No. 22-40043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING, INCORPORATED; RAYMOND A. BEEBE, JR.; JOHN ARMBRUST; et al,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; DEPARTMENT OF TRANSPORTATION; JANET YELLEN, in her official as Secretary of Treasury; et al,

Defendants-Appellants.

EMERGENCY MOTION UNDER CIRCUIT RULE 27.3
FOR A STAY PENDING APPEAL

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INTRODUCTION AND SUMMARY

The illness and mortality caused by COVID-19 have led to serious disruptions for American employers, and the federal government is no exception. Recognizing that vaccination lowers the risk of infection, serious disease, and death, many private employers have responded by requiring their employees be vaccinated against COVID-19. Likewise, exercising his constitutional and statutory authorities to oversee the Executive Branch, President Biden issued an Executive Order that directs federal agencies to require, "consistent with applicable law," that their employees be vaccinated against COVID-19, subject to legally required exceptions. *See* Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021). Just as private CEOs have wide latitude to impose requirements on their employees, the President has broad authority under Article II and numerous statutes to impose requirements on federal employees. That authority extends to the requirement at issue here, which the President reasonably found was necessary to "ensur[e] the health and safety of the Federal workforce and the efficiency of the civil service." *Id.* at 50,989.

A dozen district courts have denied requests to enjoin the Executive Order.[1] The district court here, however, issued a nationwide preliminary injunction against

[1] *See Brnovich v. Biden*, No. CV-21-1568, 2022 WL 252396 (D. Ariz. Jan. 27, 2022); *Oklahoma v. Biden*, No. CIV-21-1136, 2021 WL 6126230 (W.D. Okla. Dec. 28, 2021); *Brass v. Biden*, No. 21-cv-2778, 2021 WL 6498143 (D. Colo. Dec. 23, 2021) (report and recommendation), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14, 2022); *AFGE Local 501 v. Biden*, No. 21-23828-CIV, ECF No. 33 (S.D. Fla. Dec. 22, 2021); *Donovan v. Vance*,

implementing or enforcing the Executive Order, essentially overriding its sister courts' unanimous contrary decisions.

The injunction rests on numerous errors and should be immediately stayed pending appeal or, at minimum, substantially narrowed. The district court lacked jurisdiction because Congress has required that covered federal employees raise their workplace grievances only through the Civil Service Reform Act (CSRA). Moreover, as every other court to address this issue has recognized, the President has broad constitutional and statutory authority to impose conditions on federal employment. The district court erred in grafting atextual limitations onto those broad authorities based on different language in statutes addressing a different subject—government regulation of *private* employers.

Equitable factors also overwhelmingly favor a stay. The nationwide injunction usurps the President's authority to supervise the federal workforce and impairs the Executive Branch's operations, including by halting the process for considering requests for religious and medical exceptions from the vaccination requirement. Moreover, it irreparably harms the government's interests—shared by the public—in

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No. 21-CV-5148, 2021 WL 5979250 (E.D. Wash. Dec. 17, 2021); *McCray v. Biden*, No. 21-2882, 2021 WL 5823801 (D.D.C. Dec. 7, 2021); *Navy Seal 1 v. Biden*, No. 21-cv-2429, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021); *Rydie v. Biden*, No. 21-2696, 2021 WL 5416545 (D. Md. Nov. 19, 2021); *Altschuld v. Raimondo*, No. 21-cv-2779, 2021 WL 6113563 (D.D.C. Nov. 8, 2021); *Church v. Biden*, No. 21-2815, 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021); *Foley v. Biden*, No. 21-cv-1098, ECF No. 18 (N.D. Tex. Oct. 6, 2021).

promoting efficient government operations and resolving federal employment disputes through the processes Congress prescribed. These harms outweigh any of the quintessentially *reparable* harms that plaintiffs allege they may suffer without a preliminary injunction, such as workplace discipline.

At minimum, the Court should stay the injunction's nationwide applicability, limiting its scope to individuals who are properly before the district court and remedies that are necessary to redress those individuals' alleged injuries.

STATEMENT

A. The COVID-19 Vaccination Requirement For Federal Employees

The COVID-19 pandemic has killed nearly 900,000 Americans and devastated many businesses. Outbreaks among employees have severely disrupted companies' operations, and businesses have been forced to close temporarily or permanently. To reduce these disruptions, many private employers have required that their employees be vaccinated against COVID-19. As of fall 2021, thousands of hospitals, colleges, universities, and businesses had imposed employee vaccination requirements, including some of the nation's largest and most prominent companies. The White House, *White House Report: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy* 9, 12 (Oct. 2021), https://go.usa.gov/xtNTB (*Vaccination Report*).

The federal government has not been spared from COVID-19-related workplace disruptions. The pandemic has forced office closures, limited access to

paper-based records, interrupted official travel, and caused staffing shortages. *See* Pandemic Response Accountability Comm., *Top Challenges Facing Federal Agencies: COVID-19 Emergency Relief and Response Efforts* (June 2020), https://go.usa.gov/xefTb. To mitigate these disruptions, on September 9, 2021, President Biden issued Executive Order 14043, which announced COVID-19 vaccination requirements for federal civilian employees. *See* 86 Fed. Reg. 50,989-90. The Order is based on a finding, informed by "public health guidance," that COVID-19 vaccination is "necessary" "to promote the health and safety of the Federal workforce and the efficiency of the civil service." *Id.* at 50,989.

