

S.D.N.Y. – N.Y.C.  
21-cv-7863  
21-cv-8773  
Caproni, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3<sup>rd</sup> day of February, two thousand twenty-two.

Present:

Amalya L. Kearse,  
John M. Walker, Jr.,  
Richard J. Sullivan,  
*Circuit Judges.*

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Matthew Keil, John De Luca, Sasha Delgado,  
Dennis Strk, Sarah Buzaglo,

*Plaintiffs-Appellants,*

v.

21-3043

The City of New York, Board of Education of the City  
School District of New York, David Chokshi, in his official  
capacity as Health Commissioner of the City of New York,  
Meisha Porter, in her official capacity as Chancellor of  
the New York City Department of Education,

*Defendants-Appellees.*

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Michael Kane, William Castro, Margaret Chu, Heather Clark,  
Stephanie Di Capua, Robert Gladding, Nwakaego Nwaifejokwu,  
Ingrid Romero, Trinidad Smith, Amaryllis Ruiz-Toro,

*Plaintiffs-Appellants,*

v.

21-3047

Eric Adams, in his official capacity as Mayor of the City

of New York,\* David Chokshi, in his official capacity as  
Health Commissioner of the City of New York,  
New York City Department of Education,

*Defendants-Appellees.*

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Plaintiffs-Appellants move for injunctions pending appeal. Upon due consideration, it is hereby ORDERED that the motions are DENIED.

Appellants are New York City Department of Education employees who object to the New York City Commissioner of Health and Mental Hygiene’s mandate requiring individuals who work in New York City public schools to be vaccinated against the COVID-19 virus. Appellants have filed two suits in the Southern District of New York challenging the facial constitutionality of the vaccine mandate and the procedures used to determine whether a Department of Education employee qualifies for a religious exemption to the mandate. *See Kane v. de Blasio*, Case No. 21-cv-7863; *Keil v. City of New York*, Case No. 21-cv-8773. In October 2021, Appellants moved for preliminary injunctions that would prevent the enforcement of the vaccine mandate. The district court denied Appellants’ motions for preliminary injunctions, ruling principally that they were unlikely to prevail on their claim that the vaccine mandate was unconstitutional on its face. *See Kane v. De Blasio*, 19 F.4th 152, 162 (2d Cir. 2021). Appellants promptly appealed the denial of their preliminary injunctions and sought an injunction pending appeal in this Court. *Id.* The district court then stayed each matter pending resolution of Appellants’ appeals. On November 15, 2021, a motions panel issued an injunction pending appeal that ordered Appellees to give Appellants’ applications for religious exemptions “fresh consideration” using different standards than had previously been applied to their applications. *Id.* at 176–77. A merits panel heard oral argument a week later, and issued an opinion on November 28, 2021, holding that the vaccine mandate was not unconstitutional on its face, *see id.* at 166, but that the procedures that had been used to determine whether an employee qualified for a religious exemption to the mandate were unconstitutional, *see id.* at 169. Accordingly, the merits panel kept in place the motions panel’s injunction, vacated the district court’s denial of Appellants’ motions for preliminary injunctions, and remanded the case to the district court for further proceedings. *Id.* at 176.

Following the remand to the district court, Appellants submitted new applications for religious exemptions to a newly created panel constituted for this purpose (“the Citywide Panel”). On December 8, 2021, counsel for Appellees sent an email to Appellants’ counsel requesting each Appellant submit further information regarding his request for a religious exemption by December 10, 2021. Appellants provided that additional information on December 10. Later that day, all but one of Appellants’ applications were denied without explanation. Those denials stated that Appellants had three business days from the date of the denial to submit proof of vaccination or they would be placed on leave without pay.

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\* Though former Mayor Bill de Blasio was initially named as a defendant in this suit, Mayor Eric Adams is automatically substituted as a party pursuant to Federal Rule of Appellate Procedure 43(c)(2).

The next day, Appellants filed a joint letter-motion for a preliminary injunction in the district court, requesting that the court (1) enjoin enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination; (2) provisionally certify a class of all Department of Education employees who assert religious objections to the vaccine mandate; and (3) order Appellees to immediately reinstate Appellants and all proposed class members to the positions they held prior to the enforcement of the vaccine mandate. *See Kane*, Case No. 21-cv-7863, Doc. No. 85 at 2 (“Joint Prelim. Inj. Mot.”). That letter was a page-and-a-half long and had attached to it fifty-nine pages of sundry exhibits – including a declaration of counsel for the Appellants, the denials of Appellants’ exemption requests, two public health articles regarding the relationship between the percentage of population vaccinated and new COVID-19 cases, a smattering of news stories about COVID-19 and New York City, a “Daily COVID Case Map” from December 10, 2021, and a transcript from a press conference Mayor Bill de Blasio gave on September 23, 2021. *See generally id.* The letter did not say what relevance these exhibits had to the vaccine mandate or to the procedure employed by the Citywide Panel to determine whether Appellants qualified for a religious exemption. On December 14, 2021, the district court issued an order denying Appellants’ motion for a preliminary injunction, Appellants’ motion for class certification as premature, and Appellants’ request for an order reinstating Appellants and proposed class members; the district court also lifted its prior stay of both cases and consolidated the cases. *See Kane*, Case No. 21-cv-7863, Doc. No. 90 (“Order Denying Plaintiffs’ Prelim. Inj. Mot.”).

