No. 21-2359

In the United States Court of Appeals for the Fourth Circuit

ISRAEL RYDIE, AND
ELIZABETH FLEMING
Plaintiff – Appellants

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES;
XAVIER BECERRA IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES;
LLOYD J. AUSTIN III IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE,
Defendant – Appellees

On Appeal from the United States District Court For the District of Maryland in Case No. 8:21-cv-02696-DKC (Hon. Deborah K. Chasanow, Judge)

REPLY FOR PLAINTIFF – APPELLANTS ISRAEL RYDIE AND ELIZABETH FLEMING

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INTRODUCTION

Appellants consider the COVID-19 pandemic to be a serious problem that requires responsible measures be taken with due regard to individual rights and freedoms. As the Government has pointed out, this Court has taken its own steps to come up with a plan for building requirements and staff, which unlike Executive Order 14,043 does include an alternative of testing. *See* "COVID-19 Building Requirements," Powell Courthouse-Annex Security Committee, 12/22/2021 (appended to this brief).

Aside from the Separation of Powers concerns, the Fifth Amendment protected liberty and property interests, and Tenth Amendment concerns, there are two significant privacy rights at issue in this case. The right to keep private one's sensitive medical information goes hand-in-hand with the fundamental right of privacy under the Ninth Amendment to be free from being coerced into taking a mandated medical procedure.

The following points and authorities are offered in reply to the Government's Response Brief submitted on February 3rd.

ARGUMENT

I. The Civil Service Reform Act (CSRA) and Pre-Enforcement Review

The D.C. Circuit has held that pre-enforcement challenges to government-wide policies do not fall under the CSRA scheme and may be heard in the District Courts. See *National Treasury Employees Union v. Devine*, 733 F. 2d 114, 117 n.8 (D.C. Cir. 1984), where personnel regulations affecting the Civil Service were challenged by pre-enforcement review in federal district court, and declared null and void where Congress enacted an appropriation rider specifying that funds could not be used to effectuate new rules. "[W]e agree with the District Court that H.R.J. Res. 413 must be construed to block any further implementation, administration, or enforcement of the regulations, and they are therefore without any effect whatsoever, so long as OPM's funding derives from Res. 413." *Id*. at 120.

The same Court in *National Federation of Federal Employees v. Weinberger*, 818 F. 2d 935 (D.C. Cir. 1987) in exasperation from the Government's jurisdictional arguments went so far as to say, "To discourage any future litigant who might have the effrontery to engage the District Court with this discredited theory of subject matter jurisdiction, we briefly review the law of this circuit for what we trust will be the last time." *Id*. at 940. The full quote is copied below:

> Summarized briefly, the government's argument was that the District Court's federal question jurisdiction did not extend to the subject matter of the plaintiffs' action, because it involved a "labor-management dispute

> governed by the exclusive jurisdictional provisions of the Civil Service Reform Act [of 1978]" ("CSRA"), Pub.L. No. 95-454, 92 Stat. 1111 (codified as amended in 5 U.S.C. Sec. 1201 et seq. (1982 & Supp. III 1985)). Therefore, the government contended, the plaintiffs' claims could be heard only by the Federal Labor Relations Authority ("FLRA") or the Merit Systems Protection Board ("MSPB"), subject to judicial review by a federal appellate court. Memorandum in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction, Record Doc. No. 9, at 10.
>
> On appeal, counsel conceded in open court that the government had no legal basis for making this argument; unfortunately, this concession came too late to avoid the expenditure of judicial efforts and energy that were needlessly wasted on a theory that is completely baseless. To discourage any future litigant who might have the effrontery to engage the District Court with this discredited theory of subject matter jurisdiction, we briefly review the law of this circuit for what we trust will be the last time.

Id. at 939-940.

The above case, argued before a panel including Judge R.B. Ginsburg prior to her appointment to the Supreme Court, involved the review of a district court dismissal of a suit to enjoin officials of the Department of Defense from implementing a mandatory urinalysis drug testing program for certain civilian employees, and denial of a preliminary injunction motion. The lower court's dismissal on the grounds that the constitutional and statutory challenges to drug abuse testing programs belong in the CSRA administrative framework was reversed. And the result was inescapable: "We conclude that the District Court clearly had jurisdiction to hear the appellants' challenge and the authority to grant the equitable relief requested." *Id*. at 937.

