21-2711

United States Court of Appeals

for the

Second Circuit

MATTHEW KEIL, JOHN DE LUCA, SASHA DELGADO, DENNIS STRK and SARAH BUZAGLO,

Plaintiffs-Appellants,

– v. –

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK, DAVID CHOKSHI, in his Official Capacity of Health Commissioner of the City of New York, and MEISHA PORTER, in her official capacity as Chancellor of the New York City Department of Education,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
HONORABLE VALERIE E. CAPRONI

PLAINTIFFS-APPELLANTS' REPLY BRIEF IN SUPPORT OF MOTION

BARRY BLACK
Nelson Madden Black LLP
Attorneys for Plaintiffs-Appellants
475 Park Avenue South, Suite 2800
New York, New York 10016
(212) 382-4303

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT[1]

In defending against claims that a vaccine mandate is blatantly unconstitutional, both facially and as applied to Plaintiffs, Defendants have asserted an array of defenses that are either illogical, turned on their own heads or are flatly inapplicable. But Defendants have glaringly failed to address or refute several key claims and points of law raised by Plaintiffs in their moving papers, including:

- Where First Amendment rights are at issue (as is the case here), the test for obtaining preliminary injunctive relief essentially reduces to a single prong: "the likelihood of success on the merits is the dominant, if not the dispositive, factor." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013);
- Plaintiffs' claims constitute both a facial and an as-applied challenge to the Mandate's constitutionality;
- The Mandate violates Plaintiffs' procedural due process rights because it is unconstitutionally vague;
- The requirement that an applicant for religious exemption provide a clergy letter is unconstitutional;
- The requirement that requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine is unconstitutional;
- The requirement that "[e]xemption requests shall be considered only for recognized and established religious organizations ("*e.g.*, Christian Scientists")" is unconstitutional.

Accordingly, Plaintiffs respectfully request that this Court deem all the aforementioned points to have been conceded.

[1] Plaintiffs respectfully incorporate all definitions used in its opening submission.

ARGUMENT

I. DEFENDANTS' ARGUMENTS CONCERNING DELAY ARE MERITLESS

Defendants' position concerning alleged delay on the part of Plaintiffs reflects how out-of-touch they are with the realities of life for municipal employees in New York City. The formidable choice Plaintiffs have been forced to make between their religious convictions and their lifelong commitment to New York City's children is not one they can make fleetingly.

A. Plaintiffs brought this action as soon as they reasonably could

The Mandate went into effect on September 15. On September 18, 2021, the NYC DOE formally informed its employees, including Plaintiffs, of the opportunity to apply for the exemption, with a deadline of two days later, September 20. After exemption application letters were filed, Plaintiffs received their denial letters several days later. Then Plaintiffs needed to file an appeal, receive a hearing date, appear remotely for the hearing, and await the arrival of the results by email. All of this took several weeks, with denials generally arriving between early and late October. The action below was commenced on October 27, only several weeks after four of the plaintiffs received their denials and *one day* after Mr. De Luca's final denial.

Plaintiffs are not lawyers, or even businesspeople who routinely engage lawyers and are familiar with the legal process. They are not wealthy individuals who can walk into a high-priced law firm and readily retain qualified counsel. Instead, it has taken large groups of individuals to help organize and fund a legal challenge. When considered against that backdrop, Plaintiffs have actually moved rather quickly.

B. Defendants misconstrue and misapply the law concerning delay

Plaintiffs cite *Citibank, N.A. v. Citytrust*, 756 F.2d 273 (2d Cir. 1985) for the premise that "[p]reliminary injunctions are generally granted under the theory that there is an urgent need to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Id.* at 276. However, *Citibank* concerned trademark infringement *already in effect*, where the court pointed out that Citibank's delay of nine months after learning that competition intended to move into its home territory, and ten weeks after the competing branch was opened, undercut the "urgency" of its application that the court mandatorily enjoin City-trust from further using its name. If it was that urgent, reasoned the court, Citibank should have acted sooner. Indeed, the very next sentence following the one cited by Defendants reads: "Significant delay in applying for injunctive relief *in a trademark case* tends to neutralize any presumption that infringement alone will cause irreparable harm pending trial, and such delay alone may justify denial of a preliminary injunction for trademark infringement." *Id.* (emphasis added).

In contrast with the cases cited by Defendants involving applications for mandatory injunctions, here Plaintiffs seek a prohibitory injunction, and ask the Court to maintain the status quo and prohibit Defendants from engaging in *future* conduct that would cause irreparable harm.

II. PLAINTIFFS HAVE STANDING

Defendants suggest that Plaintiffs' standing argument is undermined by *14 Penn Plaza LLC v. Pyett*, but *Pyett* only strengthens Plaintiff's case.

In *Pyett*, the Court found that plaintiffs' arbitration of their ADEA claims precluded them from later bringing those claims in a federal forum. That was because the collective-bargaining agreement at issue "clearly and unmistakably require[d] union members" to arbitrate their statutory

rights, and the Supreme Court has permitted such claims to be arbitrated as long as "an agreement to arbitrate statutory antidiscrimination claims be explicitly stated in the collective-bargaining agreement[.]"*14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258, 274 (2009).

