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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Mark Brnovich *et al.*,
Plaintiffs,
vs.
Joseph R. Biden, *et al.*,
Defendants.

No. 2:21-cv-01568-MTL

**FEDERAL DEFENDANTS'
SUPPLEMENTAL BRIEF RE:
PLAINTIFF REBLE**

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INTRODUCTION

Pursuant to this Court’s order, ECF No. 122, the Federal Defendants (“Defendants”) respectfully submit the following supplemental brief regarding Plaintiff Al Reble. Plaintiff Reble formerly sought to proceed under the pseudonym “John Doe”; the Court denied his motion for leave to proceed pseudonymously, *id.*; and he subsequently identified himself in the Third Amended Complaint, ECF No. 134. Defendants have now confirmed that Plaintiff Reble is an employee of the U.S. Marshals Service (“USMS”), a component of the U.S. Department of Justice (“DOJ”), and has worked for USMS for approximately 30 years. *See* Ex. A ¶ 5, Decl. of Katrina Queen; *accord* Third Am. Compl. ¶ 12.

Plaintiff Reble brings two claims challenging the federal employee vaccination requirement (“Employee Requirement”). First, he asserts that the requirement violates section 564 of the Federal Food, Drug, and Cosmetics Act (“FDCA”), 21 U.S.C. § 360bbb-3, which governs the authorization of vaccines (and other biological products) for emergency use. *See* Third Am. Compl. ¶¶ 167–71 (Count Three). Second, he asserts that the requirement violates his substantive due process rights. *See* Third Am. Compl. ¶¶ 172–74 (Count Four).

The Court lacks jurisdiction over these claims (1) because they are not ripe; and (2) because they must be asserted through administrative processes, pursuant to either the Civil Service Reform Act (“CSRA”) or the Rehabilitation Act. In any event, neither claim has merit.

I. Plaintiff Reble’s Claims Remain Unripe.

In a previous brief, Defendants argued that Plaintiff Reble’s claims were constitutionally and prudentially unripe because he had allegedly requested a medical exception to the Employee Requirement. *See* Defs.’ Opp’n to Pls.’ Renewed Mot. for TRO and Prelim. Inj. 10–11, ECF No. 52 (“Opp’n”). Defendants have now verified that Plaintiff Reble has requested a medical exception and that his request remains pending with USMS.¹ *See* Queen

¹ Plaintiff Reble will not be disciplined for being unvaccinated as long as his exception request remains pending and for at least two weeks following any denial of the request. *See* Queen Decl. ¶¶ 7–8.

1 Decl. ¶ 6. Plaintiff Reble allegedly “expects that his medical [exception] request will be
 2 denied,” Third Am. Compl. ¶ 12, but this is pure speculation unsupported by any evidence.
 3 *Cf. Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (at merits stage, plaintiff cannot rest on
 4 “mere allegations” but must produce evidence establishing actual or imminent injury). If
 5 Plaintiff Reble’s exception request is granted, USMS will not require him to become vaccinated
 6 against COVID-19, and there will be no need for this Court to adjudicate his claims.

7 In sum, Plaintiff Reble’s claims depend on “contingent future events that may not
 8 occur as anticipated, or indeed may not occur at all.” *Trump v. New York*, 141 S. Ct. 530, 535
 9 (2020). They should therefore be dismissed as unripe. *See Church v. Biden*, No. 1:21-cv-2815,
 10 2021 WL 5179215, at *8–*10 (D.D.C. Nov 8, 2021) (federal employees’ claims challenging
 11 EO 14043 were unripe due to pending exception requests); *Rodden v. Fauci*, No. 3:21-cv-317,
 12 2021 WL 5545234, at *3 (S.D. Tex. Nov. 27, 2021) (same); *McCray v. Biden*, No. 1:21-cv-2882,
 13 2021 WL 5823801, at *8-9 (D.D.C. Dec. 7, 2021) (same); *Donovan v. Vance*, --- F. Supp. 3d ---
 14 , No. 4:21-cv-5148, 2021 WL 5979250, at *4–*5 (E. D. Wash. Dec. 17, 2021) (same); *AFGE*
 15 *Local 501 v. Biden*, No. 21-cv-23828, Dkt. 33, at 13–18 (S.D. Fla. Dec. 22, 2021) (same).

