely on here (*see* App. Br. 69-70), did not address the Impact Award's determination that placement on leave without pay due to failure to submit proof of vacation was not a disciplinary action (*O'Reilly* A68; *Clarke* A44). *See* 19 F.4th at 167-70. That is the relevant portion of the award for petitioners' claims. And Education Law § 3108 (App. Br. 70) is similarly irrelevant to petitioners, as none allege that they executed a waiver. The award required such a waiver only for employees who chose an extended leave or separation option (*O'Reilly* A71-72; *Clarke* A47-48), which petitioners did not do. These arguments, like the others petitioners offer, do not justify reversing the Appellate Division's considered decisions, or rewarding petitioners for their decision not to comply with a critical public-health measure during the height of the COVID pandemic.

CONCLUSION

The Appellate Division's certified questions should be answered in the affirmative, and its orders should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 12,216 words, not including the table of contents, the table of cases and authorities, this certificate, and the cover.

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