Ultimately, "*Pyett* does not plainly apply to cases in which the CBA does not explicitly reference the statutory rights subject to arbitration—that is, CBAs whose arbitration provision is not a clear and unmistakable waiver of statutory rights." *Fernandez v. Windmill Distrib. Co.*, 159 F. Supp. 3d 351, 360 (S.D.N.Y. 2016).

Plaintiffs' collective bargaining agreement contains no such provision, or other explicit statement that statutory or constitutional rights are subject to arbitration. In fact, Article 22, D(2) of its collective bargaining agreement states that, "[n]othing contained in this Article or elsewhere in this Agreement shall be construed to permit the Union to present or process a grievance not involving the application of interpretation of the terms of this Agreement in behalf of any employee without his/her consent."

III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS BECAUSE THE MANDATE IS NOT NEUTRAL

The Exemption Standards acknowledge that they arise out of a need to provide rules and procedures for the "implementation of the Vaccine Only mandate." *See* Exemption Standards at 4, Declaration of Jonathan R. Nelson ¶ 8. They also contain the following statement:

> L. The process set forth, herein, shall constitute the ***exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy*** and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision.

Id. at 13, Section I.L (emphasis added).

Since the Exemption Standards are binding obligations of the parties to the arbitration, the DOE has bound itself *not to offer any alternative administrative process* for the adjudication or resolution of religious accommodation requests.

IV. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS BECAUSE THE MANDATE IS NOT GENERALLY APPLICABLE

Defendants' cursory dismissal of *Fulton*—which sets forth the standard for determining whether a rule is one of general application—reflects a grave misunderstanding of the critical implications of that case. Defendants argue that the reasoning in *Fulton* only applies to situations in which "an agency ha[s] unfettered discretion to grant exemptions . . . but refuse[s] to consider religious accommodations . . . ." 2d Cir., 21-2711, ECF No. 34 at 18. But the existence of unfettered discretion to grant exemptions by itself makes the scheme not generally applicable.

Fulton makes this point explicitly, asserting that "[t]he 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, . . . " *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021) (citing *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990) (emphasis added)).

The text of the Mandate itself demonstrates that it is not generally applicable on its very face. While it requires "all visitors to a DOE school building" to be vaccinated, it carves out at least 8 categories of those excepted from the Mandate. Likewise, the Exemption Standards create exceptions for medical reasons and for a limited universe of "legitimate" religious claims.

The exemption standards were not generally applied in their implementation. Orthodox Jews—all of whom were told by various DOE officials that their sincerely held religious beliefs

were questionable since a rabbi they had never met and who lived in a different country supported the vaccine—received different determinations by the arbitrator, even though they possessed substantially similar beliefs. SDNY, 21-08773, ECF No. 22 ¶¶ 27-29, 31, 33-35. A Christian employee who attends Church at the Rock in Brooklyn and submitted a clergy letter from her pastor was denied while another parishioner at Church at the Rock who submitted a clergy letter from the very same pastor, was granted his exemption. SDNY, 21-08773, ECF No. 23 ¶ 22. And, a devout Catholic DOE employee did not submit a clergy letter and was granted an exemption in her appeal, while another devout Catholic with substantially the same beliefs as the first Catholic employee was denied her appeal, despite her submission of a clergy letter. SDNY, 21-08773, ECF. No. 22 ¶¶ 37-39.

V. DEFENDANTS' CLAIM THAT A SEPARATE TITLE VII RELIGIOUS ACCOMMODATIONS PROCESS EXISTS IS A SHAM

Plaintiffs and declarants were told repeatedly that DOE officials' hands were tied and they could not make their decision in accordance with anything but the Exemption Standards in the arbitrator's award. Second, the idea that there could be an alternative to a statutory (or, as Plaintiffs seek here, a constitutional) accommodation process is completely improper; indeed, any religious exemption process, whether it's the "statutory" one or the "alternative" one, must still be compliant with all statutory and constitutional law.

Defendants' brief is chock full of assurances that, despite the existence of the arbitrator's award and the standards contained therein, "the protections of Title VII remain available[.]" 21-2711, ECF. No. 34 at 9; *see also id*. at 24-27.

In oral argument before the Southern District in the *Kane* case, the attorney for the DOE

admitted the opposite:

> THE COURT: . . . . walk me through it procedurally. Anyone who wants a religious exemption makes the request to the Department of Education. If the Department of Education denies it, they get an appeal pursuant to the collective bargaining agreement to an arbitrator. Right?
>
> MS. MINICUCCI: They get an appeal pursuant to the UFT award.
>
> THE COURT: Which is?
>
> MS. MINICUCCI: Pursuant to the collective bargaining agreement.
>
> THE COURT: Collective bargaining agreement.
>
> MS. MINICUCCI: Correct. So that's essentially the process.
>
> THE COURT: And if they don't like the answer of the arbitrator, then they can file an Article 75.
>
> MS. MINICUCCI: Correct, or bring a plenary challenge, as plaintiffs have in this case.
>
> THE COURT: Right.
>
> MS. MINICUCCI: So that is essentially the whole process.