16 **II. Even if Plaintiff Reble’s Claims Ripen, He Would Be Required to Assert Them**
 17 **Through Administrative Processes Established by Congress.**

18 Defendants previously argued that even if Plaintiff Reble’s claims became ripe, they
 19 would “likely [be] precluded by the Civil Service Reform Act.” Opp’n at 12 & n.4
 20 (capitalization altered). Now that Plaintiff Reble has identified himself, Defendants have been
 21 able to verify that he is a federal civilian employee with rights under the CSRA and the
 22 Rehabilitation Act. *See* Queen Decl. ¶ 5; *see also* Opp’n at 12–14 (describing the CSRA’s
 23 remedial scheme); 29 U.S.C. § 701 (Rehabilitation Act is applicable to federal employees); 29
 24 C.F.R. pt. 1614 (relevant federal regulations).

25 Plaintiff Reble must pursue his claims—if his potential injury materializes—through
 26 the remedial schemes available to federal employees pursuant to either the CSRA or the
 27 Rehabilitation Act. For example, if his request for a medical exception were denied, he could
 28 file an administrative complaint alleging disability discrimination in violation of the

1 Rehabilitation Act. *See* 29 C.F.R. § 1614.105. If he subsequently were to receive a suspension
2 of 14 days (or less) for being unvaccinated and alleged that it was due to a “prohibited
3 personnel practice,” he could file a complaint with the Office of Special Counsel. *See* 5 U.S.C.
4 §1214(a)(3). If Plaintiff Reble were suspended for more than 14 days or removed from federal
5 employment, he could appeal his removal to the Merit Systems Protection Board (“MSPB”).
6 *See* 5 U.S.C. § 7513; 29 C.F.R. § 1614.302. And if his claims were ultimately denied at the
7 administrative level, he could likely obtain judicial review in District Court or the U.S. Court
8 of Appeals for the Federal Circuit, depending on his election of administrative remedies. *See*
9 5 U.S.C. § 7703; 29 C.F.R. § 1614.310. At present, however, he may not assert his claims
10 directly in this Court. *See* Opp’n at 12–14; *Leong v. Potter*, 347 F.3d 1117, 1121-22 (9th Cir.
11 2003) (no subject matter jurisdiction over U.S. Postal Service employee’s Rehabilitation Act
12 claim because employee failed to exhaust his administrative remedies); *Rydie v. Biden*, No. 8:21-
13 cv-2696, 2021 WL 5416545, at *2–*3 (D. Md. Nov. 19, 2021) (recognizing that under *Elgin v.*
14 *Department of Treasury*, 567 U.S. 1, 5 (2012), unvaccinated federal employees challenging EO
15 14043 “likely have to proceed through the CSRA process, even though they assert
16 constitutional challenges”), *appeal filed*, No. 21-2359 (4th Cir.); *McCray*, 2021 WL 5823801, at
17 *9 n.3 (similar).

18 **III. In Any Event, Plaintiff Reble’s Claims Lack Merit.**

19 If the Court reaches the merits of Plaintiff Reble’s claims, it should reject them. *See*
20 Opp’n at 29–34.

21 **A. The Employee Requirement Does Not Violate Section 564 of the FDCA.**

22 Since Defendants’ prior briefing on the FDCA claim, Plaintiffs amended their
23 complaint to invoke the Administrative Procedure Act (“APA”), which provides a private
24 right of action for challenges to final agency action. *Compare* First Am. Compl., Count Four,
25 ECF No. 14 (asserting FDCA claim “[u]nder 21 U.S.C. § 360bbb-3”), *with* Third Am. Compl.,
26 Count Three (also asserting FDCA claim under the APA). Even assuming that an alleged
27 violation of section 564 is subject to judicial review under the APA, Plaintiff Reble’s FDCA
28 claim fails. As a threshold matter, it is not clear what final agency action Plaintiff Reble seeks

