IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISRAEL RYDIE, et al., Plaintiffs-Appellants, v. PRESIDENT JOSEPH R. BIDEN, JR., et al., Defendants-Appellees.	No. 21-2359

OPPOSITION TO PLAINTIFFS-APPELLANTS' MOTION FOR EXPEDITED BRIEFING SCHEDULE

Defendants respectfully oppose Plaintiffs-Appellants' Motion for Expedited Briefing Schedule. On November 19, 2021, the district court denied the plaintiffs' motion for a temporary restraining order and preliminary injunction. *See* Dkt. 26. More than a month later, plaintiffs filed a motion for highly expedited consideration of their appeal, seeming to propose a schedule under which their opening brief would be due on December 22, 2021, the government would prepare its brief during the upcoming holidays, and the Court would hear argument in January 2022. That request should be denied. Plaintiffs have identified no emergency warranting such an extraordinarily compressed schedule—as evidenced by their own failure to proceed expeditiously in this appeal—and the briefing schedule that plaintiffs propose is

incompatible with government counsel's long-scheduled holiday plans. The government does not oppose reasonable expedition in this case so long as its brief is due no earlier than February 2, 2022.

STATEMENT

1. This appeal concerns a challenge to the Executive Order issued by President Biden on September 9, 2021, announcing COVID-19 vaccination requirements for federal employees. *See* Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 9, 2021). This Executive Order instructs federal agencies to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its federal employees, with exceptions only as required by law," 86 Fed. Reg. at 50,990, and directs the Safer Federal Workforce Task Force ("Task Force") to issue guidance on implementing the vaccination requirement, *id.* The Task Force guidance recognizes that federal employees may be eligible for an exception from the vaccination requirement based on a medical condition or religious objection, *see* Task Force, *FAQs, Vaccinations, Limited Exceptions to Vaccination Requirement*, https://go.usa.gov/xe5aC ("*Exception FAQs*"), and directs each agency to "follow its ordinary process to review and consider what, if any, accommodation [the agency] must offer" under applicable federal law, *see* Task Force, *FAQs, Vaccinations, Enforcement of Vaccination Requirement for Federal Employees*, https://go.usa.gov/xe5aC ("*Enforcement FAQs*"). Federal employees who have not requested or received an

exception should be fully vaccinated, and inform their employers as such, "no later than November 22, 2021," Task Force, *COVID-19 Workplace Safety: Agency Model Safety Principles* at 1 (updated Sept. 13, 2021), https://go.usa.gov/xe5a4, but employees who request an exception from the requirement will not be subject to discipline while the request is under consideration. *Enforcement FAQs*. The Task Force guidance states that, if an exception request is denied, the employee should be given two weeks from the denial to receive the first (or only) dose of a COVID-19 vaccine before an agency initiates any enforcement proceedings. *See Exception FAQs*.

If an employee does not obtain an exception, the Task Force guidance recommends a procedure for progressive discipline that begins with a five-day period of education and counseling, followed by a suspension of up to 14 days and then, if noncompliance continues, additional discipline up to and including potential removal from federal service. *See Enforcement FAQs*. Federal employees may also enjoy additional procedural protections prior to termination, such as 30 days' advance written notice of the proposed action, an opportunity to respond (orally and in writing), and a written decision setting forth the basis for removal. *See generally* 5 C.F.R. § 752.404.

2. Plaintiffs Israel Rydie and Elizabeth Fleming are two federal employees subject to the vaccination requirement in Executive Order 14043. Rydie is an employee of the U.S. Department of Defense, Defense Information Systems Agency;

Fleming is an employee of the Food and Drug Administration. Dkt. 1 at 7-8. Plaintiffs object to the vaccine requirement and are "not going to provide proof of [their] vaccination status," *id.*; they aver that they "have not applied for exceptions" from the vaccine requirement, nor "do [they] intend to do so," Dkt. 26 at 3.

On October 20, 2021, plaintiffs filed suit, seeking to enjoin the enforcement of Executive Order 14043, claiming that the Order violates constitutional separation of powers, plaintiffs' "right to privacy," and procedural due process. Dkt. 1 at 10-18. And on October 27, plaintiffs filed a motion for a temporary restraining order and preliminary injunction. Dkt. 7.

3. On November 19, the district court denied plaintiffs' motion for injunctive relief, concluding that plaintiffs satisfied "[n]one of the factors" required for that relief. Dkt. 26 at 4. The district court concluded that plaintiffs could not demonstrate likely success on the merits—explaining that plaintiffs were unlikely to prevail on any of their constitutional claims—and additionally noted that the court may "lack[] the authority to adjudicate their case or to order some of the requested relief." Dkt. 26 at 5. The court concluded in particular that plaintiffs were likely required to assert their claims pursuant to the exclusive scheme established by the Civil Service Reform Act (CSRA), which permits a federal employee to obtain judicial review of an adverse employment action in the Federal Circuit only after the employee exhausts her administrative remedies to challenge the adverse action. *See id.*

Moreover, the district court found that plaintiffs had not established likely irreparable harm pending full consideration of their claims on the merits, as loss of employment and other workplace discipline are not irreparable injuries, absent extraordinary circumstances not applicable here. Dkt. 26 at 13 (citing *Sampson v. Murray*, 415 U.S. 61, 89-92 & 92 n.68 (1974)). Even "[a]ssuming Plaintiffs are terminated before they obtain a favorable judgment, their injury can be fully redressed through reinstatement, backpay, and expungement of any mark of misconduct." *Id.*; *see also id.* (noting that other courts have recently rejected finding of irreparable injury for claims of similar "employment-based harms" (citing Op. at 8, *Altschuld v. Raimondo*, No. 21-cv-2779, Dkt. 23, (D.D.C. Nov. 8, 2021); *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688, at *8-9 (D.N.J. Nov. 8, 2021))).