Kane v. de Blasio, 1:2021-cv-07863, ECF. No. 65 (S.D.N.Y. October 12, 2021) (Transcript of Conference), at 29.

As if this were not enough, none of the Plaintiffs in this case were told about this so-called separate Title VII appeal process, either when they made their initial request, at the appeal stage, or during the arbitration hearing. The annexed [new] declarations demonstrate that the declarants were told that the arbitration method was the only avenue by which they could request religious exemptions or appeal the denial of their religious exemption requests.

Furthermore, Plaintiff Strk was told by a DOE official during his arbitration hearing that his exemption was denied because he did not have a letter from clergy. SDNY, 21-08773, ECF No. 25, ¶ 18. Plaintiff De Luca was told by a DOE official during his arbitration hearing that his religious leaders have "clearly and publicly expressed support for the vaccine," and was berated for believing that he would be condemned for taking the vaccine when "the leader of the Catholic Church . . . says you have a moral obligation to be vaccinated." SDNY, 21-08773, ECF No. 25 ¶¶ 24, 28. Plaintiff Keil—a deacon in the Russian Orthodox Church—was told by a DOE official during his arbitration hearing that his beliefs seemed to be personal in nature because other Orthodox Christians choose to get vaccinated. SDNY, 21-08773, ECF No. 27 ¶ 38. Plaintiff Delgado, a born-again Christian, was told by a DOE official during her arbitration hearing that "there's no theological objection raised by many if not all the denominations in Christianity to the vaccine." SDNY, 21-08773, ECF No. 28 ¶ 31. Plaintiff Buzaglo—an Orthodox Jew who is bound by the authority of her own rabbi—was told by a DOE official during her arbitration hearing that a Sephardic Chief Rabbi in Israel whom she did not know supported the vaccine. SDNY, 21-08773, ECF No. 29 ¶ 41. DOE employee Amoura Bryan was told by a DOE official during her arbitration hearing that the Seventh Day Adventist Church—which she affiliates with but which does not control her views on vaccination—does not oppose the vaccine. SDNY, 21-08773. ECF No. 20 ¶ 30. DOE employee Ageliki Heliotis, a member of the Orthodox Christian Church, was told by a DOE official during her arbitration hearing that it was the DOE's position that since the leader of her religion approved the vaccine, she would be automatically denied. SDNY, 21-08773, ECF No. 19 ¶ 16. DOE employee Eleni Gerasimou was told by a DOE official during her arbitration hearing that officials in the Greek Orthodox Church—of which she is a member—

support the vaccine. SDNY, 21-08773, ECF No. 26 ¶ 14. The DOE official also noted that she did not have a clergy letter supporting her request. *Id.* Finally, DOE employee Inna Cohen was told by a DOE official at her arbitration hearing that because her congregation did not specifically say, "don't get vaccinated," her objection was personal and not religion based. SDNY, 21-08773, ECF No. 24 ¶ 28.

These are only some of the myriad ways in which the DOE officials and arbitrators ignored and openly contradicted Title VII's guidance, as well as the constitutional rights of Plaintiffs and DOE employees.

VI. THE BALANCE OF HARMS TEST IS SATISFIED BY PLAINTIFFS' MERITORIOUS CONSTITUTIONAL CLAIMS

Plaintiffs are not asking the court necessarily to put them back into classrooms with unvaccinated schoolchildren, as much as they may wish the Defendants to revisit their former vax-and-test policy. The exemption applications that Plaintiffs submitted were available only to persons who were willing to be "in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect." *See* Exemption Standards at 12, Section I.K., Declaration of Jonathan R. Nelson ¶ 8. Under the Exemption Standards, employees who are granted exemptions "may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/or accommodation is in place." *Id.*

Defendants' argument that the "balance of the harms" favors a decision refusing a preliminary injunction rests entirely upon their assertions that "[e]njoining the mandate would threaten the continued safe operation of in-person schooling for the City's nearly one million

students ….” *Defendants’ Memorandum of Law*, Dkt. # 34, at 25. In *this* case, that argument is a red herring. The Mandate itself bars *employment* of unvaccinated persons by the DOE, not simply *physical presence* in the schools. Yet the DOE *employed its entire staff remotely* during portions of the 2019-2020 and 202-2021 school years. Allowing employees to work remotely *poses no risk whatsoever* to schoolchildren or workers in fully vaccinated environments.

Dated: New York, New York
November 5, 2021

NELSON MADDEN BLACK LLP
Attorneys for Plaintiffs-Appellants

By: Barry Black
475 Park Avenue South, Suite 2800
New York, NY 10016
(212) 382-4300

Jonathan R. Nelson
Sarah E. Child