UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

NAVY SEAL 1, *et al.*, for themselves and all others similarly situated, Plaintiffs, v. JOSEPH R. BIDEN, in his official capacity as President of the United States, *et al.*, Defendants.	)	No. 8:21-cv-2429-SDM-TGW

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
AND RENEWED MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, pursuant to the Court's Order of November 22, 2021 (Doc. 40, the "PI Order") and Local Rule 3.01, file this supplemental memorandum in support of their motion for preliminary injunction (Doc. 2, the "PI Motion") as for servicemember Plaintiffs, and renew their PI Motion as for civilian federal employee Plaintiffs and Plaintiff FEDERAL CIVILIAN CONTRACTOR EMPLOYER. As for servicemember Plaintiffs, the Court's PI Order deferred resolution of Plaintiffs' PI Motion pending Defendants' filing additional data ordered by the Court, and authorized the filing of supplemental memoranda regarding issuance of the preliminary injunction. (Doc. 40 at 33–35.) Defendants filed their First Notice of Compliance (Doc. 47, the "First Notice") providing the first installment of the additional data ordered by the Court, which data support immediate entry of the preliminary injunction as for servicemember Plaintiffs. (Argument Pt. I, *infra*.) And in

conjunction with Plaintiffs' filing their Motion for Leave to Amend Complaint (Doc. 49), attaching Plaintiffs' proposed First Amended Verified Class Action Complaint (Doc. 49-1), Plaintiffs renew their PI Motion on behalf of new civilian federal employee Plaintiffs identified in the proposed amended complaint (Doc. 49-1, ¶¶ 66–68, 170–72), under RFRA and the First Amendment (Argument Pt. II*, infra*), and on behalf of new civilian federal employee Plaintiffs and Plaintiff FEDERAL CIVILIAN CONTRACTOR EMPLOYER, under new Administrative Procedures Act causes of action pleaded in the proposed amended complaint (Doc. 49-1, ¶¶ 295–325 (Counts IV–VI); Argument Pt. III*, infra*).[1] For the reasons stated in the PI Motion and at the November 15 hearing thereon (Doc. 38, the "PI Hearing"), and the reasons stated herein, the Court should issue the preliminary injunction immediately.

INTRODUCTION

As the Court already observed, "the available interim data lends tentative credence" to the fact that "the regulations are subject to an undisclosed policy of 'deny them all.'" (PI Order 26.) Indeed, even at the commencement of this action (Doc. 1), Plaintiffs' contentions were—"based on current data—quite plausible that each branch's procedure for requesting a religious exemption is a ruse that will result inevitably in the undifferentiated (and therefore unlawful under RFRA) denial of each

[1] Should the Court grant Plaintiffs' motion for leave to amend, the verified amended complaint will include verifications by the new Plaintiffs as to their respective factual allegations.

service member's request." (PI Order 33.) What looked like a ruse then is proved a ruse now.

The data produced by Defendants confirms that "the actual and governing policy-in-fact—perhaps emanating from an implicit understanding common to and extending throughout each branch of the military and throughout the layers of reviewing officers and boards—demands the indiscriminate and undifferentiated denial of each request for a religious exemption." (PI Order 23.) As of Defendants' First Notice, there have been 21,243 requests for religious exemption among all military branches, with none granted to save objecting servicemembers from the choice between vaccination against conscience or involuntary separation. Defendants' unambiguous data compel entry of a preliminary injunction, as they confirm Defendants are "acting in fact under a policy of across-the-board denial without individualized determination required by RFRA." (PI Order at 28.)

- **The Army has granted *zero* religious exemptions.** The Army has received **2,064 requests** for religious exemption from the COVID-19 Vaccine Mandate and **granted none**. The Army has formally denied 122 requests, 115 of which included a chaplain's determination of sincerity. (*See* Doc. 47-2, ¶¶ 8–9.) The Army has granted 2,659 temporary and permanent medical exemptions. (Doc. 47-2, ¶¶ 13–15.)

- **The Navy has granted *zero* religious exemptions.** The Navy has received **3,711 requests** for religious exemption and **granted none**. The Navy has formally denied 3,484 requests and has 1,008 appeals pending. No appeal has been adjudicated.

(Doc. 47-3 at 7.) The Navy has granted 311 temporary and permanent medical exemptions. (Doc. 47-3 at ECF p. 7.)

- **The Marine Corps has granted *zero* religious exemptions, except for *two* exemptions given to Marines already slated for separation.** The Marine Corps has **received 3,192 requests** for religious exemption and **denied 3,080 requests**—all of which included a chaplain's determination of sincerity—with the remaining 112 initial requests still under review. The Marine Corps records 2 religious exemptions granted on appeal (Doc. 47-4 at ECF p. 6), but media investigation of the granted exemptions indicates that both exemptions were given to Marines already slated for separation.[2] The Marine Corps has granted 436 temporary and permanent medical exemptions. (Doc. 47-4 at 6.)

- **The Air Force has granted *zero* religious exemptions.** The Air Force has received **10,973 requests** for religious exemption and **granted none**. The Air Force has denied 2,387 initial requests and 311 appeals. (Doc. 47-5 at ECF p. 6.) The Air Force has granted 1,723 medical exemptions. (Doc. 47-5 at ECF p. 6.)

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[2] According to a news report, quoting "[a]n active-duty officer with a legal background who has extensive knowledge of the internal proceedings in the case involving the two approvals," one of the two exemptions granted by the Marine Corps was given to a Marine on terminal leave, ending in separation, and the other to a Marine who was within the final 180 days of service and already transitioning to civilian life. *See* Jessica Chasmar & Peter Hasson, *Marines' claim of granting 2 religious COVID-19 vaccine exemptions leads to more questions*, Fox News (Jan. 19, 2022), www.foxnews.com/politics/marines-claim-2-religious-COVID-19-vaccine-exemptions ("'Granting RAs [religious accommodations] for civilians is basically a moot point,' the officer told Fox News Digital." (modification in original)).

- **The Coast Guard has granted *zero* religious exemptions.** The Coast Guard has received **1,303 requests** for religious exemption and **granted none**. The Coast Guard has denied 226 requests, all of which included a chaplain's determination of sincerity. (Doc. 47-8 at ECF p. 5.) The Coast Guard has granted 6 permanent medical exemptions and an unknown number of temporary medical exemptions. (Doc. 47-8 at ECF p. 5.)