Appellants promptly appealed the denials of their preliminary injunctions and filed a motion for an emergency injunction pending appeal that would prevent enforcement of the vaccine mandate against all religious objectors and would temporarily reinstate any employee who was suspended or terminated due to a religious objection to the vaccine mandate. The motion was temporarily granted in a more limited form on December 21, 2021, when a one-judge order directed that no further steps be taken to terminate any Appellant’s employment for noncompliance with the vaccine mandate until a full motions panel could hear oral argument on January 18, 2022. The one-judge order did not require Appellees to reinstate Appellants, and it did not grant relief with respect to any non-parties. Having now reviewed the parties’ filings and heard oral argument, we – the full motions panel – conclude that Appellants cannot meet their high burden of establishing that they are entitled to an injunction pending appeal.

A party seeking an injunction must establish (1) “that he is likely to succeed on the merits,” (2) “that he is likely to suffer irreparable harm in the absence of preliminary relief,” (3) “that the balance of equities tips in his favor,” and (4) “that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Because we review a district court’s denial of a preliminary injunction for abuse of discretion, *see Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009), a likelihood of success on the merits for the purposes of Appellants’ motions requires Appellants to show that it is likely that the merits panel will find that the district court abused its discretion in denying Appellants’ motion for a preliminary injunction, *cf. Roman Catholic Diocese of Brooklyn v. Cuomo*, --- U.S. ---, ---, 141 S. Ct. 63, 74 (2020) (Kavanaugh, J., concurring) (clarifying that, for an injunction pending appeal, the relevant likelihood of success is the likelihood of a successful merits appeal). While “a preliminary injunction is an extraordinary remedy never awarded as of right,” *Winter*, 555 U.S. at 24, an injunction pending appeal requires

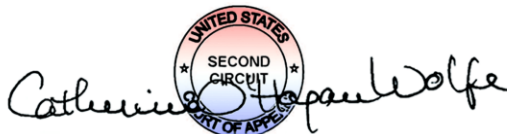
even more, because it “grants judicial intervention that has been withheld” by the lower court, *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm’n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers). Accordingly, an injunction pending appeal should be granted “only in the most critical and exigent circumstances, . . . where the legal rights at issue are indisputably clear.” *Id.* (internal quotation marks and citations omitted); *see also Agudath Israel of America v. Cuomo*, 980 F.3d 222, 226 (2d Cir. 2020).

Appellants have not shown the requisite likelihood that the district court abused its discretion in denying their joint motion for a preliminary injunction. Once again, Appellants requested that the district court “[e]njoin[] enforcement of the vaccine mandate against any employee who asserts a sincere religious objection to vaccination pending resolution of this litigation.” Joint Prelim. Inj. Mot. at 2. But this Court has already held that Appellants are unlikely to succeed on their claim that the vaccine mandate as a whole is unconstitutional, *see Kane*, 19 F.4th at 166, and Appellants have offered no new facts or arguments that would change that analysis. To the extent that Appellants seek a more limited injunction challenging the constitutionality of the Citywide Panel’s procedure for assessing religious exemptions, Appellants simply failed to carry their burden before the district court. After Appellants’ requests for religious exemptions were denied by the Citywide Panel, they rushed into the district court and filed a page-and-a-half letter motion requesting a preliminary injunction. *See* Joint Prelim. Inj. Mot. That letter motion offered no legal argument for why the district court should grant Appellants a preliminary injunction; it merely incorporated by reference Appellants’ prior filings in the district court and in this Court. *Id.* at 2. But those prior filings all addressed the religious accommodation standards that were in effect before this Court issued its November 28, 2021 order, which directed that Appellants’ requests for religious exemptions be given “fresh consideration” under new standards for evaluating exemption requests. *Kane*, 19 F.4th at 176. The injunction issued in that order, which remained in effect during and after the reconsideration of Appellants’ requests, directed the parties to “inform the district court . . . of the results of those proceedings” within two weeks of the Citywide Panel’s decisions. *Id.* Despite that generous timeline, Appellants filed their motion for a preliminary injunction the day after the Citywide Panel issued its decisions and provided the district court with “almost no information about the process before the Citywide Panel” or the standards the Citywide Panel used to assess Appellants’ applications for religious exemptions. *Kane*, Case No. 21-cv-7863, Doc. No. 90 at 8. Given that the filings before the district court fail to even describe the process and rules used to assess Appellants’ applications – let alone pinpoint their alleged deficiencies – it is unlikely that the merits panel will hold that Appellants carried their burden below. We therefore DENY the motion for an injunction pending appeal.

At oral argument on January 18, 2022, the parties consented to expediting these appeals. Accordingly, IT IS HEREBY ORDERED THAT these appeals are expedited and will be heard by a merits panel sitting on February 24, 2022 consistent with a briefing schedule established by the Clerk of Court after consultation with the parties. IT IS FURTHER ORDERED THAT the Clerk of Court shall consolidate these appeals for all further proceedings.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is divided into two horizontal sections: the top half is red with the words "UNITED STATES" in white, and the bottom half is blue with the words "SECOND CIRCUIT" in white. There are small white stars on either side of the text in the blue section. The signature is written in a cursive style, with the "O" in "O'Hagan" being particularly large and looping.