Federal guidance on implementing the Order recognizes that employees may be legally entitled to religious or medical exceptions, and it advises agencies to follow their usual processes for evaluating accommodation requests. Safer Federal Workforce Task Force, *Vaccinations*, https://go.usa.gov/xe5aC (last visited Feb. 4, 2022) (*Vaccination FAQs*). If an employee is not legally entitled to an exception and still refuses to be vaccinated (or to disclose her vaccination status), the guidance recommends progressive-discipline procedures that include education and counseling, suspension, and (if necessary) additional discipline up to and including removal from federal employment. *Id.* Employees were required to be fully vaccinated by November 22, 2021, *id.*, though agencies were later instructed to postpone most discipline until early 2022. The guidance states that employees should not be

disciplined while their exception requests are pending and should be given two weeks after an exception request's denial to receive the first (or only) vaccine dose. *Id.*

B. Prior Proceedings

1. Plaintiffs—a claimed "membership organization" called Feds for Medical Freedom (FMF), a union bargaining unit, a federal contractor, and 62 individual FMF members—filed suit to enjoin the implementation and enforcement of Executive Order 14043.[2]

2. The district court granted plaintiffs' motion for a preliminary injunction on January 21, 2022. The court rejected the government's arguments that it lacked jurisdiction over plaintiffs' claims because they are precluded by the CSRA and are unripe. The court recognized that the CSRA bars federal employees from challenging disciplinary action in district court but concluded that this bar did not apply because plaintiffs sued *before* suffering adverse employment action cognizable under the CSRA, Add. 6, and that plaintiffs would be denied meaningful review if they could not bring a pre-enforcement challenge, Add. 7. The court recognized that the claims of plaintiffs who have requested exceptions are "at least arguably unripe" but concluded that plaintiffs who have *not* requested exceptions have ripe claims because the court believed they "face an inevitable firing." Add. 7-8.

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[2] Plaintiffs also sought to enjoin Executive Order 14042, which applies to federal contractors, but the district court concluded that an existing injunction "protects the plaintiffs from imminent harm." Add. 1.

Despite acknowledging that adverse employment actions, including termination, typically are not irreparable harm, the court concluded that plaintiffs alleged irreparable injuries because they could be "bar[red]" "from significant employment opportunities" and face a "Hobson's choice" between vaccination and discipline. Add. 10.

The district court concluded that the President likely lacked authority to issue the Executive Order, holding that none of the federal statutes broadly authorizing the President to set the terms and conditions of federal employment provided authority to require government employees to be vaccinated. Add. 11-13 (discussing 5 U.S.C. §§ 3301, 3302, 7301). In so doing, the court relied heavily on the Supreme Court's recent decision to stay a vaccination-related rule adopted by the Occupational Safety and Health Administration for *private* employers. Add. 14. The court also held that the Executive Order could not be upheld as an exercise of the President's Article II authority. Add. 16.

The court next found that the balance of equities and the public interest favored relief, concluding that a preliminary injunction would not "have any serious detrimental effect" on the government's fight against COVID-19 and that "[s]topping the spread of COVID-19 will not be achieved by overbroad policies like the federal-worker mandate." Add. 18-19.

Finally, despite acknowledging the serious "equitable and constitutional questions raised by the rise of nationwide injunctions," Add. 19 (quotation marks

omitted), the court concluded that "tailoring relief" would be too difficult because FMF allegedly "has more than 6,000" widely dispersed members, Add. 20.

3. The government filed a notice of appeal later that day and, on January 28, asked the district court to stay its preliminary injunction pending appeal. As of this filing, the district court has not acted on the government's request. *See* Fed. R. App. P. 8(a)(1).

ARGUMENT

In determining whether to grant a stay, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quotation marks omitted). Each of these factors supports granting a stay.

I. The District Court Lacks Jurisdiction

The government is likely to succeed in demonstrating on appeal that the district court lacks jurisdiction because the CSRA provides "the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government." *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991); *see* 5 U.S.C. §§ 7512, 7513(d), 7703(b)(1) ("adverse actions" reviewable by Merit Systems Protection Board and Federal Circuit); *id.* §§ 1214(a)(3), 2302 (review scheme for less severe "personnel action[s]"). The Supreme Court has concluded that,

"[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions," Congress "intended to deny such employees an additional avenue of review in district court." *Elgin v. Department of the Treasury*, 567 U.S. 1, 11-12 (2012).

The district court excused plaintiffs from complying with the CSRA because they have not yet been disciplined for violating the vaccination requirement. Add. 6. That analysis is backwards—the CSRA precludes even programmatic challenges to broadly applicable policies, *Elgin*, 567 U.S. at 7-8, and plaintiffs' lack of a ripe claim under the CSRA does not mean they can circumvent the scheme Congress established, *see, e.g.*, *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.) ("[W]hat you get under the CSRA is what you get."). Although the district court mistakenly believed the D.C. Circuit permits "pre-enforcement challenges to government-wide policies" notwithstanding the CSRA, Add. 6 n.3, that court has long held that the CSRA prohibits district-court resolution of "systemwide challenge[s] to an agency policy interpreting a statute." *American Fed'n of Gov't Emps. v. Secretary of the Air Force*, 716 F.3d 633, 639 (D.C. Cir. 2013) (quotation marks omitted). Indeed, the alternative scheme the district court contemplated—permitting federal employees to bring pre-enforcement challenges to policies that might result in discipline, while challenges to actual employment actions based on the policies continued to arise under the CSRA—"would reintroduce the very potential for inconsistent

decisionmaking and duplicative judicial review that the CSRA was designed to avoid." *Elgin*, 567 U.S. at 14.