In total, the Armed Services have received **21,243 requests** for religious exemption and **granted none** to save any servicemember from the choice between vaccination against conscience or involuntary separation. The Armed Services have denied 9,073 requests for religious exemption, and have provided no evidence that any denied request involved a determination of insincerity of belief. But the Armed Services have granted more than **5,135** requests for the nonreligious, temporary and permanent medical exemptions (with the number of Coast Guard temporary medical exemptions unknown). As this Court previously observed, "[t]he data provided by the military are distinctly suggestive and certainly not inconsistent with plaintiffs' assertions" (PI Order at 31), and now the data have moved from suggestive to unequivocal that the Armed Forces' vaccine mandate policies

> in reality disguise an unlawful and pervasive policy of the Secretary of Defense and each branch of the armed forces to deny individual consideration of each claim for a religious exemption, to instead "deny them all," and to punish, possibly by discharge, without exemption and without accommodation, those who assert a sincere religious objection and accordingly refuse the vaccine.

(PI Order at 31.)

"[N]umbers don't lie." *NLRB v. Hartman & Tyner, Inc.*, 714 F.3d 1244, 1250 (11th Cir. 2013). While Defendants claim there exists a process by which military servicemembers may request and receive an accommodation for their sincerely held religious beliefs, the process is pretextual and the accommodation illusory. The preliminary injunction should issue immediately.

ARGUMENT

I. THE PRELIMINARY INJUNCTION SHOULD ISSUE AS FOR SERVICEMEMBER PLAINTIFFS BECAUSE THE COVID-19 VACCINE MANDATE VIOLATES RFRA AND THE FIRST AMENDMENT.

A. Servicemember Plaintiffs' Claims are Justiciable Now.

Contrary to Defendants' ripeness argument (First Not. 2–3), servicemember Plaintiffs' claims are justiciable now. In *Navy Seals 1–26*, a case on all fours with this case, the Northern District of Texas succinctly and correctly disposed of this argument:

> [T]he record indicates the denial of each request is predetermined. As a result, Plaintiffs need not wait for the Navy to engage in an empty formality. In addition, whether the vaccine mandate violates Plaintiffs' First Amendment rights is a legal question well suited for the courts, not the Navy's administrative process. The Court finds that exhaustion is futile and will not provide complete relief, and therefore the case is justiciable.

2022 WL 34443, at *4.[3]

[3] Plaintiffs' motion to proceed pseudonymously will be filed within one business day after this filing, giving the Court and Defendants ample time for consideration. (*See* First Not. 3–4.)

B. Defendants' Process for Religious Exemption From the Vaccine Mandate for Servicemember Plaintiffs Is a Ruse.

"The Navy provides a religious accommodation process, but by all accounts, *it is theater*." *U.S. Navy Seals 1–26 v. Biden*, No. 4:21-cv-01236-O, 2022 WL 34443, at *1 (N.D. Tex. Jan. 3, 2022) (hereinafter *Navy Seals 1–26*) (emphasis added) (granting preliminary injunction against Navy's enforcement of Federal COVID-19 Vaccine Mandate). Indeed, the Navy "merely rubber stamps each denial." *Id.* Put simply, a military servicemember's request for a religious exemption are "*denied the moment they begin*." *Id.* at *5 (emphasis added).

The data prove that the Navy is not alone within the Armed Forces—the entire process is a ruse. The Armed Forces have received **21,243 requests** for religious exemption from the vaccine mandate and **granted none** to save any servicemember from the choice between vaccination against conscience or involuntary separation. The Armed Services have denied 9,073 requests for religious exemption, and have provided no evidence that any denied request involved a determination of insincerity of belief. As is true "[i]n nearly every literary context, phantoms are shrouded in mystery: unseen, hiding, secret and strange." *O'Shea v. Omi Holdings, Inc.*, No. 2:20-cv-01616-KOB, 2021 WL 4290803, at *1 (N.D. Ala. Sept. 21, 2021). Defendants' phantom religious exemptions are likewise unseen, hiding, secret and strange—in a word, *unavailable*.

C. The Vaccine Mandate Violates RFRA by Substantially Burdening Servicemember Plaintiffs' Religious Beliefs Without Satisfying Strict Scrutiny.

"Defendants have substantially burdened Plaintiffs' religious beliefs." *Navy Seals 1–26*, 2022 WL 34443, at *9. As the Northern District of Texas correctly noted, the government impermissibly burdens religious beliefs when it "imposes a choice between one's job and one's religious belief." *Id.* There, as here, "Plaintiffs must decide whether to lose their livelihoods or violate sincerely held religious beliefs. Because they will not compromise these religious beliefs, Plaintiffs have been threatened with separation from the military and other disciplinary action." *Id.* What is true of the Navy is true of all branches. As this Court already noted, failure to accept or receive a COVID-19 vaccine would be a direct violation of an order—regardless of a servicemember's sincerely held religious beliefs—and can result in a disciplinary order, and "defendants' counsel at the hearing could not exclude dishonorable discharge as an available discipline for refusing the vaccine." (PI Order at 29–30.) This substantial burden violates RFRA because it does not satisfy strict scrutiny. (*See* Pt. I.E, *infra*.)

D. The Vaccine Mandate Violates the First Amendment by Singling Out Religious Servicemember Objectors for Especially Harsh Treatment and Treating Religious Exemptions Less Favorably than Nonreligious Exemptions Without Satisfying Strict Scrutiny.

"[G]overnment regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In fact, "the regulations cannot be viewed as

neutral because they single out [religion] for especially harsh treatment." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). "When a state so obviously targets religion for differential treatment, our job becomes much clearer." *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (Gorsuch, J.).

Defendants' treatment of servicemember Plaintiffs demonstrates they are singling out religious objectors for especially harsh treatment, and are treating religious exemption requests less favorably than nonreligious exemption requests. On a similar record, the Northern District of Texas explained,

> The mandate treats comparable secular activity (e.g., medical exemptions) more favorably than religious activity. First, the Navy has granted *only* secular exemptions—it has never granted a religious exemption from the vaccine. Second, even if the Navy were to grant a religious exemption, that exemption would still receive less favorable treatment than its secular counterparts. Those who receive religious exemptions are medically disqualified. Those who receive medical exemptions are not. But the activity itself—forgoing the vaccine—is identical.

Navy Seals 1–26, 2022 WL 34443, at *6.

The record here shows all Armed Forces branches are engaging in the same discrimination. As shown above, having received a total of 21,243 requests for religious exemption from the vaccine mandate, the combined Armed Forces have effectively granted none. Conversely, they have granted at least 5,135 medical exemption requests (with an unknown number granted by the Coast Guard). The Armed Forces have made an impermissible value judgment that nonreligious

exemptions are more worthy or important than religious exemptions. Such value judgments by the government are unconstitutional if unable to survive strict scrutiny:

> [T]he medical exemption raises concern because it indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not. As discussed above, when the government makes a value judgment in favor of secular motivations, but not religious motivations, the government's actions must survive heightened scrutiny.

Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 366 (3d Cir. 1999).

