

SECOND CIRCUIT REVIEW

Expert Analysis

Upholding COVID-19 Vaccine Mandates

Last month, in *We the Patriots USA v. Hochul*, 17 F.4th 266 (2d Cir. 2021), the U.S. Court of Appeals for the Second Circuit reviewed two district court decisions that had reached different outcomes concerning the enforcement of New York state's vaccine mandate applicable to certain health care entities and personnel. In a unanimous per curiam opinion, joined by Circuit Judge Susan Carney and Senior Circuit Judges John Walker and Robert Sack, the Second Circuit affirmed the District Court for the Eastern District of New York's refusal to block the mandate and reversed the District Court for the Northern District of New York, which had granted a preliminary injunction against the mandate. The Second Circuit held that the plaintiffs in each case were unlikely to



By
**Martin
Flumenbaum**



And
**Brad S.
Karp**

succeed on the merits that the mandate contravenes the First Amendment's Free Exercise Clause, the Supremacy Clause, Title VII, or the Fourteenth Amendment right to privacy, medical freedom, and bodily autonomy. *Id.* at 281, 293-94.

The Second Circuit's decision provides substantial guidance to state agencies and district courts on critical issues of first impression arising from the COVID-19 mandate. The Second Circuit's guidance is particularly significant given the complexity of the constitutional issues at play, as illustrated by the conflicting district court decisions.

On Dec. 13, 2021, the U.S. Supreme Court denied the plaintiffs' request for an emergency writ of injunction pending the court's disposition of

their forthcoming petition for a writ of certiorari.

Background and District Court Proceedings

On Aug. 26, 2021, the New York State Department of Health's Public Health and Health Planning Council adopted an emergency rule, 10 N.Y.C.R.R. §2.61 (the Rule), mandating that hospitals, nursing homes, hospices, adult care facilities, and other specified health care entities "continuously require" certain "personnel" to be fully vaccinated against COVID-19. The Rule contained a medical exemption, but contained no explicit exemption for personnel who opposed the vaccination on religious grounds.

In two separate proceedings—one filed in the District Court for the Northern District of New York (*Dr. A v. Hochul*, No. 21-cv-1009) and another filed in the District Court for the Eastern District of New York (*We the Patriots USA v. Hochul*, No. 21-cv-4954)—certain health care professionals, among others, sought a permanent injunction to prevent

MARTIN FLUMENBAUM and BRAD S. KARP are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss. RANDALL W. BRYER, a litigation associate at the firm, assisted in the preparation of this column.

New York state from enforcing the Rule, claiming that receiving any of the vaccines would conflict with their religious beliefs because the vaccines were developed or produced using cell lines derived from fetal cells obtained from abortions or miscarriages.

In *We the Patriots USA v. Hochul*, District Judge Kuntz denied plaintiffs' request for a temporary restraining order, preliminary injunction and permanent injunction, without explanation and without ordering or receiving a response from the state. Two days later, in *Dr. A v. Hochul*, District Judge Hurd granted plaintiffs' request for a temporary restraining order and, on Oct. 12, 2021, issued a preliminary injunction. 2021 WL 4734404 (N.D.N.Y. Oct. 12, 2021). Judge Hurd held that plaintiffs were likely to succeed on their Free Exercise Clause and Supremacy Clause claims. Appeals were taken in both cases, and the Second Circuit considered them in tandem.

The Second Circuit Opinion

The Second Circuit rejected plaintiffs' Free Exercise Clause, Fourteenth Amendment, Supremacy Clause, and Title VII claims, and reversed the District Court's decision in *Dr. A v. Hochul*.

First, the court considered whether the Rule violates the Free Exercise Clause since it does not include an exemption for employees who oppose receiving the vaccine on religious grounds. As an initial matter,

the court held, under the framework articulated by the Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that the Rule is facially neutral because "it does not single out employees who decline vaccination on religious grounds." 17 F.4th at 281.

The court also determined that the Rule is generally applicable under *Smith*. Id. at 287-90. Although plaintiffs pointed to the existence of a

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medical exemption, the court was unpersuaded, reasoning that "the limited evidence now before us suggests that the medical exemption is not 'as harmful to the legitimate government interests purportedly justifying' the Rule as a religious exemption would be." Id. at 286. The court also rejected plaintiffs' argument that the Rule created a "mechanism for individualized exemptions," holding that it provides "an objectively defined category of people to whom the vaccine requirement does not apply." Id. at 289. Because plaintiffs failed to demonstrate at the preliminary injunction stage that they were likely to succeed in showing the Rule was not neutral or

generally applicable, it was subject to rational basis review, which was "easily me[t]." Id. at 290.