The district court also erred in concluding that adhering to the CSRA would deprive plaintiffs of "meaningful review." Add. 7. The CSRA "merely directs that judicial review shall occur in the Federal Circuit," which is "fully capable of providing meaningful review." *Elgin*, 567 U.S. at 10. The statutory scheme provides mechanisms to compensate wrongfully disciplined federal employees through reinstatement, back pay, and other remedies.

II. Plaintiffs' Challenges To The Vaccination Requirement Are Meritless

Even assuming the district court had jurisdiction, the court erred in concluding that plaintiffs were likely to succeed on the merits of their claim that the President lacked authority to promulgate Executive Order 14043. Add. 11-16.

A. The Constitution vests in the President "[t]he executive Power" to "take Care that the Laws be faithfully executed." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1, cl. 1,; *id.* § 3). This includes "general administrative control of those executing the laws." *Id.* at 2197-98 (quoting *Myers v. United States*, 272 U.S. 52, 163-64 (1926)). The Supreme Court has "[t]ime and again" emphasized the government's "wide latitude" in managing federal employees. *NASA v. Nelson*, 562 U.S. 134, 148, 154 (2011) (quotation marks omitted). Accordingly, the President may "prescribe the qualifications of [Executive Branch] employees and . . .

attach conditions to their employment." *Friedman v. Schwellenbach*, 159 F.2d 22, 24 (D.C. Cir. 1946).

Congress has enacted statutes confirming the President's broad power to regulate the federal workforce. The President has express authority to: "prescribe regulations for the conduct of employees in the executive branch," 5 U.S.C. § 7301; "prescribe rules governing the competitive service," *id.* § 3302; and "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 statutes reinforce the President's broad authority to ensure "the efficient operation of the Executive Branch." *Old Dominion Branch No. 694, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 273 n.5 (1974); *see Crandon v. United States*, 494 U.S. 152, 180, 183 (1990) (Scalia, J., concurring in the judgment) (noting "the President's discretion-laden power" to regulate the Executive Branch under 5 U.S.C. § 7301).

These constitutional and statutory authorities have served as the basis for numerous familiar conditions on federal employment. Past Presidents have, for example, required that federal employees:

- abstain from using illegal drugs either on or off duty, Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 17, 1986); *see National Treasury Emps. Union v. Bush*, 891 F.2d 99, 101 (5th Cir. 1989) (upholding this Executive Order);

- refrain from "hold[ing] financial interests that conflict with the conscientious performance of duty" and from "engag[ing] in outside employment or activities . . . that conflict with official Government duties and responsibilities,"

Exec. Order No. 12674, 54 Fed. Reg. 15,159 (Apr. 14, 1989); *see* Exec. Order No. 9 (Jan. 17, 1873) (similar restrictions on other employment);

- not take part in "influenc[ing] the minds or votes of others" during partisan elections, Circular, Dep't of State (Mar. 20, 1841), *reprinted in* U.S. Civil Serv. Comm'n, *History of the Federal Civil Service: 1789 to the Present* 148-49 (U.S. Gov't Printing Office 1941); *see* Exec. Order No. 642 (June 3, 1907) (similar);

- conduct the "internal business" of a labor organization only "during the non-duty hours," Exec. Order No. 11491, 34 Fed. Reg. 17,605, 17,614 (Oct. 31, 1969); *see Old Dominion Branch No. 694*, 418 U.S. at 274 n.5; and

- assign title to any invention that "bear[s] a direct relation to or [is] made in consequence of the official duties of the [federal-employee] inventor," Exec. Order No. 10096, 15 Fed. Reg. 389, 389 (Jan. 25, 1950); *see Kaplan v. Corcoran*, 545 F.2d 1073, 1077 (7th Cir. 1976) (upholding this Executive Order).

The requirement that federal employees be vaccinated against COVID-19 unless legally entitled to an exception—in the interest of "promot[ing] the health and safety of the Federal workforce and the efficiency of the civil service," 86 Fed. Reg. 50,989—is likewise within the President's authority. A wide range of private companies have sought to reduce workplace disruptions from COVID-19 by requiring their employees to be vaccinated. *See Vaccination Report* 11-13. The Executive Order reflects the same reasonable judgment by the President in his role as chief executive officer of the Executive Branch. *See Nelson*, 562 U.S. at 148-50. Multiple courts have therefore recognized the President's ample authority to issue this Executive Order. *Brnovich*, 2022 WL 252396, at *12; *Brass*, 2021 WL 6498143, at *3; *Oklahoma*, 2021 WL 6126230, at *10; *Rydie*, 2021 WL 5416545, at *3.

B. The district court erred in concluding that the Executive Order exceeds the President's authority.

This Court should reject the district court's crabbed understanding of the President's Article II powers. Add. 15-16. Presidents have routinely issued executive orders regulating federal employees' on- and off-duty conduct, *see supra* pp. 10-11, and the Supreme Court has repeatedly acknowledged the President's broad authority to establish and enforce conditions on federal employment, *see, e.g.*, *Nelson*, 562 U.S. at 148 (discussing the government's role as "'proprietor' and manager of its 'internal operation[s]'").

The district court erred in concluding that 5 U.S.C. § 7301, which states that "[t]he President may prescribe regulations for the conduct of employees in the executive branch," extends only to "*workplace* conduct." Add. 13. That is not what the statute says. Had Congress meant to limit this broad grant of authority to regulate federal employment to promote the efficiency of the service in some way analogous to the limit to "occupational" safety in private workplaces under the Occupational Safety and Health Act, *see NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam)—"it knew how to say so." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018). The district court violated the fundamental canon that courts cannot add language limiting the reach of facially broad statutes. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

In any event, the Executive Order does regulate "workplace conduct," reflecting the President's judgment about how best to promote the efficiency of the federal civil service. The requirement that federal employees be vaccinated is a condition of their employment designed to protect their own and their colleagues' ability to perform their jobs. The fact that such direct regulation of federal employment may also have some incidental effect on, or connection to, off-duty conduct does not detract from its employment focus. Moreover, even with respect to the off-duty effects, the Order draws on a historical tradition of presidential regulation of Executive Branch employees' on- and off-duty conduct, reflecting the commonsense reality that off-duty conduct can have significant implications for employees' workplaces. *See, e.g.*, *Bonet v. U.S. Postal Serv.*, 712 F.2d 213, 216 (5th Cir. 1983) (per curiam) (upholding discharge of federal employee based on off-duty misconduct). Just as President Reagan concluded that federal employees' off-duty use of illegal drugs could negatively impact their workplaces, President Biden's Executive Order reflects that contracting a contagious virus has obvious implications for workplace efficiency. An employee may be temporarily incapacitated from working and may expose his colleagues, potentially rendering them ill or requiring them to quarantine. The pandemic has also required the government to fundamentally shift its operations, forcing office closures and limiting official travel, and the vaccination requirement is a critical component of the government's strategy to return to fully normal operations.

The district court likewise erred in concluding that 5 U.S.C. §§ 3301 and 3302 do not support the Executive Order. The court's cursory analysis of section 3301 relied principally on recent cases concerning whether the federal government can require federal contractors to vaccinate their employees—not the federal government's authority over its own employees. Add. 12. Contrary to the court's apparent belief, *see id.*, the contractor cases have nothing to do with 5 U.S.C. § 3301; they concern section 3301 of *Title 41* (among other provisions). *See, e.g.*, *Kentucky v. Biden*, No. 21-cv-55, 2021 WL 5587446, at *8 (E.D. Ky. Nov. 30, 2021). The court noted that section 3301 refers to "regulations for the admission of individuals into the civil service," while plaintiffs are "current federal employees." Add. 12. But the Executive Order applies equally to new entrants to federal service, *see Vaccination FAQs*, and courts have recognized that section 3301—like section 7301—"delegate[s] broad authority to the President to establish the qualifications and conditions of employment for civil servants within the executive branch." *American Fed'n of Gov't Emps. v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976).

With respect to section 3302, the district court stated that the provision's grant of authority to "prescribe rules governing the competitive service" "sounds broad," but viewed the next sentence, which identifies particular matters that the rules "shall" address, as "quite limited." Add. 12. That reasoning is unsound. By *mandating* that the President address particular matters under section 3302, Congress did not impliedly *prohibit* him from addressing others. Indeed, the district court's reasoning

would render the first sentence superfluous. *Cf. Alexander v. Verizon Wireless Servs., LLC*, 875 F.3d 243, 255 (5th Cir. 2017).

In short, the President, as head of the federal workforce, had authority to establish the same vaccination requirement that private employers have reasonably imposed to prevent workplace disruptions caused by COVID-19.

III. The Remaining Factors Overwhelmingly Favor A Stay Pending Appeal

The district court's nationwide injunction irreparably harms the government's—and the public's—interest in stemming the spread of a deadly, highly contagious disease within the federal workforce. It imposes significant unrecoverable costs on federal agencies by substantially increasing the likelihood of COVID-19-related absences among unvaccinated employees due to illness or the need to quarantine following viral exposure. Add. 23-24 ¶¶ 8-10. "[H]undreds of thousands of [federal employees] are not vaccinated," and "tens of thousands do not have a pending or approved request for an exception." Add. 23 ¶ 5. In addition, "over 20,000 federal civilian employees are hired in a typical month." *Id.* ¶ 6. The injunction places new and existing employees at greater risk of becoming seriously ill and unable to work. *See* CDC, *COVID-19 Vaccines Are Effective*, https://go.usa.gov/xtEDp (last updated Dec. 23, 2021); Add. 22-23 ¶ 4.

The injunction impedes the efficiency of federal operations in additional ways. As noted, the COVID-19 pandemic has significantly interfered with government operations. *See supra* pp. 3-4. Numerous agencies are in a maximum-telework posture

and have developed detailed plans to return employees to physical workplaces. Leaving the injunction in place delays reentry as agencies must revise the plans to account for more unvaccinated employees. Add. 24-25 ¶¶ 12-16. It also forces agencies to develop and implement alternative COVID-19 safety protocols, potentially renegotiate labor agreements regarding such protocols, and divert scarce resources away from core mission-related activities—all to the detriment of taxpayers and the public at large. Add. 23-27 ¶¶ 7, 9, 11, 14-16, 20; *see Church*, 2021 WL 5179215, at *19 (enjoining Executive Order could "prolong[] remote work, imped[e] public access to government benefits and records, and slow[] governmental programs"). Like many private employers, the federal government has determined that an employee-vaccination requirement will increase operational efficiency, but the injunction leaves it unable to implement that judgment. These disruptions cannot be remedied after the fact. And they are especially significant because they represent "not merely an erroneous adjudication of a lawsuit between private citizens, but an improper intrusion by a federal court into the workings of a coordinate branch of the Government." *INS v. Legalization Assistance Project of L.A. Cty. Fed'n of Labor*, 510 U.S. 1301, 1305-06 (1993) (O'Connor, J., in chambers) (staying district court injunction).

The injunction also impairs the Executive Branch's systems for accommodating employees' religious beliefs and medical conditions. Agencies have expended significant resources preparing to process employees' requests for individualized exceptions to the vaccination requirement, as federal law requires. Add. 26 ¶ 17.

Tens of thousands of these requests are pending, and agencies were adjudicating them when the injunction was issued. *Id.* Halting these adjudications leaves agencies uncertain about what percentage of their workforce might be deemed legally entitled to remain unvaccinated and leaves employees with pending requests uncertain about their status if the government prevails on appeal, with no apparent benefit to plaintiffs. The injunction also "seriously undermines" Congress's "objective of creating an integrated scheme of review" in the CSRA, "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).

These harms to the government and the public unquestionably outweigh any possible harm to plaintiffs. Plaintiffs must show a "significant threat of injury" that is "imminent" and not retroactively compensable. *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). Plaintiffs cannot carry that burden here; indeed, many plaintiffs had pending exception requests when the injunction was granted. Even if one plaintiff could show an imminent threat of discharge, it is practically "universal jurisprudence" that "there is an adequate remedy for individual wrongful discharge after the fact": "reinstatement and back pay." *Garcia*, 680 F.2d at 31-32; *see Sampson v. Murray*, 415 U.S. 61, 91, 92 n.68 (1974).

The district court acknowledged these principles but concluded that plaintiffs would be irreparably harmed if barred "from significant employment opportunities in

their chosen profession." Add. 10. The sole authority the court cited, *Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017), involved a plaintiff who was threatened with complete exclusion from "the banking industry." In contrast, if plaintiffs here do not receive exceptions, choose to remain unvaccinated, and are subsequently discharged, they can seek other, similar employment while simultaneously challenging their discharge under the CSRA. *Cf. Sampson*, 415 U.S. at 92 n.68 ("difficulties in immediately obtaining other employment" are not irreparable harm).

Relying on this Court's decision in *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021), the district court also concluded that plaintiffs suffered irreparable injury because they faced "a Hobson's choice." Add. 10. But plaintiffs in this case do not claim a violation of their "liberty interests" or other "constitutional freedoms," *BST Holdings*, 17 F.4th at 618; they allege only that the Executive Order exceeds the President's authority. Moreover, while *BST Holdings* involved private employees, this Court has made clear that *federal employees* are not irreparably harmed by job loss given the availability of remedies under the CSRA. *See, e.g.*, *Garcia*, 680 F.2d at 31-32.

IV. Any Relief Must Be More Narrowly Tailored

If the Court declines to stay the entire injunction, it should at least narrow it. "[S]tanding is not dispensed in gross," and plaintiffs must establish standing "separately for each form of relief sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation marks omitted). A "remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

Those constitutional limitations are reinforced by principles of equity, including that injunctive relief must "be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

The district court made no finding that nationwide relief was necessary to redress plaintiffs' alleged injuries. Nor could it; plaintiffs have no cognizable interest in whether *other* federal employees may remain unvaccinated. The court's view that it would be "unwieldy" to limit relief to plaintiffs because FMF allegedly has "more than 6,000 members," Add. 20, provided no license for the court to exceed the bounds of its Article III jurisdiction or its equitable authority. The principle that a remedy must be no broader than necessary to redress the plaintiff's injury, *Gill*, 138 S. Ct. at 1934, does not include an exception for convenience. Nor did the court explain why relief tailored to readily identifiable members of FMF would be unworkable: the court could easily direct FMF to notify the government of its members' names and employing agencies.

As for the court's view that tailored relief would be unworkable because FMF "is actively adding new members," Add. 20, it is far from clear that FMF has standing to litigate on behalf of so-called "members" who have merely submitted a name and email address through its website.[3] *See Funeral Consumers All., Inc. v. Service Corp. Int'l*,

[3] *See* Feds for Medical Freedom, *Become a Member*, https://feds4medfreedom.org/joinus (last visited Feb. 4, 2022).

695 F.3d 330, 344 n.9 (5th Cir. 2012) (associational standing requires "indicia of membership," *i.e.*, a showing that "members elect leadership, serve as the organization's leadership, and finance the organization's activities, including the case's litigation costs"). And even if FMF could establish associational standing, neither the district court nor plaintiffs cited any authority suggesting an organizational plaintiff can obtain relief for members who did not join until suit was filed. The court's practicality concern would more appropriately be addressed by granting relief only to individuals who possessed bona fide indicia of FMF membership when FMF filed its complaint.

The injunction also casts in stark relief the "toll" that nationwide injunctions have "on the federal court system." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring). Nationwide injunctions "prevent[] legal questions from percolating through the federal courts," *id.*, and they impede "the government's hope of implementing any new policy"—a nationwide injunction anywhere freezes the challenged action everywhere, *Department of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring). The government must prevail in every suit, while any plaintiff can derail a nationwide policy with a single victory. *See id.* at 600-01.

The government has successfully opposed motions to enjoin Executive Order 14043 in twelve other district courts, including several that specifically rejected arguments that the Order exceeds the President's authority. Indeed, at least one

named plaintiff and more than a dozen FMF members identified in the complaint filed this suit only *after* another court denied them preliminary relief. *Compare* Dkt. 1, at 1-4, 28-32, *with* Complaint at 1, *Altschuld v. Raimondo*, No. 21-cv-2779 (D.D.C. Oct. 20, 2021). This Court recently held that "[p]rinciples of judicial restraint" precluded a nationwide injunction against vaccination requirements for workers in federally-funded health care facilities, *Louisiana v. Becerra*, 20 F.4th 260, 263-64 (5th Cir. 2021); the district court exercised no restraint here in granting a nationwide injunction that essentially nullified a dozen other district court decisions.

The nationwide injunction likewise cannot be squared with the district court's recognition that employees with pending exemption requests have "arguably unripe" claims. Add. 7. The court lacked authority to grant relief to plaintiffs whose claims of injury rest on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (quotation marks omitted); *see, e.g.*, *Donovan*, 2021 WL 5979250, at *4-5 (finding similar claims unripe); *Church*, 2021 WL 5179215, at *8-9 (same). In doing so, the court transgressed fundamental Article III limitations.

The Court should also stay the injunction insofar as it exceeds what is necessary to redress plaintiffs' alleged injuries. Plaintiffs would not be injured by allowing the government to continue processing religious or medical exception requests, and this Court should permit those processes to resume during this appeal.

CONCLUSION

The government respectfully requests that this Court stay the injunction pending appeal or, at minimum, narrow it to extend only as far as necessary to redress the injuries of the named plaintiffs and any bona fide members of FMF when the complaint was filed.

Respectfully submitted,

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FEBRUARY 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 5,150 words according to the count of Microsoft Word. I further certify that this emergency motion complies with the requirements of 5th Cir. R. 27.3 because it was preceded by telephone calls to the Clerk's Office on February 1, 2022, and to the offices of opposing counsel on February 3, 2022, advising of the intent to file this emergency motion. I further certify that the facts supporting emergency consideration of this motion are true and complete. I further certify under 5th Cir. R. 27.4 that appellees oppose this motion and plan to file a response in opposition.

/s/ Casen B. Ross
CASEN B. ROSS
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on February 4, 2022, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Casen B. Ross
CASEN B. ROSS
Counsel for Appellants

No. 22-40043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING, INCORPORATED; RAYMOND A. BEEBE, JR.; JOHN ARMBRUST; et al,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; DEPARTMENT OF TRANSPORTATION; JANET YELLEN, in her official as Secretary of Treasury; et al,

Defendants-Appellants.

ADDENDUM TO EMERGENCY MOTION FOR STAY PENDING APPEAL

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United States District Court
Southern District of Texas
ENTERED
January 21, 2022
Nathan Ochsner, Clerk

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

No. 3:21-cv-356

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

v.

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

MEMORANDUM OPINION AND ORDER

JEFFREY VINCENT BROWN, *UNITED STATES DISTRICT JUDGE*:

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

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

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

I

Background

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

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

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

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

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

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

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

II

Jurisdiction

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

1. Civil Service Reform Act

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

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

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

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

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

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

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

2. Ripeness

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

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

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

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

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

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

III

Injunctive Relief

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

1. Threat of irreparable injury

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

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

As noted above, the Fifth Circuit has already determined that the Hobson's choice employees face between "their job(s) and their jab(s)" amounts to irreparable harm. *OSHA*, 17 F.4th at 618. Regardless of what the conventional wisdom may be concerning vaccination, no legal remedy adequately protects the liberty interests of employees who must choose between violating a mandate of doubtful validity or consenting to an unwanted medical procedure that cannot be undone.

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

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

2. Likelihood of success on the merits

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

a. *Ultra vires*

- **Statutory authority**

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

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

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

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

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

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

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

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

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

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

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

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

- **Constitutional authority**

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

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

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

And what is that limit? As the court has already noted, Congress appears in § 7301 to have limited the President's authority in this field to workplace conduct. But if the court is wrong and the President indeed has authority over the conduct of civilian federal employees in general—in or out of the workplace—"what is the logical stopping point of that power?" *Kentucky v. Biden*, No. 21-6147, 2022 WL 43178, at *15 (6th Cir. Jan. 5, 2022). Is it a "*de facto* police power"? *Id.* The government has offered no answer—no limiting principle to the reach of the power they insist the President enjoys. For its part, this court will say only this: however extensive that power is, the federal-worker mandate exceeds it.

b. APA review

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

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

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

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

3. Balance of equities and the public interest

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

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

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

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

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

IV

Scope

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

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

* * *

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

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

JEFFREY VINCENT BROWN
UNITED STATES DISTRICT JUDGE

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

FEDS FOR MEDICAL FREEDOM, *et al.*, Plaintiffs, v. JOSEPH R. BIDEN, JR., in his official capacity, *et al.*, Defendants.	Civil Action 3:21-cv-00356

DECLARATION OF JASON MILLER

I, Jason Miller, make the following declaration based on personal knowledge and information made available to me in the course of my official duties:

1. I am the Deputy Director for Management at the Office of Management and Budget (OMB). In this role, I coordinate Government-wide management initiatives to protect, strengthen, and empower the Federal workforce. I am also the Chair of the President's Management Council, and I chair a variety of other Government-wide executive management councils. Previously, I was the Chief Executive Officer of the Greater Washington Partnership, a civic alliance of employers in the National Capital Region focused on issues of regional inclusive economic growth and prosperity. I previously served in the White House as Deputy Assistant to the President and Deputy Director of the National Economic Council—leading economic policy development and coordination related to manufacturing and innovation, transportation and infrastructure, energy, entrepreneurship, and Puerto Rico. Prior to that, I was a management consultant with the Boston Consulting Group in San Francisco and with Marakon Associates in Chicago, where I advised large organizations across industries on strategic, financial and organizational issues. I received a B.A. from the University of Pennsylvania, an M.B.A. from

the Kellogg School of Management at Northwestern University, and an M.P.A. from Harvard's Kennedy School of Government.