E. The Phantom Exemption Policy for Servicemember Plaintiffs Fails Strict Scrutiny.

1. The Government Has No Compelling Government Interest in Undifferentiated Denials of Religious Exemptions.

While stemming the spread of disease may be a compelling government interest, "its limits are finite." *Navy Seals 1–26*, 2022 WL 34443, at *9; *see also Does 1-3 v. Mills*, 142 S. Ct. 17, 20 (Gorsuch, J., dissenting) ("[T]his interest cannot qualify as such forever.") "Courts must look beyond broadly formulated interests, and instead consider the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at *10 (cleaned up). Defendants "must articulate a compelling interest in vaccinating the . . . religious servicemembers currently before the Court." *Id.*

This Court previously recognized that satisfying RFRA's strict scrutiny requires an individualized assessment of servicemember Plaintiffs' requests for religious

exemption. (PI Order at 32–33.) Undifferentiated, across-the-board denials of religious exemptions fail the requisite inquiry and are "therefore unlawful under RFRA." (PI Order at 33.) "Without individualized assessment, the [Armed Forces] cannot demonstrate a compelling interest in vaccinating these particular Plaintiffs." *Navy Seals 1–26*, 2022 WL 34443, at *10. Moreover, the fact that the Armed Forces provide exemptions for nonreligious reasons undermines their compelling interest in blanket denials of religious exemptions. *See id.* ("[T]he Navy is willing to grant exemptions for nonreligious reasons. . . . As a result, the mandate is underinclusive.") The vaccine mandate "cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (cleaned up).

Because the vaccine mandate does not allow for individualized assessments of servicemember Plaintiffs' religious exemption requests, and because it treats nonreligious exemptions more favorably than religious exemptions posing identical risks, "Defendants do not demonstrate a compelling interest to overcome the Plaintiffs' substantial burden." *Navy Seals 1–26*, 2022 WL 34443, at *11.

2. Universal Denial of Religious Exemptions Is Not the Least Restrictive Means.

"As the Government bears the burden of proof on the ultimate question of [the vaccine mandate's] constitutionality, [Plaintiffs] must be deemed likely to prevail unless the Government has shown that [Plaintiffs'] proposed less restrictive alternatives are less effective than [the mandate]." *Ashcroft v. ACLU*, 542 U.S. 656, 666

(2004). Under this standard, "[n]arrow tailoring requires the government to demonstrate that a policy is the "least restrictive means" of achieving its objective." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 633 (2d Cir. 2020) (quoting *Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981).

To meet this burden, the government must show it "seriously undertook to address the problem with less intrusive tools readily available to it," meaning that it "considered different methods that other jurisdictions have found effective." *McCullen v. Coakley*, 573 us 464, 494 (2014). And the government must "show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason," *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016), and that "imposing lesser burdens on religious liberty 'would fail to achieve the government's interests, not simply that the chosen route was easier.'" *Agudath Israel*, 983 F.3d at 633 (quoting *McCullen*, 573 U.S. at 495).

As the Supreme Court said in *Tandon*,

> narrow tailoring requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too.

141 S. Ct. at 1296–97.

Here, Defendants cannot satisfy their burden because "restrictions inexplicably applied to one group and exempted from another do little to further [the government's]

goals and do much to burden religious freedom." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 615 (6th Cir. 2020). As shown above, having received a total of 21,243 requests for religious exemption from the vaccine mandate, the combined Armed Forces have effectively granted none. Conversely, they have granted at least 5,135 medical exemption requests (with an unknown number granted by the Coast Guard). The liberal granting of medical exemption requests eviscerates any claim that universal denial of religious exemption requests is the least restrictive means of achieving any compelling government interest. The preliminary injunction should issue immediately.

II. THE PRELIMINARY INJUNCTION SHOULD ISSUE AS FOR CIVILIAN FEDERAL EMPLOYEES BECAUSE IT VIOLATES THE FIRST AMENDMENT AND RFRA.

The vaccine mandate on civilian federal employees substantially burdens their religious beliefs, and is therefore subject to strict scrutiny under RFRA. (*See* Pt. I.C, *supra*.) Moreover, the vaccine mandate policy creates a system of individualized exemptions, permitting the government to consider the particular reasons for an individual's refusal of a COVID-19 vaccine, and is therefore not generally applicable. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). ("A law is not generally applicable if it 'invites the government to consider the particular reasons for a person's conduct by providing 'mechanism for individualized exemptions." (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 884 (1990))). Such a burden on religious exercise that is not generally applicable is subject to strict scrutiny under the First Amendment. (PI Order at 16 (noting *Smith* distinguishes a generally applicable policy from "a circumstance in

which the state has in place a system of individual exemptions, in which case the state may not refuse to extend that system to cases of religious hardship without compelling reason." (cleaned up) (quoting *Smith*, 494 U.S. at 884)).)

First, the fact that the vaccine mandate purports to offer federal employees a mechanism for requesting and receiving religious and exemptions demonstrates that the mandate requires individualized consideration of employees' requests. *See Navy Seals 1-26*, 2022 WL 34443, at *11 ("[B]y accepting individual applications for exemptions, the law invites an individualized assessment of the reasons why [an individual] is not vaccinated.").) This fact alone renders the policy not generally applicable.

Second, the vaccine mandate exempts entire departments of the federal government from its requirements. (*See* Doc. 2 at 20.) The United States Postal Service and the Internal Revenue Service are entirely exempt from the same vaccine mandate imposed on federal employee Plaintiffs. (*Id.*) These blanket exemptions for federal employees of favored governmental units also prove a system of individualized exemptions treating some "comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. Federal employees unvaccinated for nonreligious reasons (i.e., working for the IRS) are treated better than employees unvaccinated for religious reasons.

Defendants' policy of individualized exemptions and unequal treatment demonstrates that the vaccine mandate is not neutral and generally applicable as to

federal employee Plaintiffs. The mandate is therefore subject to strict scrutiny on their RFRA and First Amendment challenges, which it cannot survive. (*See* Pt. I.E, *supra*.)

III. THE PRELIMINARY INJUNCTION SHOULD ISSUE AS FOR CIVIILIAN FEDERAL EMPLOYEE PLAINTIFFS AND FEDERAL CIVILIAN CONTRACTOR EMPLOYER BECAUSE THE EXECUTIVE BRANCH LACKS AUTHORITY TO IMPOSE THE COVID-19 VACCINE MANDATE ON FEDERAL EMPLOYEES OR CONTRACTORS AND ISSUED THE MANDATE IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT.