1 to challenge as contrary to section 564. In any event, every court to consider the issue has
 2 concluded that section 564 does not prevent employers from imposing workplace discipline,
 3 up to and including termination, on employees who choose not to receive an EUA vaccine.
 4 *See Rhoades, et al. v. Savannah River Nuclear Sols., LLC*, No. 21-cv-3391, 2021 WL 5761761, at
 5 *17 (D.S.C. Dec. 3, 2021), *appeal filed*, No. 21-2381 (4th Cir.); *Villareal v. Rocky Knoll Health Ctr.*,
 6 No. 21-cv-729, 2021 WL 5359018, at *3 (E.D. Wis. Nov. 17, 2021); *McCutcheon v. Enlivant ES,*
 7 *LLC*, No. 5:21-cv-00393, 2021 WL 5234787, at *3 (S.D.W. Va. Nov. 9, 2021); *Valdez v. Grisbam,*
 8 --- F. Supp. 3d ---, 2021 WL 4145746, at *4, *appeal filed*, No. 21-2105 (10th Cir.); *Pelekai v.*
 9 *Hawaii*, No. 1:21-cv-343, 2021 WL 4944804, at *6 n.9 (D. Haw. Oct. 22, 2021); *Johnson v. Brown,*
 10 2021 WL 4846060, at *18 (D. Or. Oct. 18, 2021); *Norris v. Stanley*, --- F. Supp. 3d ---, 2021 WL
 11 4738827, at *3 (W.D. Mich. Oct. 8, 2021); *Bridges v. Hous. Methodist Hosp.*, ---F. Supp. 3d---,
 12 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021), *appeal filed*, No. 21-20311 (5th Cir. June 14,
 13 2021).

14 The relevant portion of section 564 provides:

15 With respect to the emergency use of an unapproved product, the Secretary [of
 16 Health and Human Services], to the extent practicable given the applicable
 17 circumstances [justifying the authorization of products for emergency use],
 18 shall, for a person who carries out any activity for which the authorization is
 19 issued, establish such conditions on an authorization under this section as the
 20 Secretary finds necessary or appropriate to protect the public health, including
 21 the following:

22 (ii) Appropriate conditions designed to ensure that individuals to whom the
 23 product is administered are informed--

24 (III) of the option to accept or refuse administration of the product, of the
 25 consequences, if any, of refusing administration of the product, and of the
 26 alternatives to the product that are available and of their benefits and risks.

27 21 U.S.C. § 360bbb-3(e)(1)(A).

28 This provision “confers certain powers and responsibilities to the Secretary of [HHS]
 in an emergency.” *Bridges*, 2021 WL 2399994, at *2. For each COVID-19 vaccine made
 available under an EUA, HHS properly implemented the provision by requiring that potential

1 vaccine recipients receive a Fact Sheet informing them, for example, that they have a “choice
 2 to receive or not receive” the vaccine. *See, e.g.*, FDA, Moderna EUA COVID-19 Vaccine Fact
 3 Sheet for Recipients and Caregivers at 4 (revised Oct. 20, 2021), [https://perma.cc/JZ6Y-](https://perma.cc/JZ6Y-ZUJF)
 4 ZUJF. Plaintiffs do not allege otherwise; in fact, neither the Secretary nor any agency of HHS
 5 has been named as a defendant in this case. Section 564(e)(1)(A) is directed solely at the
 6 Secretary, whom it grants broad discretion to establish conditions on the authorization of a
 7 medical product for emergency use. *See* 21 U.S.C. § 360bbb-3(e)(1)(A) (advising the Secretary
 8 to implement the provisions “to the extent practicable” and “as the Secretary finds necessary
 9 or appropriate to protect the public health”); *id.* § 360bbb-3(i) (“Actions under the authority
 10 of this section by the Secretary . . . are committed to agency discretion.”). The provision says
 11 nothing about whether any employer—public or private—may require its employees to
 12 become vaccinated using an EUA product. *See, e.g., Bridges*, 2021 WL 2399994, at *2.
 13 Accordingly, even as re-pleaded, Plaintiff Reble’s FDCA claim cannot succeed.