Second, the court assessed whether the Rule "contravenes the Supremacy Clause because it is preempted by Title VII, which prohibits discrimination in employment on the basis of religion." Id. Specifically, plaintiffs asserted that the lack of a religious exemption prevented them from seeking reasonable accommodations from their employers under Title VII. Id. at 291-93. The state countered, and the court agreed, that nothing in the Rule "precludes employers from accommodating religious objectors by giving them ... assignments—such as telemedicine—where they would not pose a risk of infection to other personnel, patients, or residents." Id. at 292 (ellipses in original). Here, plaintiffs failed to provide any evidence that they were denied reasonable accommodations. Id.

Third, the court held that plaintiffs also failed to establish that the Rule violated their fundamental rights to privacy, medical freedom, and bodily autonomy under the Fourteenth Amendment. Id. at 293-94. The court reasoned that under Supreme Court precedent, "the Constitution embodies no fundamental right that in and of itself would render vaccine requirements imposed in the public interest, in the face of a public health emergency, unconstitutional." Id. at 293 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

The court rejected plaintiffs' argument that *Jacobson* had been either expressly or impliedly overruled by the Supreme Court in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), in which the court upheld challenges brought by religious groups against occupancy limits placed on religious services but not on secular businesses with similarly high capacities. 17 F.4th at 286-87, 293.

Finally, the court held that plaintiffs were not entitled to a preliminary injunction because they cannot demonstrate irreparable harm or that the public interest and a balance of the equities favors them. Because plaintiffs' claims failed, the court determined that "their asserted harm is not of a constitutional dimension." Id. at 294. The court held that it was "well settled" that "adverse employment consequences are not the type of harm that usually warrants injunctive relief because economic harm resulting from employment actions is typically compensable with money damages." Id. (citations omitted). The court also determined that New York state had an indisputably compelling interest in ensuring that medical personnel are vaccinated against COVID-19 to protect themselves and to stop the health care system from being overburdened, and that plaintiffs failed to demonstrate that preventing the Rule's enforcement would serve the public interest. Id. at 295-96.

On remand, the Northern District of New York held that plaintiffs "no

longer needed" a preliminary injunction because the Rule "does not prevent employees from seeking a religious accommodation allowing them to continue working consistent with the Rule, while avoiding the vaccination requirement." Order, *Dr. A v. Hochul*, No. 21-cv-1009, at 3 (N.D.N.Y. Nov. 5, 2021). Shortly thereafter, the Second Circuit issued a second decision to "clarify" its prior opinion "in light of the text of the recent order of the district court in *Dr. A v. Hochul*." *We the Patriots USA v. Hochul*, 17 F.4th 368, 370 (2d Cir. 2021). It clarified that its prior opinion should not be read as allowing exempt employees from continuing to work, unvaccinated, on the basis of religion. Id. The court held once more that "if a medically eligible employee's work assignments mean that she qualifies as 'personnel,' she is covered by the Rule and her employer must 'continuously require' that she is vaccinated against COVID-19." Id.

As noted above, on Dec. 13, 2021, the Supreme Court denied the health care professionals' request for an emergency writ of injunction against the mandate. *Dr. A v. Hochul*, No. 21A145, 595 U.S. ____ (Dec. 13, 2021). Three justices dissented and would have granted the application for an emergency writ of injunction. Justice Gorsuch, joined by Justice Alito, stated that the Rule was neither neutral nor generally applicable. Id. at 7-9. Justice Gorsuch also focused on statements made by Governor Hochul that, he believed, evidenced

"more than a slight suspicion that New York acted out of animosity toward or distrust of unorthodox religious beliefs and practices." Id. at 7 (cleaned up). Thus, Justice Gorsuch stated that, in his view, the Rule was subject to strict scrutiny, and not rational basis, which it could not satisfy. Id. at 10.

Conclusion

The Second Circuit's decision in *We the Patriots USA v. Hochul* reviewed two conflicting district court decisions concerning the constitutionality of a vaccine mandate applicable to certain health care entities and personnel. Although the Second Circuit's decision assessed the constitutional issues in the preliminary injunction context rather than during the merits phase of the case, its discussion of those issues nevertheless provides significant guidance to lower courts and state agencies on a novel issue raising significant constitutional questions.