A. The Executive Branch Lacks the Authority to Impose the COVID-19 Vaccine Mandate on Federal Employees and Contractors.

As this Court has already held,

> Because the record in this action presents only a threadbare and conclusory rationalization that is incommensurate with the boundless expansiveness of the executive order's application, with the invasiveness of the executive order's requirement, and with the intrusion of the executive order into a state prerogative with which even Congress likely cannot interfere, I join Judges Van Tatenhove, Baker, and Noce in *Kentucky*, *Georgia*, and *Missouri* in concluding that Executive Order 14042 almost certainly exceeds the President's authority under FPASA.

State of Florida v. Nelson, No. 8:21-cv-2524-SDM-TGW, 2021 WL 6108948, at *11 (M.D. Fla. Dec. 22, 2021) (Merryday, J.)

The Sixth Circuit, too, has held that the President and the agencies to whom he purportedly delegated authority for the vaccine mandate lacked authority to issue such a mandate on federal contractors. *See Kentucky v. Biden*, No. 21-6147, 2022 WL 43178 (6th Cir. Jan. 5, 2022). Indeed, "if the President can order medical interventions in the name of reducing absenteeism, what is the logical stopping point of that power?" *Id.* at *15. The vaccine mandate on federal contractors "requires vaccination everywhere

and all the time. It is not 'anchored' to the statutory text, nor is it even 'anchored' to the work of federal contractors." *Id.* "We thus conclude that the federal government is unlikely to prevail on its argument that the Property Act authorizes imposition of the contractor mandate." *Id.* at 16.

There is no Executive Branch power to impose a vaccine mandate on every federal contractor, in every state, at all times, and for all places. The United States Code contains no grant of power this immensely broad. If the government could impose such a mandate on Plaintiff FEDERAL CIVILIAN CONTRACTOR EMPLOYER and other federal contractors, would federal law somehow "confer a *de facto* police power upon the President to dictate the terms and conditions of one-fifth of our workforce's lives?" *Id.* at *15. Certainly not. There is no authority to issue or enforce the vaccine mandate on federal contractors, and the preliminary injunction should issue as for Plaintiff FEDERAL CIVILIAN CONTRACTOR EMPLOYER immediately.

Nor is there any Executive Branch power to impose a vaccine mandate on all civilian federal employees. *Today*, the Southern District of Texas issued a nationwide preliminary injunction against the COVID-19 Vaccine Mandate as for civilian federal employees. *See Feds for Med. Freedom v. Biden*, Mem. Op. and Order, No. 3:21-cv-356, Doc. 36 (S.D. Tex. Jan. 21, 2022) (attached hereto as Exhibit A.) The court held that the President's Executive Order 14043, imposing the Federal COVID-19 Vaccine Mandate on all federal employees, "amounts to a presidential mandate that all federal employees consent to vaccination against COVID-19 or lose their jobs," but that "the

President's authority is not that broad." *Feds for Med. Freedom* at 1. The court noted that the question was "whether the President can, with the stroke of a pen and without the input of Congress, require millions of federal employees to undergo a medical procedure as a condition of their employment," and that, "under the current state of the law as just recently expressed by the Supreme Court, [that] is a bridge too far." *Id.* at 2. The court provided a simple reason: "the Supreme Court has expressly held that a COVID-19 vaccine mandate is not an employment regulation. And that means the President was without statutory authority to issue the federal-worker mandate." *Id.* at 15. The concluded, as this Court should too, that "[t]he 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.

B. The COVID-19 Vaccine Mandate as to Federal Contractors Violates the Administrative Procedures Act Because It Exceeds the Executive Branch's Statutory Jurisdiction.

Under the Administrative Procedures Act, 5 U.S.C. § 706, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2)(C). The COVID-19 Vaccine Mandate, as to civilian federal contractors, is unlawful, not in accordance with law, and in excess of the government's authority because it was issued by the Office of Management and Budget, which has no authority to issue such a mandate. Moreover, as to federal contractors, the Vaccine Mandate is unlawful, not in accordance with law, and in excess of the government's

authority because it represents an unlawful attempt by the President to delegate authority to issue regulations under 41 U.S.C. § 1303 when he possesses no authority to issue such regulations himself.

Furthermore, as to federal contractors, the is unlawful, not in accordance with law, and in excess of Defendants' authority because it was issued at the direction of the President, not Congress, and "invokes the outer limits of Congress' power." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001). The Court must "expect a clear indication that Congress intended" the OMB to possess such authority, *id.*, but no such clear indication of Congressional intent has been given, and no such indication could have been given because Congress lacks the authority to impose a mandate itself, much less delegate to an executive agency the authority to impose such a mandate. Congress did not authorize executive agencies, by virtue of their authority to enter procurement contracts with private companies, to concomitantly possess the right to mandate, direct, or otherwise require contractors or their employees to submit to mandates imposed by the executive agency. Congress did not give the OMB, and the President does not otherwise possess—by Constitution, statute, or otherwise—the right to impose a COVID-19 vaccine mandate on all entities contracting with the federal government.

Congress, itself, does not have the authority under the Constitution to issue a COVID-19 vaccine mandate on all federal employees. At best, Congress would have to rely on the Commerce Clause to issue such a mandate itself, but Congress's authority to impose a COVID-19 vaccine mandate under the Commerce Clause is

utterly lacking because "a person's choice to remain unvaccinated and forego regular testing is noneconomic activity," and "while the Commerce Clause power may be expansive . . . it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 617 (5th Cir. 2021). Because Congress lacks the authority under the Constitution to do so, it could not have delegated to or otherwise given the OMB the authority to impose a COVID-19 Vaccine Mandate on all entities contracting with the federal government.

C. The COVID-19 Vaccine Mandate Violates the Administrative Procedures Act Because It Is Contrary to the Constitutional Rights of Federal Employees and Federal Contractors.

Under the Administrative Procedures Act, 5 U.S.C. § 706, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). In addition to being in excess of the statutory jurisdiction afforded to the OMB, the Federal COVID-19 Vaccine Mandate is unlawful under the APA because it is contrary to a constitutional right, power, privilege, or immunity. As shown above (*see* Pt. II, *supra*), the Federal COVID-19 Vaccine Mandate and the corresponding refusals to review, consider, or grant religious exemptions and accommodations from the mandate are neither neutral nor generally applicable and cannot survive strict scrutiny, and are therefore contrary to the First Amendment rights of federal employees and federal contractors.

D. The COVID-19 Vaccine Mandate Violates the Administrative Procedures Act Because It Is Arbitrary and Capricious.

Under the Administrative Procedures Act, 5 U.S.C. § 706, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). An agency action is arbitrary and capricious where—as here—it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (cleaned up). "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and "[i]t will not do for a court to be compelled to guess at the theory underlying the agency's action." *Id.* at 196–97. The Court also cannot "be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Id.* at 197.