The district court further explained that an injunction barring enforcement of the vaccine requirement for federal employees would do "substantial and irreparable harm to the public health and to the federal government's effectiveness." *Id.* at 14; *see also id.* (noting that the government's interest in stemming the spread of COVID-19 "is 'unquestionably a compelling interest'" (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020))).

On December 6, more than two weeks after the district court denied their motion for a preliminary injunction, plaintiffs filed a notice of appeal. Two weeks later, on December 20, plaintiffs filed their motion for expedited review by this Court.

ARGUMENT

Plaintiffs ask the Court to impose what appears to be an extraordinarily expedited briefing schedule, but plaintiffs have not identified any particular reason to expedite the case on this extremely accelerated schedule. *See* 4th Cir. Local App. R. 12(c). And plaintiffs do not identify any harm that may befall them if the Court considers this appeal in the normal course. Plaintiffs waited nearly two months after the President issued Executive Order 14043 to seek any relief, they filed their notice of appeal over two weeks after the district court's decision, and plaintiffs have waited an additional two weeks to file any motion in this Court after filing their notice of appeal. Although the government is willing to agree to reasonably expedited briefing in this case, the schedule that plaintiffs have belatedly proposed is incompatible with government counsel's long-planned holiday plans with family. Accordingly, this Court should reject plaintiffs' proposed deadlines for merits briefs in this appeal and instead set a schedule under which the government's brief is due no earlier than February 2, 2022.

1. As plaintiffs correctly note (Mot. at 3), Executive Order 14043 required federal employees to be fully vaccinated by November 22, 2021. *See* Task Force, *COVID-19 Workplace Safety: Agency Model Safety Principles* at 1 (updated Sept. 13, 2021), https://go.usa.gov/xe5a4. Plaintiffs have not complied with requirements to report their vaccination status and have not sought exceptions from the vaccination

requirements. As explained above, however, any discipline that plaintiffs' employing agencies ultimately impose will be progressive and may include various procedural protections. *See supra* pp. 3, 4. Furthermore, as the district court explained, the CSRA—which requires that covered employees (like plaintiffs) exhaust their administrative remedies for challenging adverse employment actions before seeking judicial review in the Federal Circuit—provides the exclusive means by which plaintiffs may challenge any discipline that is ultimately imposed. Dkt. 26 at 5-7; *see also id.* at 3 (noting that government counsel acknowledged that the "White House has widely publicized its delayed enforcement" of taking adverse action against unvaccinated employees "until after the holidays").

Plaintiffs further suggest (Mot. at 4) that, if this case proceeds under a normal briefing schedule, "the damage [they] are seeking to prevent by preliminary injunction will likely be done" before the Court issues a decision. But plaintiffs ignore the cardinal principle that employment-related harms can generally be remedied through the normal course of litigation and therefore do not constitute irreparable injury warranting preliminary relief. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974); *see also* Dkt. 26 at 13 (any injury plaintiffs face "can be fully redressed through reinstatement, backpay, and expungement of any mark of misconduct"). Expedition is thus not warranted on that basis.

2. Plaintiffs' proposed briefing schedule is additionally unwarranted because plaintiffs apparently contemplate that the government would prepare its brief during the upcoming holidays, at a time when all government counsel in this case have previously planned personal leave to spend time with their families, as do many other individuals within the government whose input the government's brief will require.

The two attorneys with primary responsibility for preparing the government's brief in this case are Casen B. Ross and Sarah Carroll. Mr. Ross has long-planned holiday travel scheduled for December 23 to January 2. Ms. Carroll has long-planned holiday travel scheduled for December 23 to December 30.

The attorneys with principal supervisory responsibility for the government's brief are Marleigh D. Dover, Charles W. Scarborough, and Abby C. Wright. Ms. Dover is on long-planned leave until the end of the year. Mr. Scarborough and Ms. Wright have long-planned travel scheduled for December 21 to December 30, and December 23 to December 29, respectively.

3. The federal government often agrees to reasonable expedition in cases where it is warranted, but cannot consent to the schedule that plaintiffs have proposed. That is particularly true because any alleged exigency in this case is largely of plaintiffs' own making: they waited nearly seven weeks to seek a preliminary injunction after the Executive Order was issued, and then they waited nearly a month after the district court denied a preliminary injunction to request this Court's

expedited review. The government would not oppose a schedule under which its brief is due no earlier than February 2, 2022—thirty days after January 3, 2022, the first business day in 2022—and would be willing to agree not to seek any subsequent extensions of that deadline. Plaintiffs may then file their reply brief as expeditiously as they like, and the Court can issue a decision, with or without oral argument, on the timeline the Court deems appropriate.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for expedited review should be denied.

Respectfully submitted,

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December 2021

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 1,853 words, according to the count of Microsoft Word.

/s/ Casen B. Ross .
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2021, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Casen B. Ross .
CASEN B. ROSS