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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Mark Brnovich, in his official capacity as
Attorney General of Arizona; *et al.*,

Plaintiffs,

v.

Joseph R. Biden in his official capacity as
President of the United States; *et al.*,

Defendants.

No. 2:21-cv-01568-MTL

**PLAINTIFFS' RESPONSE TO
FEDERAL DEFENDANTS'
NOTICE OF RELEVANT
DECISION**

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NOTICE

The court’s decision in *Feds for Medical Freedom v. Biden*, No. 21-cv-356 (S.D. Tex. Jan. 21, 2022) (“FMF”) is notable for several reasons not stated by Federal Defendants (“Defendants”) in their Notice (Doc. 153):

1) “The [Civil Service Reform Act] does not deprive the court of jurisdiction over these claims.” Op. at 5-7

2) Imposition of the Employee Mandate would cause the plaintiffs to suffer irreparable harm: “[T]he Fifth Circuit has already determined that the Hobson’s choice employees face between ‘their job(s) and their jab(s)’ amounts to irreparable harm. Regardless of what the conventional wisdom may be concerning vaccination, no legal remedy adequately protects the liberty interests of employees who must choose between violating a mandate of doubtful validity or consenting to an unwanted medical procedure that cannot be undone.” *Id.* at 9-10 (quoting *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

3) The Executive Order imposing the Employee Mandate was reviewable as an *ultra vires* action, because “executive orders are reviewable outside of the APA.” *Id.* at 11 n.5

4) The President lacked statutory authority to impose the Employee Mandate. *Id.* at 11-15.

5) The President similarly lacked constitutional authority to do so. *Id.* at 15-16.

6) “The government has offered no answer—no limiting principle to the reach of the power they insist the President enjoys. For its part, this court will say only this: however extensive that power is, the federal-worker mandate exceeds it.” *Id.* at 16

7) The balance of equities and the public interest favored the plaintiffs. *Id.* at 18-19.

This Court should therefore issue a preliminary injunction against the Employee Mandate for all of the same reasons that the *Feds for Medical Freedom* court has.

Given the procedural posture in this case, it is puzzling that Defendants contend that so “long as the nationwide injunctions in Georgia and FMF remain in place, however, this Court’s adjudication of Counts One through Eight of Plaintiffs’ Third Amended Complaint would have no practical significance.” The parties have stipulated that adjudication of

1 Plaintiffs’ PI motion be consolidated with trial on the merits. (*See* Doc. 127.) This Court’s
2 adjudication of Plaintiffs claims will have the practical significance of achieving a final
3 resolution of the parties’ claims.

4 Moreover, Defendants have previously refused to agree to even the most modest of
5 enforcement forbearance in the event that the nationwide injunction against Contractor
6 Mandate were stayed. *See* Doc. 119 at 1-2. They equally offer *nothing* in the way of restraint
7 vis-à-vis the Employee Mandate. Thus, if the Southern District of Texas’s injunction were ever
8 stayed, Defendants could instantly resume enforcing the Employee Mandate in Arizona. For
9 all of the reasons that this Court previously denied Defendants’ explicit request for a stay (Doc.
10 121), it should similarly reject Defendants’ implied contention that a stay of adjudication on
11 the Employee Mandate is now warranted.

12 Furthermore, it is telling that Defendants sought relief in the U.S. Supreme Court as to
13 the CMS Mandate, but have not done as to the Contractor Mandate to date—even though the
14 Eleventh Circuit denied their request for a stay pending appeal more than a month ago. *See*
15 *Georgia v. President*, No. 21-14269 (11th Cir. Dec. 17, 2021); *see also Kentucky v. Biden*, --- F.4th -
16 ---, 2022 WL 43178 (6th Cir. Jan. 5, 2022).

17 If the U.S. Solicitor General’s office truly believed that the Supreme Court’s recent
18 decisions in *NFIB v. OSHA*, --- S.Ct. ----, 2022 WL 120952 (Jan. 13, 2022) and *Biden v. Missouri*,
19 --- S.Ct. ----, 2022 WL 120950 (Jan. 13, 2022) strongly supported Defendants’ Contractor
20 Mandate arguments, it would have filed an application for a stay from the Supreme Court. As
21 is often the case in life, “silence is most eloquent.” *Edmonds v. Compagnie Generale Transatlantique*,
22 443 U.S. 256, 266 (1979). And here the Solicitor General’s silence in the Supreme Court is far
23 more instructive as to what *NFIB v. OSHA* and *Biden v. Missouri* mean for the Contractor
24 Mandate than the arguments that Defendants have advanced in this Court. *See* Doc. 152.

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RESPECTFULLY SUBMITTED this 21st day of January, 2022.

**MARK BRNOVICH
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By: /s/ James K. Rogers
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of January, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona using the CM/ECF filing system. Counsel for all Defendants who have appeared are registered CM/ECF users and will be served by the CM/ECF system pursuant to the notice of electronic filing.

/s/ James K. Rogers
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