14 **B. The Employee Requirement Does Not Violate Substantive Due Process.**

15 Plaintiff Reble’s other claim—that the Employee Requirement violates his
 16 “constitutional rights . . . to bodily integrity and to refuse medical treatment,” Third Am.
 17 Compl. ¶¶ 173, fails for the reasons set forth in Defendants’ prior opposition brief, *see* Opp’n
 18 at 31–34. Indeed, since that opposition brief was filed, additional courts have held that the
 19 Employee Requirement is subject to—and easily survives—rational basis review.. *See Rydie*,
 20 2021 WL 5416545, at *5; *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688, at *6–*7 (D.N.J.
 21 Nov. 8, 2021), *appeal pending*, No. 21-3091 (3d Cir.).

22 **CONCLUSION**

23 For the foregoing reasons, Plaintiff Reble’s claims should be dismissed. In the
 24 alternative, judgment should be entered in favor of Defendants.

25
 26 Respectfully submitted this 22nd day of December, 2021.

27 BRIAN M. BOYNTON
 28 Acting Assistant Attorney General

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Defendants.

No. 2:21-cv-01568-MTL

DECLARATION OF KATRINA QUEEN

19 I, KATRINA QUEEN, hereby declare as follows:

20
21 1. I am the Chief of Affirmative Employment Programs/Disability Program
22 Manager with the Office of Equal Employment Opportunity at the U.S. Marshals Service
23 (“USMS”), a component of the U.S. Department of Justice (“DOJ”). In this position, I receive
24 reasonable accommodation requests from employees and applicants, provide guidance to
25 management officials as it relates to processing reasonable accommodation requests, and
26 gather information (medical documentation, religious statements) as necessary to complete
27 the request. I also serve as Deciding Official on COVID-19 Exemption Requests. The
28

1 statements in this Declaration are based on my personal knowledge and information provided
2 to me in my official capacity.

3 2. Consistent with Executive Order No. 14043, USMS is requiring its employees
4 to be vaccinated against COVID-19, subject to such exceptions as required by law. USMS
5 plans to use a phased process for enforcing this COVID-19 vaccination requirement with
6 respect to employees who have not timely provided proof of vaccination and do not have a
7 pending exception request. The goal of this process is to help employees understand and
8 accept the benefit of becoming fully vaccinated.

9 3. USMS's enforcement process is intended to provide unvaccinated employees
10 with every opportunity to become vaccinated. If an unvaccinated employee takes steps toward
11 becoming vaccinated, the enforcement process would be put on hold to give him or her time
12 to become fully vaccinated. In addition, if an unvaccinated employee requests an exception at
13 any time during the enforcement process, the enforcement process would be put on hold until
14 the exception request has been adjudicated.

15 4. For unvaccinated employees with no pending exception request, USMS's
16 enforcement process begins with a period of education and counseling about the benefits of
17 vaccination and ways to obtain the vaccine. After this counseling period concludes,
18 unvaccinated employees may be subject to progressive formal discipline that would begin with
19 a Letter of Reprimand and could include a proposed suspension followed by, where
20 appropriate, proposed removal from employment.

21 5. Plaintiff Al Reble is a USMS employee and has been since approximately 1990.
22 He is currently a Criminal Investigator, GS-1811.

23 6. On October 13, 2021, Plaintiff Reble requested a medical exception to the
24 requirement that USMS employees be vaccinated against COVID-19. That request remains
25 pending.

26 7. Pursuant to USMS policy, as long as Plaintiff Reble's exception request remains
27 pending, Plaintiff Reble will not be disciplined for being unvaccinated against COVID-19.
28

1 8. If Plaintiff Reble’s exception request is denied, he will be given at least two
2 weeks to initiate the process of becoming vaccinated, during which time he will not be
3 disciplined for being unvaccinated. If Plaintiff Reble fails to initiate the process of becoming
4 vaccinated within that time period, USMS would expect to initiate the enforcement process
5 outlined in paragraphs 2–4, above.

6 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the above
7 statements are true and correct.

8
9 Dated: December 22, 2021

10 Respectfully submitted,

11
12 *Katrina E. Queen*
13 _____

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