"The agency must make findings that support its decision, and those findings must be supported by substantial evidence." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). "The reviewing court should not attempt itself to make up for such deficiencies: [It] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vechicle Mfrs. Ass'n*, 463 U.S. at 43 (cleaned up). The COVID-19 Vaccine Mandate is arbitrary and capricious under the APA because it fails to reflect the required reasoned decisionmaking.

The Federal COVID-19 Vaccine Mandate for civilian federal contractors—issued at the direction of the President—contains no reasons or rationale whatsoever. It contains no examination of the relevant data or any connection of that data to the stated rationale, nor is supported by compelling or substantial evidence. The Mandate, as to federal contractors, states only that it will "improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a Federal Government contract." 86 Fed. Reg. 53,691, 53,692 (Sept. 28, 2021). It makes no supported findings, fails to provide evidence for its findings, and impermissibly relies upon the Court to chisel precision out of its arbitrary and capricious—indeed, unstated—rationale.

IV. PLAINTIFFS ARE SUFFERING IRREPRABLE HARM.

As the Supreme Court has recently affirmed, "[t]here can be no question that the challenged restrictions, if enforced, will cause irreparable harm. 'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Here, because of Defendants' refusals to grant religious exemptions to the Vaccine Mandate, Plaintiffs face the unconscionable choice of violating their sincerely held religious beliefs or facing life-altering discharge from the military or termination of their federal employment or contracts. While such losses are not typically irreparable harm, they are in this case because they "are inextricably intertwined with Plaintiffs' loss of constitutional rights." *See Navy Seals 1-26*, 2022 WL 34443, at *13. "The crisis of conscience imposed by the

mandate is itself an irreparable harm." *Id.* "It is incorrect to say that Plaintiffs' harm is merely speculative at this stage. Plaintiffs are already suffering injury while waiting for the [government] to adjudicate their requests." *Id.* at *12.

As the Southern District of Texas recognized today, "the Hobson's choice employees face between their jobs and their jabs amounts to irreparable harm." *Feds for Med. Freedom* at 10 (quoting *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021)). Indeed, "[r]egardless 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.*

V. PLAINTIFFS SATISFY THE OTHER REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

When the government imposes a universal vaccine mandate on servicemembers, employees, and contractors, and purport to strip them of the ability to receive (or even request) exemption and accommodation for the exercise of their sincerely held religious beliefs, courts "have a duty to conduct a serious examination of the need for such a drastic measure." *Roman Catholic Diocese*, 141 S. Ct. at 68. And, as here, "it has not been shown that granting the applications will harm the public." *Id.* Nor could Defendants make such a showing, as Plaintiffs are merely seeking to rise each morning, don the same uniforms and protective equipment that sufficed to make them heroes for nearly two years, and continue to provide military defense, national

security, and critical federal services to a Nation in need. Plaintiffs' vaccination status was irrelevant to their service for nearly two years, and it is irrelevant today.

Moreover, the government "is in no way harmed by the issuance of an injunction that prevents the [government] from enforcing unconstitutional restrictions." *Legend Night Club v. Miller*, 637 F.3d 291, 302–03 (4th Cir. 2011). Conversely, for Plaintiffs, even minimal infringements upon First Amendment values constitute irreparable injury. *Roman Catholic Diocese*, 141 S. Ct. at 67. "Proper application of the Constitution, moreover, serves the public interest, as it is always in the public interest to prevent the violation of a party's constitutional rights." *Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 736 (6th Cir. 2021).

There is no comparison between the irreparable injury suffered by Plaintiffs and the non-existent interest Defendants have in enforcing unconstitutional mandates and depriving Plaintiffs of federally required protection of the exercise of their sincerely held religious beliefs. Absent an immediate preliminary injunction, Plaintiffs "face an impossible choice: [accept a vaccine] in violation of their sincere religious beliefs, or risk [termination] for practicing those sincere religious beliefs." *On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 914 (W.D. Ky. 2020). The preliminary injunction should issue immediately to protect Plaintiffs' exercise of their sincerely held religious beliefs and ensure that federal protections afforded to them are honored by the Nation they faithfully and heroically serve each day.

CONCLUSION

The Armed Forces' process for requesting and obtaining a religious exemption from the vaccine mandate is a sham to otherwise conceal a policy of "deny them all" (PI Order at 26). And their vaccine mandate policy is unquestionably discriminatory in that it has denied thousands of requests for religious exemption, and granted none, while granting thousands of requests for nonreligious, medical exemptions. The vaccine mandate as to civilian federal employees is likewise discriminatory because it exempts large swaths of the federal workforce, thereby creating a system of unjustified, individualized exemptions in violation of the First Amendment. And the vaccine mandate as to federal contractors is blatantly *ultra vires* and violates the APA. Because of these incurable deficiencies and constitutional infirmities, the preliminary injunction should issue.

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CERTIFICATE OF SERVICE

I hereby certify that on this January 21, 2022, I caused a true and correct copy of the foregoing to be electronically filed with the Court. Service will be effectuated on all counsel of record via the Court's ECF/electronic notification system.

/s/ Roger K. Gannam
Roger K. Gannam

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

No. 3:21-cv-356

FEDS FOR MEDICAL FREEDOM, *ET AL.*, *PLAINTIFFS*,

v.

JOSEPH R. BIDEN, JR., *ET AL.*, *DEFENDANTS*.

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*:

The plaintiffs have moved the court to preliminarily enjoin the enforcement of two executive orders by the President. The first, Executive Order 14042, is already the subject of a nationwide injunction. Because that injunction protects the plaintiffs from imminent harm, the court declines to enjoin the first order. The second, Executive Order 14043, amounts to a presidential mandate that all federal employees consent to vaccination against COVID-19 or lose their jobs. Because the President's authority is not that broad, the court will enjoin the second order's enforcement.

The court notes at the outset that this case is not about whether folks should get vaccinated against COVID-19—the court believes they should. It

is not even about the federal government's power, exercised properly, to mandate vaccination of its employees. It is instead about whether the President can, with the stroke of a pen and without the input of Congress, require millions of federal employees to undergo a medical procedure as a condition of their employment. That, under the current state of the law as just recently expressed by the Supreme Court, is a bridge too far.

I

Background

In response to the COVID-19 pandemic, the Biden Administration has put out four mandates requiring vaccination in various contexts. Earlier this month, the Supreme Court ruled on challenges to two of those mandates. For one, a rule issued by the Occupational Safety and Health Administration (OSHA) concerning businesses with 100 or more employees, the Court determined the plaintiffs would likely succeed on the merits and so granted preliminary relief. *See Nat'l Fed'n Indep. Bus. v. OSHA*, 595 U.S. ____ (2022) [hereinafter *NFIB*]. For the second, a rule issued by the Secretary of Health and Human Services concerning healthcare facilities receiving Medicare and Medicaid funding, the Court allowed the mandate to go into effect. *See Biden v. Missouri*, 595 U.S. ____ (2022).

