No. 21-2359

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISRAEL RYDIE; ELIZABETH FLEMING,

Plaintiffs-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,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland

BRIEF FOR APPELLEES

BRIAN M. BOYNTON
Acting Assistant Attorney General

EREK L. BARRON
United States Attorney

MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
LOWELL V. STURGILL JR.
SARAH CARROLL
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division, Room 7511
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4027

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

U.S. Constitution:

Statutes:

Regulations:

Legislative Material:

Other Authorities:

INTRODUCTION

The illness and mortality caused by Coronavirus Disease 2019 (COVID-19) have led to serious disruptions for employers across the United States, and the federal government is no exception. Many private employers, including many of the nation's largest corporations, have responded by requiring their employees to be vaccinated against COVID-19. Likewise, exercising his constitutional and statutory authority to oversee the federal workforce, President Biden issued an executive order on September 9, 2021, directing federal agencies to require, "consistent with applicable law," that their employees be vaccinated against COVID-19 unless a legally required exception applies. *See* Exec. Order No. 14043, 86 Fed. Reg. 50,989, 50,990 (Sept. 9, 2021).

Plaintiffs—two federal employees who "have not disclosed their vaccination status to their management" and who do not intend to "fil[e] for an exemption," Br. 8—sought a nationwide preliminary injunction against the Executive Order's enforcement. The district court correctly denied relief, recognizing that plaintiffs' claims fail on multiple grounds. The court concluded that it likely lacked jurisdiction because the Civil Service Reform Act (CSRA)—which creates a comprehensive and exclusive scheme for resolving claims arising out of federal employment, with review before the Merit Systems Protection Board (MSPB) and then the Federal Circuit—precludes review of plaintiffs' claims. Plaintiffs do not even address this conclusion in their opening brief. Because the CSRA bars all of plaintiffs' claims, this Court should

affirm the denial of a preliminary injunction and remand with instructions to dismiss the case for lack of jurisdiction.

The district court also correctly held that plaintiffs are not entitled to a preliminary injunction because they are not likely to succeed on the merits. Recognizing the President's broad constitutional and statutory prerogatives, the court explained that "the executive branch has wide authority to establish and enforce requirements of employment within the federal government," A8-9, and that the exercise of that authority "does not infringe on powers reserved to the states under the Tenth Amendment," A9. The court correctly rejected plaintiffs' claim that the vaccination requirement violates their constitutional rights to "bodily integrity" and "privacy," explaining that the Executive Order merely creates a condition of employment, that courts have long upheld vaccination requirements that were far more restrictive, and that the government may collect information from employees that is reasonably related to its role as an employer. *See* A11-13. The court also rightly concluded that plaintiffs' procedural due process claim lacks merit; the civil service laws will give plaintiffs ample opportunity to challenge any discipline that might ultimately be imposed on them. *See* A10-11.

The district court likewise did not abuse its discretion in concluding that the equities strongly disfavor relief. The court recognized that plaintiffs are not at imminent risk of irreparable injury; the most severe penalty that plaintiffs could conceivably face for refusing to disclose their vaccination status would be removal

from their jobs, which is not irreparable because they can obtain adequate remedies for wrongful discharge through the CSRA scheme. The court also correctly found that the balance of harms and the public interest weigh heavily against relief. Plaintiffs' requested injunction would impede efforts to reduce disruptions from COVID-19 in federal workplaces, undermine the President's ability to establish and maintain reasonable conditions of federal employment (similar to those imposed by many private employers), and flout Congress's intent that government employment disputes be resolved exclusively through the CSRA's scheme of administrative and judicial review.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. A78. The district court denied plaintiffs' motion for a temporary restraining order and preliminary injunction on November 19, 2021. A2. Plaintiffs filed a timely notice of appeal on December 6, 2021. A230. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1). The government disputes plaintiffs' assertion that the district court has jurisdiction over the case.

STATEMENT OF THE ISSUES

1. Whether the district court lacks jurisdiction because plaintiffs' claims are precluded by the Civil Service Reform Act.

2. Whether the district court abused its discretion in denying a preliminary injunction.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. The Vaccination Requirement For Federal Employees

1. As Chief Executive Officer of the Executive Branch, the President has constitutional authority to ensure the efficient execution of federal law by the federal workforce. Congress has also enacted various statutes confirming the President's broad power to regulate the federal civil service. The President has express authority to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301. He "may prescribe rules governing the competitive service." *Id.* § 3302. And he may "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service." *Id.* § 3301.

These complementary authorities provide the foundation for many familiar restrictions on federal employees' conduct. In 1986, for example, President Reagan issued an executive order requiring that federal employees abstain from the use of illegal drugs, both on and off duty. *See* Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 15, 1986). In 1989, President George H.W. Bush issued an executive order setting out "principles of ethical conduct" for federal employees, requiring that they refrain from conduct on or off the job that would conflict with their official duties; satisfy all "just financial obligations," including by paying federal, state, and local

taxes; and refrain from soliciting or accepting gifts from persons doing business with their agencies, among other restrictions. *See* Exec. Order No. 12674, 54 Fed. Reg. 15,159 (Apr. 12, 1989).

2. The COVID-19 pandemic has killed nearly 900,000 Americans[1] and has devastated and disrupted a wide range of businesses. Employers have been severely affected by exposures and outbreaks of illness among employees, and many businesses and other organizations have been forced to alter operations or close their doors, either temporarily or permanently. In early September 2021, "nearly 5 million American workers reported missing work . . . because they had COVID-19 or were caring for someone with COVID-19." The White House, *White House Report: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy* 4 (Oct. 2021), https://go.usa.gov/xtNTB (*White House Vaccination Report*). Five million Americans also reported in September 2021 that they had been unable to work at some point in the last four weeks because their employer had closed or lost business due to the pandemic. U.S. Bureau of Labor Statistics, Employment Situation News Release (Oct. 8, 2021), https://go.usa.gov/xtUWu.

Many employers throughout the United States have responded by requiring that their employees be vaccinated against COVID-19. As of fall 2021, thousands of hospitals, colleges, and universities and hundreds of private businesses had imposed

[1] *See* Centers for Disease Control and Prevention (CDC), *COVID Data Tracker*, https://go.usa.gov/xtpWf (last visited Feb. 3, 2022).

employee vaccination requirements. *White House Vaccination Report* 9. Among these were some of the United States' largest and most prominent employers, including United Airlines, Tyson Foods, AT&T, Bank of America, CVS, Disney, Google, Hess, Johnson & Johnson, Microsoft, Netflix, Procter & Gamble, and Walgreens. *Id.* at 12. The reason for these employers' decisions is clear: higher employee vaccination rates can be expected to reduce worker morbidity, mortality, and absenteeism and increase worker productivity and labor market participation. *Id.* at 17.

3. The federal government has not been spared from the workplace disruptions that COVID-19 has inflicted. The pandemic has interfered with numerous aspects of the government's work, forcing office closures, limiting employees' access to paper-based records, impeding official travel, and causing staffing shortages. *See generally* Pandemic Response Accountability Comm., *Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts* (June 2020), https://go.usa.gov/xefTb (*Top Challenges Facing Federal Agencies*).

On September 9, 2021, in an effort to "ensur[e] the health and safety of the Federal workforce and the efficiency of the civil service," President Biden issued Executive Order 14043, which announced a COVID-19 vaccination requirement for federal civilian employees. *See* 86 Fed. Reg. at 50,989. The order instructs federal agencies to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of [their] Federal employees, with exceptions only as required by law." *Id.* at 50,990. The order, which is based on "public health

guidance" from the CDC assessing that "the best way to slow the spread of COVID-19 and to prevent infection by the Delta variant or other variants is to be vaccinated," directs the Safer Federal Workforce Task Force (Task Force) to issue guidance on implementation of the vaccination requirement. *Id.* at 50,989-90; *see also* Exec. Order No. 13991, 86 Fed. Reg. 7045, 7046 (Jan. 25, 2021) (establishing the Task Force).

The Task Force guidance recognizes that federal employees may be entitled to exceptions from the vaccination requirement based on a disability (which would include medical conditions) or religious objections. *See* Task Force, *Vaccinations, Limited Exceptions to Vaccination Requirement*, https://go.usa.gov/xe5aC (last visited Feb. 3, 2022) (*Exception FAQs*). It indicates that each agency should "follow its ordinary process to review and consider what, if any, accommodation [the agency] must offer" under applicable federal law. Task Force, *Vaccinations, Enforcement of Vaccination Requirement for Employees*, https://go.usa.gov/xe5aC (last visited Feb. 3, 2022) (*Enforcement FAQs*). The guidance states that federal employees who have not requested or received an exception should be fully vaccinated "by November 22, 2021," Task Force, *Vaccinations, Vaccination Requirement for Federal Employees*, https://go.usa.gov/xe5aC (last visited Feb. 3, 2022), but employees who request an exception should not be subject to discipline while the request is under consideration, *Enforcement FAQs*. If an exception request is denied, the employee should be given two weeks from the denial to receive the first (or only) dose of a COVID-19 vaccine before an agency initiates any enforcement proceedings. *See Exception FAQs*.

If employees do not request exceptions, if their requests are denied and they refuse vaccination, or if they refuse to disclose their vaccination status, guidance from the Task Force and the Office of Personnel Management recommends a procedure for progressive discipline that includes a period of education and counseling, followed by, optionally, a letter of reprimand, and then suspension. *See Enforcement FAQs.* If noncompliance continues, the guidance provides for additional discipline up to and including potential removal from the federal service. *See id.* Federal employees may also enjoy additional procedural protections prior to termination, such as 30 days' advance written notice of the proposed action, an opportunity to respond (orally and in writing), and a written decision setting forth the basis for removal. *See generally* 5 C.F.R. § 752.404.

B. Factual Background And Prior Proceedings

1. Plaintiffs are two federal civilian employees who are subject to Executive Order 14043. Plaintiff Israel Rydie is employed by the Defense Information Systems Agency, a component of the U.S. Department of Defense. A79. Plaintiff Elizabeth Fleming is employed by the Food and Drug Administration, a component of the U.S. Department of Health and Human Services (HHS). A80. Both plaintiffs aver that they are "not going to provide proof of [their] vaccination status," and they expect to be disciplined for failing to establish that they are vaccinated. A79-80.

Plaintiffs filed this lawsuit against the President and the Secretaries of Defense and HHS on October 20, 2021, alleging that the vaccination requirement for federal

employees violates the Due Process Clause of the Fifth Amendment, the Ninth Amendment, the Tenth Amendment, and the constitutional separation of powers. A90-91. Plaintiffs requested a nationwide injunction against enforcement of Executive Order 14043 and also seek to enjoin defendants "from commencing the schedule for adverse employment action"; from collecting or maintaining documents related to federal employees' COVID-19 vaccination status; "from [imposing] burdensome testing requirements on Plaintiffs, such as weekly PCR tests"; and from "treating Plaintiffs disparately, such as singling them out to be required to wear a mask while others are not." *Id.*

2. On October 27, 2021, plaintiffs filed a motion for a temporary restraining order or preliminary injunction "against Defendants' enforcement of Executive Order 14043." A115. The district court denied the motion on November 19, 2021. A2.

The court first noted possible jurisdictional barriers to its consideration of plaintiffs' claims, explaining that "[i]t may well be that this court lacks the authority to adjudicate their case or to order some of the requested relief." A6. The court acknowledged that the Civil Service Reform Act provides the exclusive means for covered federal employees to challenge adverse employment actions within its scope, requiring such employees to seek review first by the MSPB and then by the Federal Circuit, even with respect to constitutional claims. A7-8. The court noted plaintiffs' failure to "argue that they attempted to exhaust this process," stressed that it was their burden to establish subject matter jurisdiction, and concluded that "their showing is

questionable at best." A8. In addition, the court held that, even if the CSRA did not bar plaintiffs' claims, "they cannot obtain the relief they seek against President Biden," one of the three defendants named in the complaint. A8. Nevertheless, the court found it unnecessary to reach a definitive conclusion on these jurisdictional issues because it concluded that plaintiffs were not entitled to a preliminary injunction. *See* A6.

The district court further concluded that, even if it had jurisdiction, plaintiffs had not demonstrated a substantial likelihood of success on any of their claims. Describing plaintiffs' federalism and separation-of-powers claims as "insubstantial," the court stressed that "the executive branch has wide authority to establish and enforce requirements of employment within the federal government." A8-9. "The executive power to manage federal officers is clearly conferred in the Constitution," and contrary to plaintiffs' argument, the "exercise of [those] enumerated powers does not infringe on powers reserved to the states under the Tenth Amendment." A9. The court likewise rejected plaintiffs' argument that the Executive Order violates the constitutional separation of powers, explaining that both the Constitution and federal statutes authorize the President to regulate the federal workforce. *See* A9-10.

The district court further rejected plaintiffs' claims that the vaccine requirement violates their individual constitutional rights. As for plaintiffs' procedural due process claim, the court explained that the civil service laws provide ample procedural protections to employees facing termination and other discipline. *See* A10-11. The

court concluded that plaintiffs' asserted "right to make informed choices about their own medical treatment" does not preclude the government from conditioning federal employment on vaccination. A11-12. The court stressed that there is no "'deeply rooted'" right to refuse vaccination; there is instead "a long tradition of upholding *mandatory* vaccination laws under rational basis scrutiny." A12 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). The court also rejected plaintiffs' claim that the Executive Order violates their right to informational privacy, relying on Supreme Court precedent to conclude that the government may permissibly request relevant information from employees in its capacity as an employer. A13.

The district court next found that plaintiffs would not suffer irreparable harm absent an injunction, explaining that workplace discipline, including the loss of employment, does not ordinarily constitute irreparable harm. A13-14. The court saw "nothing extraordinary" about plaintiffs' claims that would warrant departure from this principle: assuming plaintiffs' claims are valid, and assuming plaintiffs "are terminated before they obtain a favorable judgment, their injury can be fully redressed through reinstatement, backpay, and expungement of any mark of misconduct." A14.

Finally, the district court concluded that the balance of equities and the public interest "weigh heavily against granting a preliminary injunction," as "an injunction barring enforcement of the vaccine requirement for federal employees would do substantial and irreparable harm to the public health and to the federal government's effectiveness." A15. The court recognized that the government's interest in

stemming the spread of COVID-19 among federal workers and other Americans is "'unquestionably . . . compelling'" and that "[t]he effective administration of the federal government, in which Defendants and the public have a deep and abiding interest, would likely be hampered by an injunction." A15 (quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020)).

3. On January 21, 2022, a district court in the Southern District of Texas issued a nationwide preliminary injunction against "implement[ation] or enforc[ement]" of Executive Order 14043. *Feds for Med. Freedom v. Biden*, No. 21-cv-356, 2022 WL 188329, at *8 (S.D. Tex. Jan. 21, 2022). That decision conflicts with the ruling of the district court in this case and numerous others, and the government has appealed the order to the U.S. Court of Appeals for the Fifth Circuit. *See Feds for Med. Freedom v. Biden*, No. 22-40043 (5th Cir.). As of the filing of this brief, the government's motion for a stay pending appeal is pending before the district court. The vaccination requirement for federal employees is not being enforced while the injunction is in effect. *See* Task Force, *Vaccinations*, https://go.usa.gov/xe5aC (last visited Feb. 3, 2022).

SUMMARY OF ARGUMENT

The district court correctly denied plaintiffs' request to preliminarily enjoin Executive Order 14043, which requires that federal civilian employees be vaccinated against COVID-19 unless they are legally entitled to an exception for a disability (which would include medical conditions) or a sincerely held religious belief. Because

the district court lacked jurisdiction to entertain this suit, this Court should both affirm the denial of preliminary relief and remand the case with instructions to dismiss for lack of jurisdiction.

I. The district court lacks jurisdiction over plaintiffs' claims. Plaintiffs' claims are precluded by the Civil Service Reform Act, which "constitutes the exclusive remedy for claims arising out of federal employment." *Hall v. Clinton*, 235 F.3d 202, 203 (4th Cir. 2000). The CSRA requires that covered federal employees seek administrative review of qualifying disciplinary actions from the MSPB, even with respect to constitutional claims, and then, if necessary, seek judicial review in the Federal Circuit. *See Elgin v. Department of the Treasury*, 567 U.S. 1, 5-6 (2012); *Fleming v. Spencer*, 718 F. App'x 185, 188-89 (4th Cir. 2018). Plaintiffs' suit—which amounts to a preemptive challenge to potential personnel actions—is barred by the CSRA's comprehensive scheme. Plaintiffs bear the burden of establishing jurisdiction, and they have failed to carry that burden both in district court and before this Court. Indeed, they do not even address CSRA preclusion in their opening brief.

II. Apart from the threshold jurisdictional problems with plaintiffs' claims, the district court did not abuse its discretion in denying the "extraordinary remed[y]" of a preliminary injunction. *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001). The court properly concluded that plaintiffs satisfied none of the requirements for injunctive relief.

A. As the district court recognized, plaintiffs are unlikely to succeed on the merits of their challenge to Executive Order 14043. Plaintiffs' argument that the Executive Order violates their constitutional rights largely proceeds as if the order forces employees to be vaccinated, rather than establishing a condition of employment. But courts have repeatedly held that even mandatory vaccination requirements (as opposed to the conditions of employment here) do not violate the Constitution. *See, e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 25-30 (1905); *Klaassen v. Trustees of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021). The district court also properly recognized that the vaccination requirement for federal employees is a legitimate condition of employment that falls squarely within the President's authority to prescribe rules for the conduct of employees in the executive branch; it is directly connected to the government's compelling interest in combating the spread of COVID-19 among the federal workforce. Plaintiffs' claim to "informational privacy" likewise fails; federal employees have no constitutional right to refuse to provide their employers with information relevant to their employment, particularly where (as here) the information is subject to the stringent protections of the Privacy Act. *See NASA v. Nelson*, 562 U.S. 134, 159 (2011). And the district court rightly recognized that plaintiffs' procedural due process claim is unlikely to succeed, as the civil service laws provide ample procedural protections to federal employees who are subject to discipline.

The district court also correctly rejected plaintiffs' claim that the Executive Order violates separation-of-powers and federalism principles. The Constitution vests all Executive power in the President, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020), including the authority to oversee those in the Executive Branch who execute federal law, *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). This constitutional authority is buttressed by various federal statutes that confirm the President's broad authority to regulate the federal workforce. *See* 5 U.S.C. §§ 3301, 3302, 7301. And the district court correctly recognized that the President's exercise of his constitutional authority to regulate federal employees "does not infringe on powers reserved to the states." A9. Contrary to plaintiffs' claim, the federal government may exercise its constitutional powers even where the matters at issue might otherwise be within states' police power. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 292 (1981).

B. The district court also correctly found that plaintiffs cannot establish the irreparable injury necessary to obtain preliminary relief. They have not been suspended or discharged from their federal employment, and they would have an adequate avenue to challenge any discipline that was ultimately imposed through the CSRA scheme. Courts have long recognized that loss of employment—the most severe discipline that plaintiffs could potentially face for refusing to be vaccinated or refusing to provide proof that they are vaccinated—is ordinarily insufficient to warrant injunctive relief. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974).

Plaintiffs point out that the Executive Order affects many federal employees, but that has no bearing on the key deficiency of their theory of irreparable injury—that their alleged injuries could be "fully rectified" through the CSRA scheme. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 (4th Cir. 2019).

C. Finally, the district court correctly concluded that the public interest and the balance of harms weigh decidedly against injunctive relief. Plaintiffs' requested injunction would undermine the strong public interest in slowing the spread of COVID-19 among federal employees and the millions of Americans they serve. It would prevent the President from establishing reasonable conditions of employment for the federal workforce, resembling those imposed by many private employers, and it would thus impose unique and unprecedented limits on the government's broad authority when acting as an employer (not a regulator). An injunction would also circumvent Congress's long-established processes for resolving federal employees' employment disputes exclusively through the comprehensive administrative and judicial procedures set forth in the CSRA.

STANDARD OF REVIEW

This Court "review[s] the grant or denial of a preliminary injunction for abuse of discretion, recognizing that preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quotation marks omitted).

ARGUMENT

I. Plaintiffs' Claims Are Barred By The Civil Service Reform Act

The district court lacks jurisdiction because the Civil Service Reform Act precludes review of all of plaintiffs' claims. Plaintiffs have the burden of establishing jurisdiction, but they did not carry that burden before the district court, *see* A6-8, nor can they do so here—indeed, they entirely fail to address CSRA preclusion in their opening brief. This Court should therefore affirm the district court's denial of a preliminary injunction and remand with instructions to dismiss. *See Munaf v. Geren*, 553 U.S. 674, 691 (2008) ("[A] reviewing court has the power on appeal from an interlocutory order to examine the merits of the case . . . and upon deciding them in favor of the defendant to dismiss the bill." (ellipsis in original) (quotation marks omitted)); *Mapoy v. Carroll*, 185 F.3d 224, 225 (4th Cir. 1999) (vacating a preliminary injunction and remanding with instructions to dismiss for lack of jurisdiction).

In the CSRA, Congress "established a comprehensive system for reviewing personnel action taken against federal employees" who are covered by the statutory scheme. *United States v. Fausto*, 484 U.S. 439, 455 (1988). More serious "adverse actions"—including removal and suspension for more than 14 days, 5 U.S.C. § 7512—may generally be appealed directly to the MSPB, with judicial review of the MSPB's decision in the Federal Circuit. *See id.* §§ 7513(d), 7703(b)(1). A challenge to a less severe "personnel action" may generally be sought through agency administrative or negotiated grievance procedures, through an equal employment

opportunity complaint if a prohibited basis is alleged, or from the Office of Special Counsel (OSC) if the applicant or employee alleges a prohibited reason for the action. *Id.* §§ 1214(a)(3), 2302.[2]

The Supreme Court has held that the CSRA provides the exclusive means by which covered federal employees may challenge adverse employment actions (aside from limited exceptions for certain types of discrimination claims not at issue here). *See Elgin v. Department of the Treasury*, 567 U.S. 1, 5 (2012). The CSRA thus deprives district courts of jurisdiction to hear challenges to covered employment actions: "[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Id.* at 11-12. The Supreme Court has described this as an "implied preclusion of district court jurisdiction." *Id.* at 12; *see also Bennett v. SEC*, 844 F.3d 174, 180-81 (4th Cir. 2016) (discussing *Elgin*). This Court has accordingly explained that "the

[2] The CSRA defines "personnel action" broadly to extend beyond disciplinary or predisciplinary corrective actions. *See* 5 U.S.C. § 2302(a). Congress authorized OSC to investigate whether a challenged "personnel action" constitutes a "prohibited personnel practice[]," including the violation of a law that directly concerns "fair and equitable treatment" of federal employees "with proper regard for their . . . constitutional rights." *Id.* §§ 1212(a)(2), 1214(a)(1)(A), 2301(b)(2), 2302(b)(1)-(14). OSC thus has jurisdiction to investigate an employee's claim that a personnel action violated the Constitution. *See, e.g.*, *Fleming v. Spencer*, 718 F. App'x 185, 188 (4th Cir. 2018) (per curiam).

CSRA constitutes the exclusive remedy for claims arising out of federal employment." *Hall v. Clinton*, 235 F.3d 202, 203 (4th Cir. 2000).

The CSRA is equally preclusive where an employee challenges an adverse employment action on constitutional grounds. In *Elgin*, for example, the Supreme Court required plaintiff federal employees to challenge their adverse employment actions through the CSRA's review scheme, rather than filing suit in district court, where they claimed that they were discharged because of an unconstitutional federal statute. 567 U.S. at 5. Similarly, in *Fleming v. Spencer*, 718 F. App'x 185 (4th Cir. 2018) (per curiam), a professor at the United States Naval Academy filed suit in district court, alleging that he had been disciplined in "violation of his First Amendment right to academic freedom." *Id.* at 186. This Court affirmed the dismissal of his claims, explaining that "[t]he CSRA plainly precludes extrastatutory judicial review of constitutional claims that are asserted before an employee has exhausted his remedies available under the statute"; rather than filing suit in district court, the plaintiff was required to assert his claims before OSC, then seek further review from the MSPB and the Federal Circuit if necessary. *Id.* at 188.

Plaintiffs do not dispute that they are covered by the CSRA, and their standing to pursue their claims rests on potential personnel actions within the CSRA's scope. *See, e.g.*, Br. 3 (asserting that plaintiffs "are federal employees who face termination on account of not disclosing their vaccination status"). Plaintiffs cannot circumvent the CSRA's exclusive-review framework by launching a preemptive challenge to those

personnel actions in district court. *Cf. Pinar v. Dole*, 747 F.2d 899, 909-12 (4th Cir. 1984) (holding that the CSRA barred a plaintiff's request that his employer "be enjoined from harassing him in the exercise of his first amendment rights and proposing any further unwarranted disciplinary action against him"); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216 (1994) (holding that a statutory scheme establishing a "comprehensive enforcement structure" in the interest of "channeling and streamlining the enforcement process" demonstrated Congress's intent to preclude pre-enforcement challenges); *Scottsdale Capital Advisors Corp. v. Financial Indus. Regulatory Auth., Inc.*, 844 F.3d 414, 417, 424 (4th Cir. 2016) (holding that a district court lacked jurisdiction to consider a challenge to "an ongoing disciplinary proceeding before the Financial Industry Regulatory Authority," as the plaintiff could "obtain meaningful judicial review of its claim . . . following the appeal process outlined" by statute).

Although plaintiffs' opening brief makes no effort to explain why their claims may proceed notwithstanding the CSRA, they asserted in district court that the CSRA did not apply because their claims rest on "facts [that] are common to both Plaintiffs and *all* others similarly situated." A223. But a plaintiff who has not exhausted her remedies under the CSRA may not resort to an action in district court simply because she challenges a policy that also affects others. In *Elgin*, for example, the Supreme Court held that the CSRA precluded "claims for equitable relief" by plaintiffs who were discharged based on a generally applicable, and allegedly unconstitutional, statute prohibiting individuals who failed to register for the draft from holding federal

employment. 567 U.S. at 6-8; *see also, e.g.*, *American Fed'n of Gov't Emps. v. Secretary of the Air Force*, 716 F.3d 633, 639 (D.C. Cir. 2013) ("[A] plaintiff's inability to use the APA to circumvent the CSRA's requirements applies to a systemwide challenge to an agency policy interpreting a statute just as it does to the implementation of such a policy in a particular case." (quotation marks omitted)). Allowing plaintiffs to circumvent the entire administrative process under the CSRA by bringing pre-enforcement suits to challenge broadly applicable policies would be especially inappropriate where, as here, a challenged policy allows exceptions for individual employees depending on employee-specific facts and circumstances (which the CSRA process would be particularly well equipped to review).

Indeed, permitting plaintiffs to file preemptive attacks on potential adverse employment actions that might someday result from a broadly applicable policy would amplify the "very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid." *Elgin*, 567 U.S. at 14. District courts around the country would be left to deal with preemptive challenges, while challenges to actual employment actions would continue to arise under the CSRA's scheme. Such bifurcated review would squarely contravene "[t]he CSRA's objective of creating an integrated scheme of review." *Id.* And that disruption would not be limited to preemptive challenges related to Executive Order 14043 or vaccine requirements; plaintiffs' reasoning would suggest that a federal employee who anticipated potential discipline based on *any* government policy affecting multiple employees could

circumvent the CSRA's reticulated scheme by preemptively bringing suit in federal court.

The closest plaintiffs come to advancing a CSRA argument in their opening brief is their suggestion, made for the first time on appeal, that the Executive Order is "subject to immediate review" because it is "*ultra vires*." Br. 17-18. Plaintiffs waived this argument by failing to raise it before the district court, and in any event, the CSRA applies equally to allegations of ultra vires executive action. *See, e.g.*, *American Fed'n of Gov't Emps. v. Trump*, 929 F.3d 748, 757-58 (D.C. Cir. 2019) (holding that unions were required to present their ultra vires claims through the comprehensive administrative scheme created by the Federal Service Labor-Management Relations Statute, which is part of the CSRA); *see also Hall*, 235 F.3d at 203 ("[T]he CSRA constitutes the exclusive remedy for claims arising out of federal employment . . . . "). *Elgin* holds that claims challenging a statute on constitutional grounds must go through the CSRA scheme, and it follows, *a fortiori*, that claims challenging a policy on the ground that it is ultra vires are subject to the same rule. And, as explained elsewhere in this brief, the Executive Order does not exceed the President's authority in any event.[3]

[3] Plaintiffs' opening brief also does not challenge the district court's conclusion that it could not grant injunctive or declaratory relief against the President, and for good reason. It is well established that "in general '[a] court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.'" *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (quoting *Mississippi v. Johnson*, 71 U.S. (4

II. The District Court Did Not Abuse Its Discretion In Denying A Preliminary Injunction

Although this Court need not reach the merits in light of this suit's jurisdictional deficiencies, the district court correctly concluded that plaintiffs failed to satisfy any of the requirements for a preliminary injunction. *See* A6-13 (merits); A13-14 (irreparable harm); A15-16 (balance of equities and public interest). This Court has emphasized that a preliminary injunction is an "extraordinary remed[y] involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (quotation marks omitted). To obtain a preliminary injunction, a plaintiff must demonstrate "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." *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017). A mere "possibility" of success on the merits or of irreparable harm is insufficient. *See id.*

Wall.) 475, 501 (1866)); *see also International Refugee Assistance Project v. Trump*, 857 F.3d 554, 605 (4th Cir.) (en banc), *vacated on mootness grounds sub nom. Trump v. International Refugee Assistance*, 138 S. Ct. 353 (2017). Other district courts considering similar challenges to the Executive Order at issue here have rejected claims on this basis. *See McCray v. Biden*, No. 21-2882, 2021 WL 5823801, at *5-8 (D.D.C. Dec. 7, 2021); *Rodden v. Fauci*, No. 21-cv-317, 2021 WL 5545234, at *2 & n.2 (S.D. Tex. Nov. 27, 2021); *Navy Seal 1 v. Biden*, No. 21-cv-2429, 2021 WL 5448970, at *2 (M.D. Fla. Nov. 22, 2021); *Foley v. Biden*, No. 21-cv-1098, slip op. at 3 (N.D. Tex. Oct. 6, 2021), ECF No. 18.

A. Plaintiffs Are Unlikely To Succeed On The Merits

Plaintiffs contend that the vaccination requirement imposed by Executive Order 14043 violates their constitutional rights, invoking due process and various privacy-related theories. Br. 1-2. They also contend that the President lacked the authority to impose these requirements and violated federalism and separation-of-powers principles in doing so. As the district court correctly concluded, none of these claims is likely to succeed. Plaintiffs have no constitutional right to be employed by the federal government while refusing to comply with reasonable conditions of employment, such as vaccination and disclosure of their vaccination status. Moreover, in imposing these requirements, the President acted well within his broad statutory and constitutional authority to supervise employees in the Executive Branch.

1. Plaintiffs Have No Constitutional Right To Hold Federal Employment While Refusing Vaccination Or Refusing To Disclose Their Vaccination Status

a. This case does not concern whether an individual possesses a constitutional right to refuse vaccination, but rather whether an individual has a right to hold federal employment while refusing to be vaccinated against COVID-19 or to disclose her vaccination status. *Cf. We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294 (2d Cir. 2021) (per curiam) (explaining that New York's vaccination requirement for certain health care workers was "a condition of employment in the healthcare field; the State is not forcibly vaccinating healthcare workers"); *NASA v. Nelson,* 562 U.S. 134, 148-49 (2011) ("[T]he Government has a much freer hand in dealing with citizen

employees than it does when it brings its sovereign power to bear on citizens at large." (quotation marks omitted)). Plaintiffs have cited no case that holds that any such constitutional right exists.

Even assuming the Executive Order could be subject to the same analysis as vaccination requirements that apply more generally, it is well established that vaccination requirements do not impermissibly burden any "fundamental right ingrained in the American legal tradition." *Klaassen v. Trustees of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021) (noting that "vaccination requirements, like other public-health measures, have been common in this nation");[4] *see also Workman v. Mingo Cty. Bd. of Educ.*, 419 F. App'x 348, 355-56 (4th Cir. 2011) (holding that a parent had no fundamental right to avoid immunizing her child as a precondition to attending school). That is consistent with the Supreme Court's longstanding recognition that a government may require vaccination even under penalty of criminal sanctions. *See*

[4] Justice Barrett denied an emergency application to enjoin the vaccine requirement at issue in *Klaassen*. *See Klaassen v. Trustees of Ind. Univ.*, No. 21A15 (U.S. Aug. 12, 2021) (Barrett, J., in chambers). Justice Sotomayor denied an application for emergency relief in *Maniscalco v. New York City Department of Education*, which concerned a substantive due process challenge to a vaccination requirement imposed on public employees. No. 21-CV-5055, 2021 WL 4344267, at *3 (E.D.N.Y. Sept. 23, 2021), *aff'd*, No. 21-2343, 2021 WL 4814767 (2d Cir. Oct. 15, 2021), *application for injunctive relief denied*, No. 21A50 (U.S. Oct. 1, 2021) (Sotomayor, J., in chambers). And Justice Gorsuch denied an application for an injunction in *Valdez v. Grisham*, which rejected a constitutional challenge to state orders requiring vaccination for health care workers and entrants to a state fair. *See* No. 21-cv-783, 2021 WL 4145746, at *5-8 (D.N.M. Sept. 13, 2021), *application for injunctive relief denied*, No. 21A253 (U.S. Dec. 21, 2021) (Gorsuch, J., in chambers).

Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905); *see also Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (reiterating that the Constitution does not provide "freedom from compulsory vaccination"); *Zucht v. King*, 260 U.S. 174, 176-77 (1922) (similar); *cf. Biden v. Missouri*, 142 S. Ct. 647 (2022) (staying preliminary injunctions against a rule requiring that staff of certain health care facilities be vaccinated against COVID-19).[5]

Plaintiffs attempt to characterize the right at issue as the "right to their own bodily integrity and to refuse medical treatment." Br. 22.[6] But even if plaintiffs could distinguish precedents like *Jacobson* by redefining the relevant right in those terms, Executive Order 14043 does not concern such rights because it does not force anyone to receive medical care. As explained, federal employees may seek exceptions from the vaccination requirement based on disabilities (which would include medical conditions) or sincerely held religious beliefs. If a federal employee does not seek an

[5] Within the past several months, several district courts have also concluded that there is no constitutional right to refuse a vaccine. *See, e.g.*, *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688, at *6-7 (D.N.J. Nov. 8, 2021); *Rodriguez-Vélez v. Pierluisi-Urrutia*, No. 21-1366, 2021 WL 5072017, at *15 (D.P.R. Nov. 1, 2021); *Bauer v. Summey*, No. 21-CV-2952, 2021 WL 4900922, at *10 (D.S.C. Oct. 21, 2021); *Johnson v. Brown*, No. 21-CV-1494, 2021 WL 4846060, at *13 (D. Or. Oct. 18, 2021); *Dixon v. De Blasio*, No. 21-CV-5090, 2021 WL 4750187, at *8 (E.D.N.Y. Oct. 12, 2021); *Norris v. Stanley*, No. 21-CV-756, 2021 WL 4738827, at *1-2 (W.D. Mich. Oct. 8, 2021); *Valdez v. Grisham*, No. 21-CV-783, 2021 WL 4145746, at *5 (D.N.M. Sept. 13, 2021); *Doe v. Zucker*, 520 F. Supp. 3d 217, 251 (N.D.N.Y. 2021).

[6] Plaintiffs locate this right in the Ninth Amendment, *see, e.g.*, Br. 11, but it is more commonly evaluated under the rubric of the Fifth and Fourteenth Amendments, *see, e.g.*, *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994) (describing "the foundational concept of individual privacy" as "shielded by the Due Process Clause of the Fourteenth Amendment"). The distinction is immaterial here because plaintiffs' claims lack merit however they are framed.

exception or her exception request is denied, she will not be forcibly vaccinated; she will simply be subject to discipline up to and including removal from federal employment. *See, e.g.*, *We the Patriots USA*, 17 F.4th at 294 (rejecting a contention that conditioning employment on vaccination amounted to "forcibly vaccinating healthcare workers"); *Klaassen*, 7 F.4th at 593-94 (noting that there are many conditions on university attendance and concluding that COVID-19 vaccination may permissibly be one of them). For that reason, plaintiffs' reliance on cases that they describe as reflecting a "right to refuse medical treatment," Br. 25, or "the privacy interests involved in penetrating the skin," Br. 27, is misplaced. And although plaintiffs attempt to distinguish *Jacobson* based on their view that the penalty for refusing vaccination in that case was small, *see* Br. 14, the plaintiff in *Jacobson* was criminally prosecuted and ordered "committed" until he paid the fine, *Jacobson*, 197 U.S. at 13-14. Here, by contrast, vaccination and disclosure of vaccination status are merely a condition of plaintiffs' employment, subject to legally required exceptions.

Plaintiffs are likewise mistaken in their reliance (Br. 24-28) on *Washington v. Glucksberg*, 521 U.S. 702 (1997), *Cruzan ex rel. Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), and other cases that they characterize as establishing a constitutional right "to obtain or reject medical treatment." *Glucksberg* upheld a state-law ban on assisted suicide, rejecting the plaintiff's reliance on cases involving bodily integrity and privacy and holding that the asserted right at issue—properly construed as the "'right' to assistance in committing suicide"—"is not a fundamental liberty

interest protected by the Due Process Clause." 521 U.S. at 728. *Cruzan*, which assumed that a "competent person" had "a constitutionally protected right to refuse lifesaving hydration and nutrition," 497 U.S. at 279, involved the forcible administration of medical treatment, unlike this case, and—as the Supreme Court later emphasized in *Glucksberg*—was "entirely consistent with this Nation's history and constitutional traditions," 521 U.S. at 725. Here, history and constitutional tradition point exactly the opposite way, demonstrating that individuals have no constitutional right to refuse vaccination and related disclosure requirements (much less to do so only on pain of employment-related discipline).[7]

Moreover, individuals' exercise of the asserted liberty interests at issue in the cases plaintiffs cite did not threaten the health of other persons; by contrast, plaintiffs' insistence that federal employees have a right to remain unvaccinated while continuing their federal employment does just that. Executive Order 14043 requires that federal employees be vaccinated against COVID-19 infection to protect themselves and others in their workplace from the spread of a highly contagious virus. *See, e.g.*, 86 Fed. Reg. at 50,989-90 (explaining, based on "public health guidance," that "the best way to slow the spread of COVID-19 . . . is to be vaccinated"). Consistent with

[7] Plaintiffs also rely (Br. 27-28) on *Missouri v. McNeely*, 569 U.S. 141, 159 (2013), citing the Supreme Court's statement that "compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." But the Executive Order does not involve forcible administration of a vaccine, so *McNeely*—a case addressing whether the Fourth Amendment requires a warrant for nonconsensual blood testing of individuals suspected of intoxicated driving—is likewise inapposite.

Jacobson, workers in a wide range of industries have long been subject to vaccination requirements, which "have been common in this nation." *Klaassen*, 7 F.4th at 593; *see also* Teri Dobbins Baxter, *Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 Utah L. Rev. 885. As the Supreme Court explained more than 100 years ago, "[r]eal liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others." *Jacobson*, 197 U.S. at 26.

Plaintiffs invoke "the [d]octrine of [u]nconstitutional[] [c]onditions," asserting that they are being "coerce[d] . . . into relinquishing their constitutional right[s]" through the threat of discharge from their federal jobs. Br. 42-43. As explained, however, plaintiffs' underlying constitutional claims are unavailing. Again, even if objecting federal employees "have a hard choice to make, they do have a choice"; the government "is not forcibly vaccinating" anyone. *We the Patriots USA*, 17 F.4th at 294. Indeed, the Supreme Court recently upheld a vaccination requirement that was imposed as a condition of receiving federal funds. *See Biden v. Missouri*, 142 S. Ct. 647. Plaintiffs cannot demonstrate that the potential consequences of noncompliance—which are retroactively compensable and therefore do not even satisfy the irreparable-injury requirement for a preliminary injunction, *see Sampson v. Murray*, 415 U.S. 61, 91-92, 92 n.68 (1974)—are so severe as to transform the Executive Order into a forcible-

vaccination directive. That is particularly true in light of the available mechanisms for employees to seek individual exceptions for medical or religious reasons.

b. Under applicable case law, the Court must uphold a vaccination requirement so long as it "is rationally related to a legitimate governmental interest." *Waters v. Gaston Cty.*, 57 F.3d 422, 427 (4th Cir. 1995); *see Workman*, 419 F. App'x at 355-56 (concluding that rational-basis scrutiny applied to a requirement that children be vaccinated to attend school). Under that framework, the challenged measure "is presumed constitutional," and "[t]he burden is on the one attacking the [measure] to negative every conceivable basis which might support it." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993) (first alteration in original) (quotation marks omitted); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) (observing that courts "hardly ever strike[] down a policy as illegitimate under rational basis scrutiny").

Plaintiffs appear to concede that the government's interest in promoting "[t]he health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact," during the COVID-19 pandemic is not merely legitimate but compelling. 86 Fed. Reg. at 50,989; *see* Br. 47-48 (arguing that the vaccine requirement fails strict scrutiny only because it is not the least restrictive means of promoting the government's interest). And plaintiffs cannot dispute that the Executive Order is rationally related to that interest. Plaintiffs identify no case holding that a vaccination requirement lacked a rational basis, and there are many cases to the contrary. *See, e.g.*, *We the Patriots USA*, 17 F.4th at 293-94 (rejecting

plaintiffs' claim that a vaccination requirement violates substantive due process); *Klaassen*, 7 F.4th at 593-94 (similar); *Workman*, 419 F. App'x at 355-56 (similar).

c. Plaintiffs also suggest that the vaccination requirement for federal employees infringes on an asserted "right not to disclose their closely guarded private medical information." Br. 25. This argument is foreclosed by Supreme Court precedent. Even assuming federal agencies' collection of information about their employees "implicate[s] a privacy interest of constitutional significance," the Supreme Court has held that any such interest "does not prevent the Government from asking reasonable questions" about its employees—including particularly sensitive questions about drug use, drug treatment, and "mental or emotional stability"—"subject to the Privacy Act's safeguards against public disclosure." *Nelson*, 562 U.S. at 147-48, 154 (quotation marks omitted); *see also* 5 U.S.C. § 552a (Privacy Act). The Court reasoned in *Nelson* that "[r]easonable investigations of applicants and employees aid the Government in . . . employing a competent, reliable work force" and that the government is granted "wide latitude . . . in its dealings with employees." 562 U.S. at 150, 154 (quotation marks omitted). "[A]ny interest in avoiding disclosure" is overcome by the government's interest "in managing its internal operations" as an employer, along with the Privacy Act's stringent protections. *Id.* at 138; *see id.* at 156 (discussing relevant Privacy Act provisions). Plaintiffs have no serious response to the district court's conclusion that it is likewise "reasonable for the government to request employees' vaccination status in light of the risks posed by COVID-19," A13,

and in light of that information's direct relevance to agency efforts to implement appropriate safety protocols.[8]

Plaintiffs emphasize that the Privacy Act may permit their employers, as part of a so-called "routine use," to "share[]" their vaccination information "with external sources, including 'contractors, grantees, or volunteers as necessary to perform their duties for the Federal Government.'" Br. 10 (quoting A114); *see* 5 U.S.C. § 552a(a)(7) (defining "routine use"). But the Supreme Court rejected the same concern in *Nelson*: as the Court held, "the mere fact that the Privacy Act's nondisclosure requirement is subject to exceptions does not show that the statute provides insufficient protection against public disclosure," and the "routine uses" permitted under the Act do not "create any undue risk of public dissemination." 562 U.S. at 157; *see also id.* at 158 (holding that a "'remote possibility' of public disclosure created by these narrow 'routine use[s]'" would "not undermine the Privacy Act's substantial protections" (alteration in original)). In light of *Nelson*, the district court properly rejected plaintiffs' contention that the Privacy Act provides insufficiently robust protection to support the collection of information regarding vaccination status. A13.[9]

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[8] *See, e.g.*, Task Force, COVID-19 Workplace Safety: Agency Model Safety Principles (Sept. 13, 2021), https://go.usa.gov/xtmtP (different safety recommendations for vaccinated and unvaccinated employees with respect to masking, physical distancing, COVID-19 testing, and official travel).

[9] Although plaintiffs quote at length from a rule that HHS issued in 2000 to implement the Health Insurance Portability and Accountability Act of 1996 (HIPAA), they appear to recognize that HIPAA does not govern employees' disclosure of

d. Plaintiffs scarcely engage with the district court's rejection of their claim that the federal-employee vaccination requirement violates procedural due process. As the district court explained, "[a]ny cognizable property or liberty interest Plaintiffs have in their federal employment is protected by ample procedures." A10; *see, e.g.*, 5 U.S.C. §§ 7513, 7701 (establishing procedures for employee discharge). Relevant Task Force guidance states that agencies "pursuing any adverse action . . . must provide the required procedural rights to an employee and follow normal processes," *Enforcement FAQs*, which include the extensive procedures mandated by the CSRA for covered employees, *see supra* Part I.A.

Plaintiffs appear to suggest that their due process rights are violated because they will not have an opportunity to challenge the vaccination requirement's validity in defending against potential discipline. *See* Br. 21 (asserting that "[n]o real hearing *could* take place" where "the inquiry . . . would be limited to nothing more than, 'Did you or did you not take a COVID-19 vaccine?'"). That is incorrect. Plaintiffs will be free to dispute the requirement's validity in a challenge to any disciplinary action under the CSRA, and the Supreme Court has emphasized that the Federal Circuit is "fully competent to adjudicate" constitutional claims in reviewing adverse employment actions. *Elgin*, 567 U.S. at 17.

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information to their employers. Br. 52; *see also* 45 C.F.R. § 160.103 (definition of "Protected health information"); 65 Fed. Reg. 82,426, 82,592 (Dec. 28, 2000) ("[I]t is beyond the scope of this regulation to prohibit employers from requesting or obtaining protected health information.").

2. The President Has Authority To Condition Federal Employment On Vaccination

Plaintiffs are likewise mistaken in their arguments that—despite his role as CEO of the Executive Branch—the President lacks authority to impose reasonable conditions on federal employment, such as vaccination requirements and other measures designed to curb the spread of disease in the federal workforce. As the district court correctly concluded, the President's exercise of that broad authority in Executive Order 14043 does not infringe on any powers reserved exclusively to Congress or the states. *See* A8-10.

a. Executive Order 14043 is well within the President's constitutional and statutory authority. "Under our Constitution, the 'executive power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (first quoting U.S. Const. art. II, § 1, cl. 1; and then quoting *id.* § 3). "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789)). Accordingly, as the district court explained, "[t]he President derives his authority to regulate the federal workforce from the Constitution." A9.

Congress has also enacted various statutory provisions that confirm the President's broad power to regulate the federal workforce. A9-10. The President has

express statutory authority to "prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301; to "prescribe rules governing the competitive service," *id.* § 3302; and to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service," *id.* § 3301. As numerous courts have recognized, these provisions give the President "broad authority . . . to regulate employment matters." *Clarry v. United States*, 85 F.3d 1041, 1047 (2d Cir. 1996); *see also Old Dominion Branch No. 694, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 n.5 (1974) (concluding that an executive order governing federal labor relations was both "plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch" and "express[ly]" authorized by 5 U.S.C. § 7301); *DiLuigi v. Kafkalas*, 584 F.2d 22, 24 n.3 (3d Cir. 1978) ("Congress delegated broad power to the President to establish qualifications and conditions of employment."); *Friedman v. Schwellenbach*, 159 F.2d 22, 24 (D.C. Cir. 1946) ("[The United States] has the right to prescribe the qualifications of its employees and to attach conditions to their employment."). Relying on these provisions, as well as the President's authority under Article II, courts have concluded that the President had authority to issue Executive Order 14043. *See Brnovich v. Biden*, No. 21-1568, 2022 WL 252396, at *12 (D. Ariz. Jan. 27, 2022); *Oklahoma v. Biden*, No. 21-1136, 2021 WL 6126230, at *10 (W.D. Okla. Dec. 28, 2021); *Brass v. Biden*, No. 21-cv-2778, 2021 WL 6498143, at *3 (D. Colo. Dec. 23, 2021) (report and recommendation), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14,

2022); *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688, at *6 (D.N.J. Nov. 8, 2021).[10]

Plaintiffs' suggestion (Br. 18-19) that only Congress has authority to regulate the federal workforce contravenes the Supreme Court's repeated pronouncements, as well as the longstanding position of the Executive Branch. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 492 (emphasizing the Executive power to "appoint[], oversee[], and control[] those who execute the laws"); *Myers v. United States*, 272 U.S. 52, 163-64 (1926) ("[A]rticle 2 grants to the President the executive power of the government—i[.]e., the general administrative control of those executing the laws . . . . "); *Appointment and Promotion of Women in Federal Civil Service*, 4 Op. Att'y Gen. 157, 160 (1962) (noting that "[t]he power of the President to prescribe rules for the promotion of the efficiency of the Federal Service" derives in part "from his constitutional power as Chief Executive"); *cf. Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (explaining that the President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person

[10] One court has reached a contrary conclusion, holding that the Executive Order exceeds the President's authority. *See Feds for Med. Freedom v. Biden*, No. 21-cv-356, 2022 WL 188329, at *4-6 (S.D. Tex. Jan. 21, 2022). The government has appealed that decision to the Fifth Circuit; as of the filing of this brief, the government's motion for a stay pending appeal is pending before the district court.

access to such information flows primarily from th[e] constitutional investment of power in the President and exists quite apart from any explicit congressional grant").

Plaintiffs' assertion that Congress "has *plenary* authority in this area," and that the President is powerless, relies primarily on a significant misreading of the Constitution's text. Br. 18. Plaintiffs suggest that the Constitution empowers Congress to "make Rules for the Government," and they contend that that authority is exclusive. *Id.* (quoting U.S. Const. art. I, § 8); *see also* Br. 19, 32-33 (citing this provision). The clause that plaintiffs cite, however, states that Congress shall "make Rules *for the Government and Regulation of the land and naval forces*." U.S. Const. art. I, § 8 (emphasis added); *cf. Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (explaining that this provision relates to "the framework of the military establishment"). It therefore has no bearing on the balance of authority with respect to federal civilian employees—a context in which the President has both broad and express statutory authority, *see* 5 U.S.C. §§ 3301, 3302, 7301, and wide constitutional power. Plaintiffs are mistaken to assert (Br. 18-19) that the President was "obliged to approach Congress for" authority that both Congress and the Constitution had already given him.

Plaintiffs also fail to explain why the statutory provisions the Executive Order invokes—which reinforce and confirm the President's underlying constitutional authority—are inapposite. These provisions serve as the basis for many familiar conditions of federal service, including requirements that federal employees abstain from the use of illegal drugs, both on and off duty, *see* Exec. Order No. 12564, 51

Fed. Reg. 32,889 (Sept. 15, 1986); refrain from engaging in conduct on or off the job that would conflict with their official duties, *see* Exec. Order No. 12674, § 101(j), 54 Fed. Reg. 15,159 (Apr. 12, 1989); and satisfy all "just financial obligations," including by paying federal, state, and local taxes, *id.* § 101(*l*); *see also* Exec. Order No. 11491, 34 Fed. Reg. 17,605 (Oct. 31, 1969) (specifying that Executive Branch employees have the right "to form, join, and assist a labor organization," while requiring that the labor organization's "internal business . . . shall be conducted during the non-duty hours").

Plaintiffs concede (Br. 39-40) that "[p]revious executive orders touching on the Civil Service," including the prohibition against on- and off-duty illegal drug use, are valid. They nevertheless suggest that the Executive Order is invalid because 5 U.S.C. § 3302, which authorizes the President to "prescribe rules governing the competitive service," and 5 U.S.C. § 7301, which authorizes the President to issue "regulations for the conduct of employees," must "be understood in the context of the traditional American employer-employee relationship, as found in both the public and private sector." Br. 37, 39. If anything, considering traditional employment practices would reinforce the Executive Order's validity, as a wide range of public and private employers alike have responded to the COVID-19 pandemic by requiring vaccination as a condition of employment. *See, e.g.*, *Sambrano v. United Airlines, Inc.*, 19 F.4th 839 (5th Cir. 2021) (denying injunction pending appeal in challenge to United Airlines' vaccine requirement); *Together Employees v. Mass Gen. Brigham Inc.*, 19 F.4th 1 (1st Cir. 2021) (denying injunction pending appeal in challenge to health care entity's employee

vaccination requirement); *White House Vaccination Report* 11-13 (noting that many private employers have required that their employees be vaccinated against COVID-19).

Plaintiffs contend that 5 U.S.C. § 7301 addresses only "performance and standard operating procedures, and perhaps what the employees may *not* do outside of the work environment." Br. 38-39. But nothing in the text of the statute supports the limitations that plaintiffs seek to impose. On the contrary, that provision broadly authorizes the President to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301. "Congress could have limited" the statutory language "in any number of ways, but it chose not to do so." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020). Plaintiffs suggest (Br. 40) that the Executive Order does not govern "conduct," 5 U.S.C. § 7301, but it plainly does, reflecting the President's judgment about how best to promote the workplace efficiency of the civil service. Section 7301 and other statutory provisions, as well as the President's constitutional authority, amply support the President's issuance of the Executive Order to ensure that the workplace is safe and efficient. *Cf. Giesler v. MSPB*, 686 F.2d 844, 849 (10th Cir. 1982) (deferring to agency judgment about "[t]he remedy necessary to promote efficiency of civil service").

Likewise, plaintiffs offer no basis to second-guess the President's finding that requiring federal civilian employees to be vaccinated would serve the "efficiency" of the civil service within the meaning of 5 U.S.C. § 3301, an additional provision that

supports the Executive Order's promulgation. The President expressly found that "ensuring the health and safety of the Federal workforce and the efficiency of the civil service requires immediate action" and that "the best way to slow the spread of COVID-19 and to prevent infection . . . is to be vaccinated." 86 Fed. Reg. at 50,989; *see also Top Challenges Facing Federal Agencies* (explaining that the COVID-19 pandemic has disrupted federal workplaces by forcing office closures, limiting employees' access to paper-based records, impeding official travel, and causing staffing shortages); *American Fed'n of Gov't Emps. v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976) (recognizing that § 3301 reflects an "obvious intent of Congress to confer broad discretion upon the President and the" now-defunct Civil Service Commission).

Plaintiffs additionally err in contending that 5 U.S.C. § 3301 provides no authority for the President to promulgate Executive Order 14043 because that provision simply concerns "admission" to federal employment, while plaintiffs "already hold federal jobs." Br. 36-37. The Executive Order requires that new entrants to the federal service be vaccinated against COVID-19, and this provision plainly confirms the President's authority to impose that requirement. *See* Task Force, *Vaccinations, Vaccination Requirement for Federal Employees*, https://go.usa.gov/xe5aC (last visited Feb. 3, 2022). Moreover, courts have recognized that, "[u]nder 5 U.S.C. [§] 3301," like the other provisions at issue, "Congress has delegated broad authority to the President to establish the qualifications and conditions of employment for civil servants within the executive branch." *Hoffman*, 543 F.2d at 938; *see also Atkins v.*

Salazar, 677 F.3d 667, 670-71 & n.1 (5th Cir. 2011) (noting that new National Park Service medical qualification standards, which were applied to a long-time employee, had been promulgated under 5 U.S.C. § 3301). The authority to establish requirements for new federal employees necessarily includes the authority to modify requirements for existing employees.

Plaintiffs are likewise mistaken to invoke the so-called "major questions" doctrine, which they cite for the proposition that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *See* Br. 32 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)). The President is not an "agency" created by Congress, but rather the head of a coordinate branch of the federal government, vested with independent constitutional authority under Article II. Plaintiffs identify no support for the view that Congress must speak clearly to "delegate" the authority to decide major questions to the President, who is elected by the American people for the very purpose of making significant decisions on behalf of the Nation. And in any event, the statutes here *do* speak clearly and unambiguously in confirming the President's broad authority to regulate the federal workforce. *See, e.g.*, 5 U.S.C. § 7301 (broadly authorizing the President to "prescribe regulations for the conduct of employees in the executive branch"). Nor does the Executive Order reflect a significant "exercise [of] regulatory authority." Br. 34 (quoting *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari)). The federal government is not acting as a

regulator here, but rather as an employer, instituting the same requirements that an array of private employers have reasonably imposed on their employees. *See Nelson*, 562 U.S. at 148 (emphasizing that "the Government has a much freer hand in dealing with citizen employees than it does when it brings its sovereign power to bear on citizens at large" (internal quotation marks and citations omitted)).

b. Plaintiffs also err in their alternative contention that neither Congress nor the President could enact a vaccine requirement for federal employees because doing so "infringes the local health and police powers reserved to the States under the Tenth Amendment." Br. 43. As the district court explained, "[t]he executive power to manage federal officers is clearly conferred in the Constitution," and "[t]he federal government's exercise of its enumerated powers does not infringe on powers reserved to the states." A9. Plaintiffs are wrong to contend that any federal action addressing a general subject upon which states may also have power to regulate is unconstitutional. *See, e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981) ("This Court has upheld as constitutional any number of federal statutes enacted under the commerce power that pre-empt particular exercises of state police power."). The Executive Order does not regulate "the States as States"—it merely imposes conditions on individuals who are employed by the federal government—and there is accordingly "no Tenth Amendment impediment." *Id.* at 286; *see also Brnovich*, 2022 WL 252396, at *12 (rejecting a state's federalism-based

challenge to the Executive Order); *Oklahoma*, 2021 WL 6126230, at *12 (similar, with respect to military vaccination requirement).

It is irrelevant that plaintiff Fleming resides in a state whose governor has allegedly "bann[ed] the development or use of a COVID-19 passport scheme." Br. 43-44. Ms. Fleming has chosen to work for the federal government, and she is thus properly subject to the President's constitutional and statutory authority to prescribe regulations governing federal employment. Indeed, the Supreme Court recently stayed injunctions that states had obtained against an HHS rule requiring that certain health care facilities ensure their staff are vaccinated against COVID-19, subject to medical and religious exemptions. *See Biden v. Missouri*, 142 S. Ct. 647. Just as the Centers for Medicare & Medicaid Services may properly condition funding upon compliance with a vaccination requirement, the government acting in its proprietary role as an employer may condition the benefit of continued employment on compliance with a vaccination requirement.

Nor is it relevant that there has been "a deep divide . . . between the States" (Br. 35) about how to respond to the COVID-19 pandemic. Regardless of how states decide to exercise (or decline to exercise) their independent police powers in response to the pandemic, the President is not foreclosed from exercising his broad authority to require that the federal workforce be vaccinated as a condition of continued employment with the federal government. To the extent there is any conflict between the employment conditions the President imposes and state law, "the Supremacy

Clause of the Constitution requires that the federal law preempt the state law." *Petersburg Cellular P'ship v. Board of Suppliers of Nottoway Cty.*, 205 F.3d 688, 701 (4th Cir. 2000).[11]

B. Plaintiffs Have Not Established Any Irreparable Injury

Because plaintiffs cannot establish a likelihood of success on the merits, they are not entitled to a preliminary injunction. *See Henderson ex rel. NLRB v. Bluefield Hosp. Co.*, 902 F.3d 432, 439 (4th Cir. 2018) (explaining that all preliminary-injunction factors must be satisfied to obtain relief). But the district court also properly concluded that plaintiffs have not satisfied the irreparable-injury requirement, which requires "a clear showing that [the movant] will suffer harm that is neither remote nor speculative, but actual and imminent," and that "cannot be fully rectified by the final judgment after trial." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 (4th Cir. 2019) (quotation marks omitted).

[11] Plaintiffs' reliance (Br. 45) on *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), is misplaced. That case involved a First Amendment challenge to a statute barring federal government employees from accepting compensation for making speeches and writing articles. *See id.* at 457. This case presents no First Amendment issue, and to the extent plaintiffs rely on the case for the broader argument that government action must be adequately justified by government interests, *see* Br. 45-46, the Executive Order was issued to "ensur[e] the health and safety of the Federal workforce and the efficiency of the civil service" in the face of a "highly contagious" variant of COVID-19 that had recently "led to a rapid rise in cases and hospitalizations," and it is premised on the CDC's expert judgment that "the best way to slow the spread of COVID-19" "is to be vaccinated," 86 Fed. Reg. at 50,989.

As the district court recognized, joining numerous other courts that have denied preliminary injunctions against the Executive Order, plaintiffs "have not shown that they are likely to suffer irreparable harm." A13; *see, e.g.*, *Church v. Biden*, No. 21-2815, 2021 WL 5179215, at *13-15 (D.D.C. Nov. 8, 2021); *Altschuld v. Raimondo*, No. 21-cv-2779, 2021 WL 6113563, at *3-5 (D.D.C. Nov. 8, 2021); *Smith*, 2021 WL 5195688, at *8-9. The most severe penalty that either plaintiff could ultimately face for refusing to become vaccinated is loss of employment, which the Supreme Court has held does not constitute irreparable harm absent a "genuinely extraordinary situation." *Sampson*, 415 U.S. at 92 & n.68. As the district court reasoned, even assuming plaintiffs ultimately prevail in this litigation, and assuming they "are terminated before they obtain a favorable judgment, their injury can be fully redressed through reinstatement, backpay, and expungement of any mark of misconduct." A14. Depending on the claims asserted by a discharged employee and the nature of her employment, she may be able to pursue reinstatement or back pay in an appropriate forum pursuant to some combination of the CSRA, Title VII of the Civil Rights Act, the Rehabilitation Act, and the Back Pay Act. Plaintiffs' alleged injuries can therefore "be fully rectified" if they prevail in the CSRA process. *Mountain Valley*, 915 F.3d at 216.

Nor is plaintiffs' asserted injury—which is "terminat[ion]," Br. 49— "actual and imminent." *Mountain Valley*, 915 F.3d at 216. The Task Force guidance sets forth a procedure for progressive discipline that begins with a period of education and

counseling, possibly followed by a letter of reprimand, then suspension, and then, if noncompliance continues, additional discipline up to and including potential removal from the federal service. *See Enforcement FAQs*. Even when discipline has been initiated, plaintiffs would not necessarily be discharged from their federal employment. Agencies may impose a range of disciplinary measures for refusing to comply with vaccination requirements, and any adverse action would be subject to a host of procedural protections. *See generally* 5 C.F.R. § 752.404 (providing an employee 30 days' advance written notice, an opportunity to respond orally and in writing, and a written decision setting forth the basis for removal). Disciplinary proceedings are necessarily fact- and context-specific, and the mere "possibility" that plaintiffs would be terminated after the proceedings conclude does not support a preliminary injunction. *Di Biase*, 872 F.3d at 235. Plaintiffs could also seek to avoid discipline by requesting exceptions from the vaccination requirement if they have medical issues or sincere religious objections. *See Exception FAQs*; *Di Biase*, 872 F.3d at 235 ("[A] preliminary injunction is not warranted where . . . the moving parties have not shown that they availed themselves of opportunities to avoid the injuries of which they now complain.").

Plaintiffs suggest this is a "genuinely extraordinary" employment case in which irreparable injury exists, *Sampson*, 415 U.S. at 92 n.68, because of "the sheer number of" federal employees affected by the Executive Order, Br. 31. But the total number of individuals subject to a government policy has no bearing on whether plaintiffs

could be retroactively compensated for alleged injuries from that policy. This is not a class action, and plaintiffs cannot establish irreparable harm to themselves based on speculation that others may suffer similar injuries (much less injuries that would likewise be retroactively compensable). *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (requiring the movant to show "that *he* is likely to suffer irreparable harm in the absence of preliminary relief" (emphasis added)). Plaintiffs also speculate that (after some hypothetical, future disciplinary proceeding) they may be required to disclose on job applications "that they were terminated from their previous employment," Br. 49, but this Court has held that "damage to [one's] reputation during the interim between his discharge and the decision of the board reviewing his discharge . . . does not rise to the *Sampson* level of irreparable injury justifying an injunction," *Guerra v. Scruggs*, 942 F.2d 270, 274-75 (4th Cir. 1991). The district court properly rejected plaintiffs' contention that they are currently suffering, or are in imminent danger of suffering, irreparable injury.

C. The Public Interest And The Balance Of Harms Favor The Government

The district court also correctly found that "[t]he balance of the equities and the public interest weigh heavily against granting a preliminary injunction." A15; *see also Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that these factors "merge" when relief is sought against the government).

As the district court recognized, "[t]he effective administration of the federal government, in which Defendants and the public have a deep and abiding interest, would likely be hampered by an injunction." A15. The COVID-19 pandemic has interfered with numerous aspects of the government's work, forcing office closures, hampering employees' access to paper-based records, limiting official travel, and causing staffing shortages. *See Top Challenges Facing Federal Agencies*. Requiring employees to become vaccinated against COVID-19, with exceptions only as required by law, reduces disruptions caused by worker absences associated with illness or exposure to the virus, generating meaningful gains in efficiency. That is why private employers throughout the United States have implemented requirements that their employees be vaccinated against COVID-19. *See supra* pp. 5-6. Indeed, some federal courts have required that their staff be vaccinated. *See, e.g.*, U.S. Court of Appeals for the Fourth Circuit, COVID-19 Building Requirements (Dec. 22, 2021), https://go.usa.gov/xtmzw (vaccination or regular testing); General Order 21-009 (7th Cir. Aug. 25, 2021), https://go.usa.gov/xtEM2 (vaccination absent a legally required exception). The injunction that plaintiffs request would leave the Executive Branch uniquely disabled among employers to take measures to ensure the safety and efficiency of its workforce and workplaces and to move toward the resumption of normal, pre-pandemic operations.

A preliminary injunction would also undermine the elaborate and exclusive scheme Congress established for handling employment disputes. As discussed above,

the CSRA creates comprehensive procedures for work-related controversies involving most federal civil servants. *See supra* Part I.A. Granting preliminary relief here would "seriously undermine[]" Congress's "objective of creating an integrated scheme of review," "reintroduc[ing] the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid." *Elgin*, 567 U.S. at 14; *see also Garcia v. United States*, 680 F.2d 29, 32 (5th Cir. 1982) (finding it "quite clear" that a preliminary injunction allowing a federal employee to circumvent administrative remedies "would have a far more disruptive effect on the administrative processes established by the government to handle cases such as these than would, on balance, be the burden on the employee resulting from a refusal to grant the injunction").

Plaintiffs suggest that a preliminary injunction would not disrupt federal operations because mitigation measures other than vaccination, such as "mask wearing, social distancing, deep cleaning, and ventilation," would remain available. Br. 49; *see also, e.g.*, Br. 5 (stating that some states have given their employees a choice between vaccination and regular testing). But plaintiffs fail to mention that their complaint *also* seeks to enjoin "burdensome testing requirements . . . , such as weekly PCR tests," and the "singling . . . out" of plaintiffs "to wear a mask . . . on account of their not providing their vaccination status." A91. Plaintiffs' suggestion that the government adopt alternative mitigation measures is also ironic because the complaint seeks to bar the government from "collect[ing]" "documents . . . related to" federal

employees' vaccination status, A91, which the government needs to properly implement safety protocols. *See, e.g.*, Task Force, COVID-19 Workplace Safety: Agency Model Safety Principles (Sept. 13, 2021), https://go.usa.gov/xtmtP (different safety recommendations for vaccinated and unvaccinated employees with respect to masking, physical distancing, COVID-19 testing, and official travel). More fundamentally, the Executive Order is premised on the CDC's expert judgment that "the best way" for federal employees to protect themselves (and, by extension, the efficiency of the civil service), as well as "their co-workers and members of the public[,] . . . is to be vaccinated." 86 Fed. Reg. at 50,989. The United States has endured the COVID-19 pandemic for nearly two years, at great human and economic cost, and experts have determined that safe and effective vaccines are the best way to end the disruptions that the pandemic has inflicted on federal workplaces across the country.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed, and the Court should remand with instructions to dismiss the case for lack of jurisdiction.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

EREK L. BARRON
United States Attorney

MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
LOWELL V. STURGILL JR.

s/ Sarah Carroll
SARAH CARROLL
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division, Room 7511
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 514-4027
sarah.w.carroll@usdoj.gov

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,764 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Sarah Carroll
Sarah Carroll

ADDENDUM

TABLE OF CONTENTS

5 U.S.C. § 3301

§ 3301. Civil service; generally

The President may—

(1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;

(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and

(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

5 U.S.C. § 3302

§ 3302. Competitive service; rules

The President may prescribe rules governing the competitive service. 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.

5 U.S.C. § 7301

§ 7301. Presidential regulations

The President may prescribe regulations for the conduct of employees in the executive branch.