2. In my role as Deputy Director for Management at OMB, I regularly interact with agency leaders from across the Federal Government, helping them work through a range of operational issues. Through the President's Management Council and the other Government-wide executive management councils that I chair, agencies regularly report to OMB through my staff and me regarding issues related to COVID-19 workplace safety. This includes issues associated with implementation and enforcement of Executive Order 14043. In addition, I have been in contact with executives from major employers and leading management experts about how large employers are approaching the health and safety of their workforce, including COVID-19 vaccination requirements.

3. Based on my first-hand knowledge relating to EO 14043 and the procedures and processes to implement it, as well as information provided to me in the course of my duties, complying with the January 21, 2022 preliminary nationwide injunction enjoining implementation and enforcement of Executive Order 14043 ("the injunction") during the pendency of the appellate process will cause significant harm to the Federal Government for at least three reasons. First, if the injunction remains in place, it will imperil the Federal Government's ability to protect the health and safety of the Federal workforce. Second, the significant additional resources required to protect the health and safety of the Federal workforce with the injunction in place may limit the Federal Government's ability to accomplish critical mission needs, including supporting the American people and combatting the COVID-19 crisis. Third, there are additional costs and harms that the Federal Government will suffer during the pendency of the appeal.

Imperiling the Health and Safety of the Federal Workforce

4. Delaying implementation and enforcement of a vaccination requirement will imperil the health and safety of the Federal workforce. Relying on guidance from the U.S. Centers for

Disease Control and Prevention (CDC), I understand that the best way to avoid contracting, spreading, and becoming seriously ill with COVID-19 is to be vaccinated. Individuals who remain unvaccinated are at a higher risk of contracting the virus and spreading it to those around them.

5. While most Federal civilian employees are fully vaccinated, hundreds of thousands of them are not vaccinated. Of these unvaccinated employees, tens of thousands do not have a pending or approved request for an exception from the vaccination requirement.

6. Further, over 20,000 federal civilian employees are hired in a typical month. The number of unvaccinated individuals will thus increase as new hires will no longer be subject to a vaccination requirement pursuant to the injunction.

7. In order to limit the additional risk that unvaccinated individuals pose in the workplace, Federal agencies will need to undertake significant mitigation measures that are both more costly and less effective at preventing the spread of COVID-19 in the workplace in the absence of a vaccination requirement. These measures include enforcing masking and physical distancing requirements, and requiring unvaccinated employees to submit to weekly or, if required by their work environment, more frequent testing for infection with SARS-CoV-2, the virus that causes COVID-19.

8. Because those measures are less successful at mitigating the spread of COVID-19 in the absence of a vaccination requirement, it is reasonable to conclude—given the sheer size of the Federal civilian workforce, with millions of employees—that a number of employees will become ill with COVID-19 during the pendency of the injunction who would not have become ill absent the injunction. It is also reasonable to conclude that a number of employees will have close contacts with others with confirmed or probable COVID-19 infections that would not have occurred absent the injunction.

9. These illnesses and close contacts will cause Federal employees, and unvaccinated employees in particular, to isolate and quarantine, consistent with guidance from the CDC, to the

detriment of their ability to perform their typical job functions. Increasing the number of employees who will become ill with COVID-19 and who will have to isolate and miss work as a result—or who will have to quarantine consistent with CDC guidance following close contacts, and will therefore be unable to report to work in-person—will affect the mission capability and critical operations of the Federal Government.

10. Moreover, given that unvaccinated people are at a higher risk for severe disease from a COVID-19 infection, by increasing the number of unvaccinated employees in the Federal workforce, it is reasonable to conclude that more Federal employees will suffer acute and/or chronic health effects, including serious health effects and possibly even death.

Consuming Resources Dedicated to the Federal Government's Mission

11. Second, because the Federal Government will be required to devote considerable additional time and resources (which are finite) to protect the health and safety of the Federal workforce as a result of the injunction (as explained below), agencies' ability to execute on other mission critical programs that agencies should be working on but cannot because they are having to reconsider COVID-19 workplace safety will be undermined. And if the Government prevails on appeal, those resources will not be recouped.

12. For example, Federal agencies will need to revise their workforce safety plans and protocols, in place at each Federal agency and consistent with CDC guidance, to account for the injunction.

13. Agencies were previously directed to plan for how and when to return an increased number of employees in-person to the Federal workplace ("reentry") and intended post-reentry personnel policies and work environment. Agencies spent months drafting and submitting workplace reentry and post-reentry plans to the Safer Federal Workforce Task Force ("Task Force"). These plans have been reviewed by management and health experts on the Task Force, and revised as appropriate. The reentry plans and post-reentry plans reflected the vaccination requirement in Executive Order 14043 with the understanding that all Federal employees, other

than those who are entitled to accommodations on medical or religious grounds, would be vaccinated against COVID-19.

14. Now, in removing the vaccination requirement, agencies will have to expend considerable time and money keeping their entire workforce—both those vaccinated and those unvaccinated—safe. In particular, agencies need to account for numerous challenging issues they would not otherwise need to address, including, for example, development of measures to further protect vaccinated Federal employees who may be immunocompromised, live with high-risk individuals, or are otherwise concerned about working in close proximity with unvaccinated employees, as well as accounting for likely increases in the percentage of Federal employees who are unvaccinated as agencies hire over time and are unable to condition employment on vaccination.

15. Agency COVID-19 workplace safety coordination teams are thus now focused on revising agency COVID-19 workplace safety plans and protocols, as well as revising agency reentry and post-reentry plans and schedules, to account for an increased number of unvaccinated employees who will be in Federal workplaces. That includes, for example, setting up expanded COVID-19 testing programs at agencies and supporting more employees who are unable to work in-person due to COVID-19, either exposure or illness.

16. Additionally, the many changes in Federal employee protocols triggered by needing to account for an increased number of unvaccinated workers in Federal workplaces may require renegotiation with Federal employee union partners. In some cases agencies have finalized negotiations with union partners over implementation of these safety plans, approaches to agency reentry plans, and post-reentry personnel policies and work environment. To the extent any safety plans need to be revised, agencies may be required to expend resources restarting such negotiations and considering with union partners how best to protect the health and safety of a workforce that will be less vaccinated, and therefore less protected against COVID-19.

17. What is more, if the Government prevails on appeal, agencies would not simply be able to go back to where they are today but would need to expend yet further resources. For example, they would need to yet again revise their workplace safety plans and, as needed, renegotiate aspects of those plans with employee unions. Additionally, agencies have already devoted significant resources to establishing systems for collecting and processing exception requests, standing up teams to undertake these efforts, and beginning the actual processing of those requests. Tens of thousands of exception requests are currently pending across the federal government. If processing of exception requests is delayed a significant period of time, resources that agencies have already invested will go to waste as personnel will necessarily be shifted to other responsibilities and plans to process the current set of exception requests will become out of date. Agencies would need to start these processes anew if the vaccination requirement is subsequently allowed to resume, establishing new review teams and developing new plans to reflect the then-current set of exception requests.

18. In sum, each day that the vaccination requirement for Federal employees is delayed requires agencies that provide critical support for U.S. foreign policy, global financial systems, American infrastructure, and the pandemic response to devote additional time and resources to ensuring the safety of the Federal workforce above and beyond the substantial time and resources already devoted to these efforts—time and resources that would otherwise be spent doing critical mission function to the benefit of the American people.

Other Costs

19. There are additional related costs and harms that will be borne by the Federal Government if the vaccination requirement remains enjoined pending appeal.

20. As noted above, without being able to enforce Executive Order 14043, agencies expect many employees will choose to remain unvaccinated, and the percentage of Federal employees who are unvaccinated will likely increase over time. The cost of regular screening testing of unvaccinated employees therefore is expected to increase as a direct result of the injunction

being in place. The Federal Government's COVID-19 workplace safety protocols require unvaccinated employees to submit to regular testing consistent with CDC recommendations that call for multi-layer prevention strategies, including mask-wearing, physical distancing, and testing, to mitigate the spread of COVID-19. Testing is a significant financial cost and, as those testing costs increase, will require agencies to divert funding from other mission critical activities and programs. Increased testing volumes due to an increased percentage of unvaccinated employees will divert taxpayer dollars from other necessary uses. Based on prior estimates, for every 1% of the Federal civilian workforce that Federal agencies need to test weekly for COVID-19 because those individuals are not fully vaccinated, it could cost taxpayers on the order of $1.4 million to $2.7 million per week, and $16 million to $33 million per quarter calendar year. At the time the injunction was put in place, roughly 2% of the overall Federal workforce covered by a vaccination requirement had neither affirmed they were fully vaccinated nor submitted a request for or received an exception. Testing 2% of the total covered Federal workforce weekly could cost taxpayers on the order of $11 million to $22 million each month, or $33 million to $65 million each quarter. The longer these individuals remain unvaccinated and employed in Federal agencies, the more taxpayers costs will increase. Should the percentage of unvaccinated employees increase over time as new hires come aboard, as is expected while the injunction remains in place, agency testing expenses will increase accordingly. These increased screening testing expenses will be on top of the cost of screening testing for those employees with an approved exception.

21. In addition, in the Federal law enforcement context, while the injunction remains in place, employees who violated a direct order – in that they remained unvaccinated and were either not entitled to a reasonable accommodation or did not request an accommodation – will be allowed to continue to serve alongside those who did follow orders. I understand from federal law enforcement agencies that allowing the continued service of those employees violating orders from their superiors will damage good order and discipline within those vital law

enforcement agencies, harming the collective work of those agencies' workforces and those agencies' ability to meet their vital law enforcement and homeland and national security missions.

22. Finally, the COVID-19 vaccination requirement provides comfort to the vast majority of the Federal workforce by ensuring that their colleagues are vaccinated, protecting their own health and safety. Removing this assurance may negatively impact morale and, in turn, the effective day-to-day performance of the Federal workforce.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Executed on the 28th day of January, 2022.

/s/ Jason S. Miller
Jason S. Miller
Deputy Director for Management in the Office of Management and Budget