In this case, the plaintiffs challenge the other two mandates. One compels each business contracting with the federal government to require its employees to be vaccinated or lose its contract. Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (Sept. 9, 2021). Because that order has been enjoined nationwide, *Georgia v. Biden*, No. 1:21-CV-163, 2021 WL 5779939, at *12 (S.D. Ga. Dec. 7, 2021), this court declines to grant any further preliminary relief. The other mandate requires that all federal employees be vaccinated—or obtain a religious or medical exemption—or else face termination. *See* Exec. Order No. 14043, Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 86 Fed. Reg. 50,989 (Sept. 9, 2021) [hereinafter federal-worker mandate].

The federal-worker mandate was issued last year on September 9. At first, federal agencies were to begin disciplining non-compliant employees at the end of November. But as that date approached, the government announced that agencies should wait until after the new year. *See* Rebecca Shabad, et. al, *Biden administration won't take action against unvaccinated federal workers until next year*, NBC News (Nov. 29, 2021).[1] The court

[1] *Available at* https://www.nbcnews.com/politics/white-house/biden-administration-delay-enforcement-federal-worker-vaccine-mandate-until-next-n1284963.

understands that the disciplining of at least some non-compliant employees is now imminent.

Before this case, the federal-worker mandate had already been challenged in several courts across the country, including this one. *See Rodden v. Fauci*, No. 3:21-CV-317, 2021 WL 5545234 (S.D. Tex. Nov. 27, 2021). Most of those challenges have fallen short due to procedural missteps by the plaintiffs or a failure to show imminent harm. *See, e.g.*, *McCray v. Biden*, No. CV 21-2882 (RDM), 2021 WL 5823801, at *5–9 (D.D.C. Dec. 7, 2021) (denied because plaintiff tried to directly enjoin the President and did not have a ripe claim).

This case was filed by Feds for Medical Freedom, Local 918, and various individual plaintiffs on December 21. Dkt. 1. The next day, the plaintiffs moved for a preliminary injunction against both mandates. *See* Dkt. 3. At a scheduling conference on January 4, the court announced it would not consider preliminary relief on Executive Order No. 14042 while the nationwide injunction was in effect. Dkt. 14, Hrg. Tr. 7:8–8:11. The court then convened a telephonic oral argument on January 13, shortly before the Supreme Court ruled on the OSHA and healthcare-worker mandates. *See* Dkt. 31. At that hearing, both sides agreed that the soonest any plaintiff might face discipline would be January 21. Dkt. 31, Hrg. Tr. 4:11–5:5.

II

Jurisdiction

The government[2] mounts two challenges to the court's jurisdiction: that the Civil Service Reform Act precludes review and that the plaintiffs' claims are not ripe.

1. Civil Service Reform Act

"Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq*., certain federal employees may obtain administrative and judicial review of specified adverse employment actions." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 (2012). The government maintains that the CSRA, by providing an exclusive means of relief, precludes the plaintiffs' claims in this case. Dkt. 21 at 8–12. Specifically, the government argues that by challenging the vaccine mandate, the plaintiffs are disputing a "significant change in duties, responsibilities, or working conditions," which is an issue exclusively within the province of the CSRA. *Id*. at 11 (quoting 5 U.S.C. § 2302(a)(2)(A)(xii)).

Unfortunately, the CSRA does not define "working conditions." But the interpretation that courts have given that term would not encompass a requirement that employees subject themselves to an unwanted vaccination. Rather, "these courts have determined that the term 'working conditions'

[2] Throughout this memorandum opinion, the court will refer to all the defendants, collectively, as "the government."

generally refers to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources." *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020).

The government also argues that the CSRA applies "to hypothetical removals or suspensions." Dkt. 21 at 11 (citing 5 U.S.C. § 7512). But, contrary to the government's suggestion, the statute says nothing about "hypothetical" adverse employment actions. *See* 5 U.S.C. § 7512. Rather, it applies to actual discipline, whether that be firings, suspensions, reductions in pay, or furloughs. *See id.* Indeed, neither the Merit Systems Protection Board (the administrative body charged with implementing the CSRA) nor the Federal Circuit (which hears CSRA appeals) has jurisdiction until there is an actual adverse employment action.[3] *Esparraguera v. Dep't of the Army*, 981 F.3d 1328, 1337–38 (Fed. Cir. 2020).

[3] The government relies on two Fifth Circuit cases as support for its contention that the CSRA applies to the plaintiffs' claims in this case. But in both of those cases, unlike this one, the plaintiffs had already suffered an adverse employment action and were not seeking prospective relief. *See Rollins v. Marsh*, 937 F.2d 134, 136 (5th Cir. 1991); *Broadway v. Block*, 694 F.2d 979, 980–81 (5th Cir. 1982). Moreover, the D.C. Circuit has held repeatedly that pre-enforcement challenges to government-wide policies—such as the mandates at issue here—do not fall within the scheme of the CSRA. *See, e.g., Nat'l Treasury Emps. Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984) (allowing "preenforcement judicial review of rules" over CSRA objections); *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d, 935, 940 n.6 (D.C. Cir. 1987) (discussing the right of federal employees

Finally, central to the Supreme Court's holding in *Elgin* was the idea that employees must be afforded, whether under the CSRA or otherwise, "meaningful review" of the discipline they endure. *Elgin*, 567 U.S. at 10. But requiring the plaintiffs to wait to be fired to challenge the mandate would compel them to "to bet the farm by taking the violative action before testing the validity of the law." *Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010) (cleaned up). As the Fifth Circuit has held, the choice between one's "job(s) and their jab(s)" is an irreparable injury. *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). To deny the plaintiffs the ability to challenge the mandate pre-enforcement, in district court, is to deny them meaningful review. The CSRA does not deprive the court of jurisdiction over these claims.

2. Ripeness

The government also argues that the court lacks jurisdiction because none of the plaintiffs' claims are ripe. *See* Dkt. 21 at 12–14. Some of the plaintiffs' claims—those who have asserted a religious or medical exemption from the mandate—are indeed at least arguably unripe. *See Rodden*, 2021

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to seek injunctive relief through the courts where agencies cannot act); *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 497 (D.C. Cir. 1988) (allowing judicial review for employees who did not have access to the Merit Systems Protection Board).

WL 5545234, at *2 (the claims of plaintiffs whose exemption claims remain unresolved are as yet "too speculative").[4] But the government insists that even plaintiffs who have not claimed exemptions do not have ripe claims because "federal employees have ample opportunities to contest any proposed suspension or removal from employment through a multi-step administrative process." Dkt. 21 at 13.