Civilian federal employees may seek to enjoin government actions that violate their constitutional rights. See *Hubbard v. United States Envtl. Protection Agency*, 809 F. 2d 1, 10 (D.C. Cir. 1986); *Spagnola v. Mathis*, 809 F.2d 16, 23 n.8, 25 (D.C. Cir. 1986); *Cutts v. Fowler*, 692 F.2d 138, 139-140 (D.C. Cir. 1982).

Consider also these words from yet another case from the D.C. Circuit, which are entirely appropriate here: "We cannot see that subjecting a decision of this magnitude to judicial review is likely to sweep into court along with it so many decisions, or any decisions of lessor import, as to have an adverse impact on OPM's ability to perform its statutory duties." *National Treasury Emps. Union v. Horner*, 854 F. 2d 490, 497 (by its rulemaking, OPM excepted a number of government jobs from the competitive civil service).

The Government seeks to find safe harbor in *Elgin v. Department of Treasury*, 567 U.S. 1, 5-6 (2012), but their reliance is unfounded. That case addresses adverse employment actions, which is very different from the kind of pre-enforcement review scenario found here. At issue was whether the Civil Service Reform Act provided the exclusive avenue of judicial review when a qualifying employee challenged an adverse employment action by arguing that a federal statute was unconstitutional. Put in the proper framing, the instant case is challenging E.O. 14,043 not any adverse employment action. See *Feds for Medical Freedom, et al. v. Biden, et al.*, No. 21-cb.369 (S.D. Tex.) (January 21, 2022). Put simply, the Merit

Systems Protection Board has no jurisdiction over these claims. Likewise with the Office of Special Counsel (OSC), which is an investigatory tool for prohibited personnel practices. 5 U.S.C. §1214. A close review of "other matters" under the OSC's purview and investigatory authority includes such matters as undue political influence on personnel decision making, political activity by federal employees, and discrimination in the workplace. 5 U.S.C. §1216 (1), (2), and (5). Here with nothing to investigate, the OSC would serve no useful purpose.

In its Response Brief, the Government (Br. 21) claims without support that the challenged policy allows exceptions for individual employees depending on employee-specific facts and circumstances. Quite on the contrary, the Executive Order orders as follows: "each agency shall implement," "a program to require COVID-19 vaccination," "with exceptions only as required by law." A97. The Safer Federal Workforce Task Force, commissioned with developing the guidance for implementation, is equally clear: "[C]onsistency across government in enforcement of this government-wide vaccine policy is desired, and the Executive Order **does not permit exceptions** from the vaccination requirement except as required by law." (emphasis added). A107-108. This comports with how one of the appellants, Elizabeth Fleming, though she is a 100% remote worker from Idaho, is nevertheless still required to comply.

The Civil Service Reform Act does not deprive the federal courts of jurisdiction of the Appellants' claims. To deny Mr. Rydie and Ms. Fleming of the ability to challenge the mandates pre-enforcement is to deny them meaningful review, in violation of the due process clause of the Fifth Amendment of the Constitution of the United States.

II. The extraordinariness element of a preliminary injunction remains a fair question despite the nationwide injunction currently in place.

There is very little that is ordinary about America's largest employer seeking to force a medical procedure on everyone, whether they want it or not. Appellants will defer to this Court's experience and judgment on how best to handle the situation as it currently stands, with a nationwide injunction in place by the Texas Southern District. We would ask that due consideration be given that in light of the fast-moving litigation around the country on this issue anything can happen, at any time. Prior to the submission of this brief, the Fifth Circuit could grant the Government's stay request or narrow the scope of the injunction.

III. Unlike the private sector, the Federal Government is not a common employer and as such is directly accountable to the Federal Constitution.

From their first day on the job, federal employees swear an oath to uphold the Constitution. The President's inauguration is centered around his Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect

and defend the Constitution of the United States." U.S. Const. Art. II, §2. The Government contends that the President by issuing E.O. 14,043 is acting as employer, not regulator. Br. 42. Since that is the case, his actions must be squared with the Constitution in a way that the large private corporations referenced do not.

In addition, unlike their counterparts in the private sector, federal employees cannot strike. 5 U.S.C. §7311 (federal employees may not participate in a strike, assert the right to strike, or even belong to a union that "asserts the right to strike against the government of the United States"). 18 U.S.C. §1918 makes it a felony to strike against the United States or belong to a union that asserts the right to strike against the United States. In 1981, President Ronald Reagan fired over 11,000 air traffic controllers who ignored his order to report to duty. Federal employees give up this leverage in the collective bargaining process because they serve important and sometimes vital public interests. The least they can expect in return is that their most basic fundamental rights are protected.

IV. The well-established Doctrine of Nondelegation between the Branches along with the Major Questions Doctrine strongly suggest the same underlying principles hold true for the President.

To buttress its argument for the President's authority for E.O. 14,043 falling under his broader authority to ensure that the workplace is safe and efficient (Br. 39), the Government references just one case in point demonstrating deference to agency judgment on what constitutes "promot[ing] efficiency of the civil service."

This case, however, proves Appellants' point. In *Giesler v. MSPB*, 686 F.2d 844 (10th Cir. 1982), an air traffic control specialist was put on a one-month suspension for abuse of sick leave and lying about going on a hunting trip. Deference was indeed appropriately given to the agency's discretion on what, given all the facts and circumstances of the case, constituted an appropriate penalty. This is the quintessential case of what truly denotes "efficiency of the service." Conspicuously absent from the Government's brief is any sister case where a federal agency is asserting some kind of a health power over the private medical choices of its employees, for assuredly if there was one the Government would have cited it. The reason is quite simple: the Government has never in the history of this country ever claimed to have such a power. It is wholly without precedent, a true case of first impression before this Court.

In its assertion that "Plaintiffs identify no support for the view that Congress must speak clearly to 'delegate' the authority to decide major questions to the President," (Br. 41), the Government surprisingly overlooks all of the references to *Youngstown* in Appellants' brief. For the case of *Youngstown* was just that- a finding that the President lacked clear authority from the Legislature.

> The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself. There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has

> been directed from which such a power can fairly be implied.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952).

The Government is strangely silent about Appellants' references to *Youngstown,* despite its striking resemblance to this case. In both instances the President was acting under the auspices of the chief executive power, within the context of an emergency, directing a secretary/secretaries to execute the order in a manner of their own choosing, and without a clear expression from Congress. As seen in the case at bar, E.O. 14,043 commissions the Safer Federal Workforce Task Force to issue guidance to be followed by all the agency and department heads. A97. The resulting guidance can be seen in A99-108. *See also* OPM's "Memorandum for Heads of Executive Departments and Agencies," October 1, 2021 Washington DC. A111-112. The Court in *Youngstown* paints a very similar picture, stating this:

> The preamble of the order itself [E.O. 10340], like that of many statutes, sets out reasons why the President believes certain policies should be adopted, proclaims these policies as rules of conduct to be followed, and again, like a statute, authorizes a government official to promulgate additional rules and regulations consistent with the policy proclaimed and need to carry that policy into execution.

Id. at *588.

As in that case, this too constitutes the President's own policy preference. But that is not how our constitutional republic is set up. The Court goes on to say:

> The Founders of this Nation entrusted the law making power to the Congress alone both in good and bad times. It would do no good to recall the historical events, the fears

> of power and the hopes for freedom that lay behind their choice.

Id. at *589.

To drive the point home for all future generations, including this one, the Court draws the line on how we are fundamentally different from an autocracy. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Id*. at *587. The Court ultimately held that not only was there no express Congressional authority delegated to the President, but his claimed chief executive authority was too far-fetched. This Court should do the same.

V. The three Title 5 code provisions relied upon in the Executive Order are laws Necessary & Proper for carrying into execution the authority vested in the President.

The President relies on Title 5 §3301, §3302, and §7301. A96. These are Organization of Government provisions re-codified in 1965 which are necessary and proper for the carrying into execution the President's Article II powers. *See* U.S. Const. Art. I, §8.

Though there were *two* constitutional provisions Appellants pointed out to demonstrate their Separation of Power arguments with respect to Legislative lawmaking authority for carrying into execution the powers of the President, the Government challenged one but not the other. Even aside from the President's power to make rules for the Government and Regulation of the land and naval forces

(Art. I, §8, cl. 14), the Framers were unequivocal in their intent that it is Congress that makes the laws and the President's role is to execute them:

> [Congress] shall make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, §8, cl. 18 (emphasis added).

Laws that are passed pursuant to the Necessary & Proper clause represent a clear indication about how a separate Branch (the Legislature) perceived the President's power in question (in this case, as employer), and what laws were necessary and proper to effect that end. By no means was this ever meant to be a runaway train. Contrary to the Government's misrepresentation of Appellants believing the President to be powerless (Br. 37), this was never stated. But there can be no doubt the President's powers are not unlimited. Nowhere in its brief is there any indication on what the outer limits of what the Government thinks the President's authority to be. The Executive is a separate coequal branch of government, and it was the seasoned understanding of the Framers that set it up this way, that Congress makes the determination of what is "necessary" and what is "proper."

No fair reading of these provisions vests the President with the power to mandate a medical procedure for the Civil Service. Appellants will not burden this Court by rehashing its arguments as to the obvious management and administrative

aspects of these laws and various Executive Orders from the past cited to by both Parties. Importantly, Congress knows how to speak clearly on matters of *major* political significance, such as this one, touching on the most physically invasive Right of Privacy directly impacting tens of thousands and their families. The pandemic has been with us now since early 2020; by now it is clear that Congress has chosen not to require COVID-19 vaccines for all federal employees.[1] The President decided to go it alone, on what amounts to a policy preference.

As the Court so aptly put it in *Youngstown*, "The Constitution limits his [President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." *Youngstown Sheet & Tube Co*., 343 U.S. 579, 587 (1952). If the President wanted to attempt to enact his policy preference, he should have presented it at the State of the Union address. U.S. Const. Art. II, §3.

VI. The *Ultra Vires* arguments before the District Court can be found inside of some of the language used in the briefs and at the hearing.

The argument for lack of authority was clearly alluded to on p. 19 of the transcript for the preliminary injunction hearing: "Nothing in the law hints at the sweeping power claimed. Congress did not make an explicit law that would vest the

[1] Parliamentary deliberations are a hallmark of the Legislature's lawmaking process. Even Congress, however, must act pursuant to one of its enumerated powers under the Constitution.

President with the authority to do this." A36. In addition, on p. 6 of the Complaint, in ¶12 it states as follows: "Executive Order 14043 presumes to accrue to the President an authority that has never before existed in the history of this country, to fundamentally alter the conditions of employment for the entire Federal Civil Service based on *personal health care choices*." A78. Appellants' contention that the Executive Order was beyond the scope of the President's authority can also be found on p. 23-24 of the transcript. Here the distinction between constitutionality and scope of authority was specifically discussed:

> It is - - a case like this one, where the executive order lacks the authority - - if there is a - - if there was a law that was passed by Congress which is being interpreted by such employees that you - - that you put as an example as being unconstitutional, that's different than an executive order that is void ab initio. The executive order itself should never have been attempted, there was no authority to begin with, and that's why this is a different scenario

A40-41.

The *ultra vires* arguments were heard by the District Court and fairly preserved.

Dated: February 10, 2022

Respectfully submitted by:

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/s/

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COVID-19 BUILDING REQUIREMENTS

- **PROOF OF VACCINATION OR NEGATIVE TESTING REQUIRED:** Proof of full vaccination is required as set forth below, with full vaccination occurring, as defined by the CDC, two weeks after the second dose of the Pfizer or Moderna vaccine or a single dose of the Johnson & Johnson vaccine. Absent proof of full vaccination, proof of a negative COVID-19 test administered by a pharmacy or health care provider no more than 72 hours before entry is required and must be repeated weekly for continued entry.
  - Staff must submit such proof in accordance with instructions from their appointing authority.
  - Attorneys and visitors must submit such proof in accordance with instructions from the Clerk's Office. Instructions will be provided when a case is scheduled for argument. To conduct other business at the Courthouse, advance arrangements must be made by calling the Clerk's Office at 804-916-2700.
  - Deliveries may be made without presenting proof of vaccination or negative testing. A Drop Box is available adjacent to the Annex Lobby for Court filings.
  - Contractors must strictly adhere to the temperature screening, self-certification, masking, and social distancing requirements set forth below and to all additional instructions received from the Court or Agency.
- **TEMPERATURE SCREENING AND SELF-CERTIFICATION REQUIRED:** All persons must conduct a temperature self-screening at the building entrance. By entering the building, all persons certify that:
  - They do not have symptoms of COVID-19: temperature of 100.4 degrees or more, chills, cough, difficulty breathing, unusual fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion, nausea, vomiting, or diarrhea.
  - They are not subject to isolation under CDC guidelines following a diagnosis of COVID-19 or probable COVID-19.
  - They are not subject to quarantine under CDC guidelines following close contact with someone with COVID-19 or following international travel.
- **FACE COVERINGS AND SOCIAL DISTANCING REQUIRED:** All persons, regardless of vaccination status, are required to wear masks and maintain 6 feet of physical distance whenever possible in public and shared common areas and adhere to chambers and office standards within private areas. All persons must remain masked in the courtroom except that attorneys and judges may, at their option, remove their masks while participating in oral argument from the lectern or bench.

Call the Clerk's Office at 804-916-2700 if you are unable to enter the building. For additional information, see Powell Courthouse Entry and Oral Argument Protocol.

Powell Courthouse-Annex Security Committee *12/22/2021*