The government pushes the ripeness doctrine too far. Absent a valid exemption request, at least some plaintiffs face an inevitable firing. *See, e.g.*, Dkt. 35, Exhibit 39 at 4 (federal employer claiming that employee's failure to provide evidence that he is fully vaccinated "will not be tolerated"). The court does not have to speculate as to what the outcome of the administrative process will be. Many plaintiffs have not only declined to assert any exemption but have also submitted affidavits swearing they will not. The court takes them at their word. Many of these plaintiffs already have received letters from their employer agencies suggesting that suspension or termination is imminent, have received letters of reprimand, or have faced

[4] There is some dispute as to whether some plaintiffs who have asked for an exemption are in danger of being disciplined even while their exemption requests are still pending. Though in *Rodden* this court ruled that plaintiffs who had claimed exemptions did not yet face imminent harm, that ruling was based largely on the specific representations of the agencies for which those plaintiffs worked that there would be no discipline before the exemption claims were resolved. But because there are plaintiffs here who have not claimed exemptions, the court need not sort out that dispute.

other negative consequences. Dkt. 3, Exhibits 15–18, 20), 26–27. To be ripe, the threat a plaintiff faces must be "actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). And in the context of preliminary relief, "a plaintiff must show that irreparable injury is not just possible, but likely." *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2176 (2020) (Thomas, J., dissenting). Because at least some of the plaintiffs have met that burden, the government's ripeness allegations are unfounded. The court has jurisdiction.

III

Injunctive Relief

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

1. Threat of irreparable injury

Because injunctive relief is an extraordinary tool to be wielded sparingly, the court should be convinced the plaintiffs face irreparable harm

before awarding it. *See Booth v. Galveston Cnty*, No. 3:18-CV-00104, 2019 WL 3714455, at *7 (S.D. Tex. Aug. 7, 2019), *R&R adopted as modified*, 2019 WL 4305457 (Sept. 11, 2019). The court is so convinced.

As noted above, the Fifth Circuit has already determined that the Hobson's choice employees face between "their job(s) and their jab(s)" amounts to irreparable harm. *OSHA*, 17 F.4th at 618. 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.

The Fifth Circuit has also held that the reputational injury and lost wages employees experience when they lose their jobs "do not necessarily constitute irreparable harm." *Burgess v. Fed. Deposit Ins. Corp.*, 871 F.3d 297, 304 (5th Cir. 2017). But when an unlawful order bars those employees from significant employment opportunities in their chosen profession, the harm becomes irreparable. *Id.*

The plaintiffs have shown that in the absence of preliminary relief, they are likely to suffer irreparable harm.

2. Likelihood of success on the merits

The court does not decide today the ultimate issue of whether the federal-worker mandate is lawful. But to issue a preliminary injunction, it must address whether the claim is likely to succeed on the merits. The plaintiffs' arguments fall into two categories: (1) that the President's action was *ultra vires* as there is no statute authorizing him to issue the mandate and the inherent authority he enjoys under Article II is not sufficient, and (2) that the agencies' implementation of his order violates the Administrative Procedures Act (APA).[5] Each argument will be addressed in turn.

a. *Ultra vires*

- **Statutory authority**

The government points to three statutory sources for the President's authority to issue the federal-worker mandate: 5 U.S.C. §§ 3301, 3302, and

[5] The government maintains that the plaintiffs cannot challenge the mandate as *ultra vires*, leaving the APA as their only vehicle to attack it. An action is not *ultra vires*, the government argues, unless the President "acts 'without any authority whatever.'" Dkt. 21 at 25 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 n.11 (1984) (cleaned up)). "Because the 'business' of the 'sovereign' certainly encompasses issuing [this] kind of directive," the government contends, there is no room for *ultra vires* review. Dkt. 21 at 25–26. But the government's argument misinterprets the law concerning judicial review of presidential action: executive orders are reviewable outside of the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) ("[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive"); *see also Halderman*, 465 U.S. at 101 n.11 ("[A]n *ultra vires* claim rests on the officer's lack of delegated power.") (citation omitted).

7301. None of them, however, does the trick.

Section 3301, by its own terms, applies only to "applicants" seeking "admission . . . into the civil service." 5 U.S.C. § 3301. The statutory text makes no reference to current federal employees (like the plaintiffs). And other courts have already held that whatever authority the provision does provide is not expansive enough to include a vaccine mandate. *See, e.g.*, *Georgia*, 2021 WL 5779939, at *10; *Kentucky v. Biden*, No. 3:21-CV-55, 2021 WL 5587446, at *7 (E.D. Ky. Nov. 30, 2021), *aff'd*, No. 21-6147, 2022 WL 43178 (6th Cir. Jan. 5, 2022).

Section 3302 provides that the "President may prescribe rules governing the competitive service." 5 U.S.C. § 3302. That language sounds broad until one reads the next sentence: "The rules shall provide, as nearly as conditions of good administration warrant, for . . . (1) necessary exceptions of positions from the competitive service; and (2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title." *Id.* When the cross-referenced provisions are checked, it becomes evident that the "rules" the President may prescribe under § 3302 are quite limited. For example, he may exempt certain employees from civil-service rules and from certain reports and examinations, and he may prohibit marital and

disability discrimination within the civil service. But not even a generous reading of the text provides authority for a vaccine mandate.

The final statutory authority on which the government relies is § 7301, which provides in its entirety: "The President may prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301. According to the government, "the act of becoming vaccinated" is "plainly 'conduct'" within the meaning of the statute. Dkt. 21 at 27.

But the plaintiffs argue that rather than regulate "conduct," the federal-worker mandate compels employees to assume a vaccinated "status," and "one that is untethered to job requirements, no less." Dkt. 3 at 12. Moreover, the plaintiffs contend, even if becoming vaccinated is "conduct," it is not "workplace conduct," which is all that § 7301 reasonably authorizes the President to regulate. Dkt. 23 at 12.

Assuming that getting vaccinated is indeed "conduct," the court agrees with the plaintiffs that under § 7301, it must be *workplace* conduct before the President may regulate it. Any broader reading would allow the President to prescribe, or proscribe, certain private behaviors by civilian federal workers outside the context of their employment. Neither the plain language of § 7301 nor any traditional notion of personal liberty would tolerate such a sweeping grant of power.

So, is submitting to a COVID-19 vaccine, particularly when required as a condition of one's employment, workplace conduct? The answer to this question became a lot clearer after the Supreme Court's ruling in *NFIB* earlier this month. There, the Court held that the Occupational Safety and Health Act of 1970, 29 U.S.C. § 15 *et seq*., allows OSHA "to set workplace safety standards," but "not broad public health measures." *NFIB*, 595 U.S. ____ slip op. at 6. Similarly, as noted above, § 7301 authorizes the President to regulate the *workplace* conduct of executive-branch employees, but not their conduct in general. *See* 5 U.S.C. § 7301. And in *NFIB*, the Supreme Court specifically held that COVID-19 is *not* a workplace risk, but rather a "universal risk" that is "no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases." *NFIB*, 595 U.S. ____ slip op. at 6. Accordingly, the Court held, requiring employees to get vaccinated against COVID-19 is outside OSHA's ambit. *Id*. Applying that same logic to the President's authority under § 7301 means he cannot require civilian federal employees to submit to the vaccine as a condition of employment.

The President certainly possesses "broad statutory authority to regulate executive branch employment policies." *Serv. Emps. Int'l Union Loc. 200 United v. Trump*, 419 F. Supp. 3d 612, 621 (W.D.N.Y. 2019), *aff'd*,

975 F.3d 150 (2d Cir. 2020). But the Supreme Court has expressly held that a COVID-19 vaccine mandate is not an employment regulation. And that means the President was without statutory authority to issue the federal-worker mandate.

- **Constitutional authority**

Though the government argues §§ 3301, 3302, and 7301 evince the authority the President wields to regulate the federal workforce, it also contends that statutory authorization is wholly unnecessary. Dkt. 21 at 26–27. Article II, the government maintains, gives the President all the power he needs. *Id.* But the government points to no example of a previous chief executive invoking the power to impose medical procedures on civilian federal employees. As Chief Judge Sutton of the Sixth Circuit has noted, no arm of the federal government has ever asserted such power. *See In re MCP No. 165, OSHA Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 289 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial rehearing en banc) ("A 'lack of historical precedent' tends to be the most 'telling indication' that no authority exists.").

The government relies on *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), but that case concerns certain "Officers of the United States who exercise significant authority

pursuant to the laws of the United States," not federal employees in general. *Id.* at 486 (cleaned up). Moreover, the *Free Enterprise Fund* Court itself acknowledges that the power Article II gives the President over federal officials "is not without limit." *Id.* at 483.

And what is that limit? As the court has already noted, Congress appears in § 7301 to have limited the President's authority in this field to workplace conduct. But if the court is wrong and the President indeed has authority over the conduct of civilian federal employees in general—in or out of the workplace—"what is the logical stopping point of that power?" *Kentucky v. Biden*, No. 21-6147, 2022 WL 43178, at *15 (6th Cir. Jan. 5, 2022). Is it a "*de facto* police power"? *Id.* 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.

b. APA review

The plaintiffs argue that even if the President had the authority to issue the federal-worker mandate, the agencies have violated the APA by arbitrarily and capriciously implementing it. Dkt. 3 at 16–25. While the court need not reach this question, as it has already determined the federal-worker mandate exceeds the President's authority, the government correctly argues

that, if the President had authority to issue this order, this case seems to present no reviewable agency action under the APA. The Supreme Court held in *Franklin v. Massachusetts* that executive orders are not reviewable under the APA. 505 U.S. 788, 800–01 (1992). But the plaintiffs seem to argue that *Franklin* no longer applies once an agency implements an executive order—the order itself is then vulnerable to review. That is not the law. To hold otherwise would contravene the thrust of the Supreme Court's holding in *Franklin* by subjecting almost every executive order to APA review.

The plaintiffs are right to argue that agency denials of religious or medical exemptions, additional vaccination requirements by agencies apart from the federal-worker mandate, or other discretionary additions to the executive order would likely be reviewable under the APA's arbitrary-and-capricious standard. But the plaintiffs have not challenged any discretionary agency action—only the implementation of the federal-worker mandate itself.[6] Accordingly, there is nothing for the court to review under the APA.

[6] The court is convinced that the best reading of the APA in light of *Franklin* is to allow APA review only when the challenged action is discretionary. *See* William Powell, *Policing Executive Teamwork: Rescuing the APA from Presidential Administration*, 85 MO. L. REV. 71, 121 (2020).

3. Balance of equities and the public interest

Finally, the court weighs the plaintiffs' interest against that of the government and the public. When the government is the party against whom an injunction is sought, the consideration of its interest and that of the public merges. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

The government has an undeniable interest in protecting the public against COVID-19. Through the federal-worker mandate, the President hopes to slow the virus's spread. But an overwhelming majority of the federal workforce is already vaccinated. According to a White House press release, even for the federal agency with the lowest vaccination rate, the portion of employees who have received at least one COVID-19 vaccine dose exceeds 88 percent. OFF. OF MGMT. & BUDGET, *Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees* (Dec. 9, 2021).[7] The government has not shown that an injunction in this case will have any serious detrimental effect on its fight to stop COVID-19. Moreover, any harm to the public interest by allowing federal employees to remain unvaccinated must be balanced against the harm sure to come by terminating unvaccinated workers who provide vital services to the nation.

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[7] *Available at* https://www.whitehouse.gov/omb/briefing-room/2021/12/09/update-on-implementation-of-covid-%e2%81%a019-vaccination-requirement-for-federal-employees/.

While vaccines are undoubtedly the best way to avoid serious illness from COVID-19, there is no reason to believe that the public interest cannot be served via less restrictive measures than the mandate, such as masking, social distancing, or part- or full-time remote work. The plaintiffs note, interestingly, that even full-time remote federal workers are not exempt from the mandate. Stopping the spread of COVID-19 will not be achieved by overbroad policies like the federal-worker mandate.

Additionally, as the Fifth Circuit has observed, "[t]he public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions." *OSHA*, 17 F.4th at 618. The court added that the government has no legitimate interest in enforcing "an unlawful" mandate. *Id*. All in all, this court has determined that the balance of the equities tips in the plaintiffs' favor, and that enjoining the federal-worker mandate is in the public interest.

IV

Scope

The court is cognizant of the "equitable and constitutional questions raised by the rise of nationwide injunctions." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring); *see also Trump*

v. Hawaii, 138 S. Ct. 2393, 2428–29 (2018) (Thomas, J., concurring). But it does not seem that tailoring relief is practical in this case. The lead plaintiff, Feds for Medical Freedom, has more than 6,000 members spread across every state and in nearly every federal agency, and is actively adding new members. The court fears that "limiting the relief to only those before [it] would prove unwieldy and would only cause more confusion." *Georgia*, 2021 WL 5779939, at *12. So, "on the unique facts before it," the court believes the best course is "to issue an injunction with nationwide applicability." *Id.*

* * *

The court GRANTS IN PART and DENIES IN PART the plaintiffs' motion for a preliminary injunction. Dkt. 3. The motion is DENIED as to Executive Order 14042, as that order is already subject to a nationwide injunction. The motion is GRANTED as to Executive Order 14043. All the defendants, except the President, are thus enjoined from implementing or enforcing Executive Order 14043 until this case is resolved on the merits. The plaintiffs need not post a bond.

Signed on Galveston Island this 21st day of January, 2022

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE