**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 capacity as Secretary of Treasury; et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas

# OPENING BRIEF FOR APPELLANTS

BRIAN M. BOYNTON
*Acting Assistant Attorney General*

BRIT FEATHERSTON
*United States Attorney*

SARAH E. HARRINGTON
*Deputy Assistant Attorney General*

MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
LOWELL V. STURGILL JR.
SARAH CARROLL
CASEN B. ROSS
*Attorneys, Appellate Staff*
*Civil Division*
*U.S. Department of Justice*
*950 Pennsylvania Ave., NW*
*Washington, DC 20530*
*202-514-1923*

## CERTIFICATE OF INTERESTED PERSONS

*Feds for Medical Freedom v. Biden*

A certificate of interested persons is not required, as defendants-appellants are government agencies and government officials sued in their official capacities. *See* 5th Cir. R. 28.2.1.

*/s/ Casen B. Ross*
Casen B. Ross

## STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for March 8, 2022.

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## INTRODUCTION

Illness and death caused by Coronavirus Disease 2019 (COVID-19) have led to serious disruptions for American employers. Recognizing that vaccination lowers the risk of infection, serious disease, and death, many private employers have responded by requiring that their employees be vaccinated against COVID-19. The federal government did the same in its capacity as an employer. Exercising his constitutional and statutory authorities to oversee the Executive Branch, President Biden issued an Executive Order that directs federal agencies to require that current and new employees be vaccinated against COVID-19, subject to legally required exceptions for medical conditions or religious objections. *See* Exec. Order No. 14043, 86 Fed. Reg. 50,989 (Sept. 14, 2021).

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

[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); *American Fed'n of Gov't Emps. Local 501 v. Biden*, No. 21-23828-CIV, 2021 WL 6551602 (S.D. Fla. Dec. 22, 2021); *Donovan v. Vance*, 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. 8:21-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. 1:21-cv-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021); *Foley v. Biden*, No. 4:21-cv-1098, ECF No. 18 (N.D. Tex. Oct. 6, 2021).

against implementation or enforcement of the Executive Order, overriding the other unanimous contrary decisions and the judgment of the President—"the head of a co-equal branch of government and the most singularly accountable elected official in the country," Stay Order 7 (Feb. 9, 2022) (Higginson, J., dissenting).

The injunction rests on numerous errors and should be vacated. The district court lacks jurisdiction because Congress has required that covered federal employees raise their workplace grievances only through the Civil Service Reform Act (CSRA). The CSRA creates a comprehensive and exclusive scheme for resolving claims arising out of federal employment, generally with review before the Merit Systems Protection Board (MSPB) and then the Federal Circuit. Because the CSRA bars plaintiffs from challenging Executive Order 14043 in district court, this Court should vacate the preliminary injunction and remand with instructions to dismiss those claims for lack of jurisdiction.

Plaintiffs are not entitled to a preliminary injunction for the additional reason that their claims are unlikely to succeed on the merits. "[T]he President, as head of the federal executive workforce, has authority to establish the same immunization requirement that many private employers have reasonably imposed to ensure workplace safety and prevent workplace disruptions caused by COVID-19." Stay Order 6 (Higginson, J., dissenting). Under Article II and the statutes invoked in the Executive Order, the President was well within his authority to impose the requirement at issue here, which he reasonably found necessary to "ensur[e] the health

and safety of the Federal workforce and the efficiency of the civil service." 86 Fed. Reg. at 50,989. The district court erred in grafting atextual limitations onto that broad authority based on different language in statutes addressing a different subject—government regulation of *private* employers.

Plaintiffs also cannot satisfy the equitable requirements for preliminary relief. The injunction seriously harms the public interest by impeding efforts to reduce disruptions from COVID-19 in federal workplaces, undermining the President's authority to establish and maintain reasonable conditions of federal employment (similar to those imposed by many private employers), and flouting Congress's intent that government employment disputes be resolved exclusively through the CSRA's scheme of administrative and judicial review. On the other side of the ledger, the district court identified no plaintiff who is at imminent risk of injury. The most severe penalty that plaintiffs could ultimately face for violating the vaccination requirement would be removal from their jobs, but that speculative future harm is not irreparable because employees can obtain adequate remedies for wrongful discharge through the CSRA scheme, including reinstatement and backpay where appropriate.

At minimum, the Court should narrow 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 OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. §§ 701-706 and 28 U.S.C. §§ 1331, 1346, 1361, and 2201. ROA.103. The district court entered a preliminary injunction on January 21, 2022. ROA.1751-70. The federal government timely appealed the same day. ROA.1771; *see* Fed. R. App. P. 4(a)(1)(B). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE ISSUES

1. Whether the district court lacked jurisdiction because the CSRA precludes plaintiffs' claims.

2. Whether plaintiffs failed to demonstrate a likelihood of success on the merits of their claim that the President lacked authority to issue the Executive Order.

3. Whether plaintiffs fail to satisfy the equitable requirements for a preliminary injunction.

4. Whether the district court erred in granting a nationwide preliminary injunction.

## STATEMENT OF THE CASE

### A. The COVID-19 Vaccination Requirement for Federal Employees

**1.** The President is responsible for establishing rules for admission into the civil service and for the conduct of civilian employees. "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). The President's executive powers have long been understood to include "'the general administrative control of those executing the laws,'" and it ultimately is "*his* responsibility" as head of the Executive Branch "to take care that the laws be faithfully executed." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492-93 (2010) (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)).

Consistent with the President's constitutional role as "Chief Executive," *Free Enter. Fund*, 561 U.S. at 493 (quotation marks omitted), Congress has enacted various statutes confirming the President's broad power to regulate the federal civil service. As particularly relevant here, the President has long been given express authority to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301; *see* Act of Mar. 3, 1871, ch. 114, § 9, 16 Stat. 514-15. Congress has also authorized the President 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" and to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability." 5 U.S.C. § 3301(1), (2). And Congress has delegated to the President broad authority to "prescribe rules governing the competitive service." *Id.* § 3302.[2]

[2] Federal civilian employees are classified into three main categories: the competitive service, 5 U.S.C. § 2102; the excepted service, *id.* § 2103; and the Senior Executive Service, *id.* § 3132.

These complementary constitutional and statutory 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. 17, 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. 14, 1989).

**2.** The COVID-19 pandemic has killed more than 900,000 Americans.[3] It has also 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-*

[3] *See* Centers for Disease Control and Prevention (CDC), *COVID Data Tracker*, https://go.usa.gov/xtpWf (last visited Feb. 14, 2022).

*19, and Strengthen the Economy* 4 (Oct. 2021), https://go.usa.gov/xtNTB (*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 public and private 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 employee vaccination requirements. *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. Numerous states and municipalities have also required that their employees be vaccinated against COVID-19. *See, e.g.*, City of New Orleans Exec. Order No. LC 21-05, § 4 (Aug. 19, 2021), https://go.usa.gov/xtHhh (requiring that New Orleans city employees be vaccinated or periodically tested); N.C. Exec. Order No. 224, § 4 (July 29, 2021), https://go.usa.gov/xtsUy (similar for North Carolina state employees). 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. *Vaccination Report* 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 a sincerely held religious belief, practice, or observance. *See* Task Force, *Vaccinations, Limited Exceptions to Vaccination Requirement*, https://go.usa.gov/xe5aC (last visited Feb. 14, 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. 14, 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. 14, 2022) (*Vaccination FAQs*), 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 (OPM) recommends a procedure for progressive discipline that includes a period of education and counseling, followed by, potentially, 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.* Most federal employees 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. 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—challenge Executive Order 14043 and a separate executive order that applies to federal contractors. ROA.74-96. They filed suit on December 21, 2021, more than three months after the President issued the orders and several weeks after federal employees were required to be vaccinated. At least one named plaintiff and numerous FMF "members" whom the complaint identifies by name filed this lawsuit only after another district court denied their request to enjoin Executive Order 14043. *Compare* Dkt. 1, at 1-4, 28-32, *with* First Amended Complaint at 1, *Altschuld v. Raimondo*, No. 21-cv-2779, ECF No. 5 (D.D.C. Oct. 20, 2021). Plaintiffs allege that the Executive Order exceeds the President's authority and violates the Administrative Procedure Act (APA).

**2.** Plaintiffs moved for a nationwide preliminary injunction. The district court granted plaintiffs' motion with respect to Executive Order 14043 on January 21, 2022, barring the government from "implementing or enforcing" the order. ROA.1751-70.[4]

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 any adverse employment action. ROA.1756. The court further declared that plaintiffs would be denied meaningful review if they could not bring a pre-enforcement challenge. ROA.1757. The court recognized that the claims of plaintiffs who have requested exceptions from the vaccination requirement 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." ROA.1757-58.

The district court acknowledged that adverse employment actions, including termination, typically do not constitute irreparable harm. ROA.1760. The court nonetheless concluded that plaintiffs satisfied the irreparable-injury requirement because the court believed the Executive Order "bar[red]" plaintiffs "from significant

[4] The court denied the motion with respect to the contractor vaccination requirement, concluding that an existing injunction barring enforcement of that order "protects the plaintiffs from imminent harm." ROA.1751.

employment opportunities" and because the court believed plaintiffs faced a "Hobson's choice" between vaccination and discipline. *Id.*

The district court also found that plaintiffs had shown a substantial likelihood of success on the merits. The court concluded that the President likely lacked authority to issue the Executive Order, holding that none of the federal statutes empowering the President to prescribe rules for federal employment authorized him to require that federal employees be vaccinated. ROA.1761-63 (discussing 5 U.S.C. §§ 3301, 3302, 7301). 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. ROA.1764. The court also invoked cases evaluating challenges to the vaccination requirement for federal contractors, which was issued under a separate set of statutory authorities. ROA.1762.

The district court held that the Executive Order could not be upheld as a valid exercise of the President's Article II authority. In particular, the court reasoned that, under its construction of the three statutes cited above, Congress has "limited the President's authority in this field to workplace conduct." ROA.1766. The court stated that, if the President's Article II authority over the civilian workforce extends beyond such "workplace conduct," then the President's authority would lack a "logical stopping point." *Id.*

The court found it unnecessary to resolve plaintiffs' APA claim definitively but agreed with the government that, "if the President had authority to issue this order, this case seems to present no reviewable agency action under the APA." ROA.1767.

The court next found that the balance of equities and the public interest favored relief. The court acknowledged that "vaccines are undoubtedly the best way to avoid serious illness from COVID-19" but asserted that a preliminary injunction would not "have any serious detrimental effect" on the government's fight against COVID-19. ROA.1768-69. The court further declared that "[s]topping the spread of COVID-19 will not be achieved by overbroad policies like the federal-worker mandate." ROA.1769.

Finally, despite acknowledging the serious "equitable and constitutional questions raised by the rise of nationwide injunctions," ROA.1769 (quotation marks omitted), the court granted relief here to all federal employees who have not complied with the vaccination requirement, regardless of whether they are parties to this suit. The court suggested that "tailoring relief" would be difficult and could create confusion because FMF allegedly "has more than 6,000" widely dispersed members. ROA.1770.

**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.[5] The

[5] The district court issued a one-paragraph order denying a stay on February 11. Dkt. 43.

government filed an emergency motion for a stay pending appeal with this Court on February 4. On February 9, the motions panel ordered that the motion be "carried with the case" and expedited the matter to the next available oral argument panel. Stay Order 1. The motions panel emphasized that the merits panel to whom the expedited appeal would be assigned would have the authority to grant the government's still-pending emergency motion for a stay "immediately." *Id.* at 2.

Judge Higginson dissented, explaining that he would grant an immediate stay pending appeal. Judge Higginson concluded that the government was likely to succeed in its challenge to the preliminary injunction "for at least three independent reasons." Stay Order 3-4 (Higginson, J., dissenting). First, he explained that the district court likely lacked jurisdiction because Congress has required "covered federal employees to raise their workplace grievances through the administrative procedures set forth in the [CSRA]." *Id.* at 4-5. Second, plaintiffs' claims lack merit because "the President, as head of the federal executive workforce, has authority to establish the same immunization requirement that many private employers have reasonably imposed to ensure workplace safety and prevent workplace disruptions caused by COVID-19." *Id.* at 6. As Judge Higginson observed, "[t]he President is not an unelected administrator"; he is "the head of a co-equal branch of government and the most singularly accountable elected official in the country." *Id.* at 7. Third, plaintiffs did not meet their burden to demonstrate irreparable harm; it is "practically universal

jurisprudence" that there is an adequate after-the-fact remedy for wrongful discharge. *Id.* at 8-9 (quoting *Garcia v. United States*, 680 F.2d 29, 31 (5th Cir. 1982)).

Judge Higginson also concluded that the equities favored a stay, explaining that "the district court's injunction places federal employees at a greater risk of hospitalization and death, not to mention being unable to work because of illness or the need to quarantine," and "the Government's operational efficiency will be greatly impeded if this executive order cannot go into effect." Stay Order 9-10 (Higginson, J., dissenting). He further observed that "the public interest is not served by a single Article III district judge, lacking public health expertise and made unaccountable through life tenure, telling the President of the United States, in his capacity as CEO of the federal workforce, that he cannot take the same lifesaving workplace safety measures as . . . private sector CEOs." *Id.* at 11.

Finally, Judge Higginson concluded that, even if the injunction were to remain in place as to plaintiffs, it should be stayed with respect "to any person or entity that is not either a named plaintiff or an individual possessing, at the time the complaint was filed, bona fide indicia of membership in one of the plaintiff organizations." Stay Order 11 (Higginson, J., dissenting). Summarizing the well-recognized harms flowing from overbroad nationwide injunctions, Judge Higginson concluded that "an unelected lower court" should not "impose its Article III fiat on millions of Article II employees, above all when a dozen other lower courts have declined to enjoin the President's order." *Id.* at 12.

As of this filing, the government's emergency stay motion remains pending before the Court.

## SUMMARY OF ARGUMENT

The district court erred in preliminarily enjoining enforcement and implementation of 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.

**I.** The district court lacks jurisdiction over plaintiffs' challenges to Executive Order 14043. Plaintiffs' claims are precluded by the CSRA, which 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). The CSRA requires that covered employees seek administrative review of qualifying disciplinary actions from the MSPB, even with respect to facial constitutional claims; then, if necessary, they may seek judicial review in the Federal Circuit. *See Elgin v. Department of the Treasury*, 567 U.S. 1, 5-6 (2012). Plaintiffs' suit—which amounts to a preemptive challenge to hypothetical, future personnel actions—is barred by the CSRA's comprehensive scheme. Because the district court lacks jurisdiction over plaintiffs' challenge to the Executive Order, this Court should vacate the preliminary injunction and remand the case with instructions to dismiss those claims.

**II.** Plaintiffs also failed to show a substantial likelihood of success on the merits because they cannot demonstrate that the Executive Order exceeds the President's authority. In issuing the Executive Order, the President invoked his authority under Article II and three specific statutory provisions through which Congress has expressly confirmed his authority to prescribe rules for admission to the federal service and for the conduct of federal employees. *See* 5 U.S.C. §§ 3301, 3302, 7301. Those constitutional and statutory authorities have served as the basis for numerous valid restrictions on federal employees' conduct, including President Reagan's limitation of on- and off-duty drug use and various ethical restrictions imposed by President George H.W. Bush. The district court erred in grafting limitations onto the President's broad authority with respect to the federal workforce based on the language of entirely different statutes addressing federal regulation of private entities.

**III.A.** Plaintiffs also failed to establish the irreparable injury necessary to obtain preliminary relief. Courts have long recognized that loss of employment—the most severe discipline that plaintiffs could potentially face for refusing to be vaccinated—is insufficient to warrant injunctive relief absent extraordinary circumstances. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 91-92, 92 n.68 (1974). That rule is fully applicable here: the CSRA provides ample redress for covered federal employees who challenge workplace discipline.

**B.** The public interest and the balance of harms weigh decidedly against injunctive relief. The preliminary injunction undermines the vital public interest in slowing the spread of COVID-19 among federal employees and the millions of Americans they serve. It prevents the President from establishing reasonable conditions of employment for the federal workforce, resembling those imposed by many private employers. It halts the entire process for considering employee requests for medical and religious exceptions, and it disrupts carefully developed plans for returning federal employees to physical workspaces and resuming more normal, pre-pandemic operations. It also harms the public interest by circumventing Congress's long-established processes for resolving federal employees' employment disputes exclusively through the comprehensive and judicial procedures set forth in the CSRA.

**IV.** At minimum, any preliminary injunction must be more narrowly tailored. Article III requires that a remedy "be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Principles of equity likewise require that injunctive relief "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 a nationwide injunction was necessary to redress plaintiffs' asserted injuries, and it overrode the prior decisions of a dozen other district courts. The court concluded that an injunction limited to plaintiffs would pose practical difficulties because FMF allegedly has thousands of "members," but the court failed to consider various ways that relief could be limited

to the parties properly before it. In any event, the constitutionally grounded principle that an equitable remedy must be no broader than necessary to remedy plaintiffs' injuries does not include an exception for convenience.

## STANDARD OF REVIEW

The district court's grant of a preliminary injunction is "generally reviewed under an abuse of discretion standard," but "*de novo* review is appropriate where 'a district court's ruling rests solely on a premise as to the applicable rule of law' and the applicable facts are established or of no controlling relevance." *National Football League Players Ass'n v. National Football League*, 874 F.3d 222, 225 (5th Cir. 2017) (per curiam) (quoting *United Offshore Co. v. South Deepwater Pipeline Co.,* 899 F.2d 405, 407 (5th Cir. 1990)).

## ARGUMENT

"A preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." *Bluefield Water Ass'n v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009) (quotation marks omitted). Plaintiffs satisfy none of the requirements for preliminary relief, and the district court seriously erred in granting a nationwide injunction against enforcement and implementation of Executive Order 14043. The Court should vacate the injunction or, at minimum, limit it to "named plaintiff[s]" and "individual[s] possessing, at the time the complaint was filed, bona fide indicia of

membership in one of the plaintiff organizations." Stay Order 11 (Higginson, J., dissenting).

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

The district court lacks jurisdiction over plaintiffs' challenge to Executive Order 14043 because the CSRA prescribes the exclusive avenues for covered federal employees to challenge any adverse personnel action they may suffer as a result of the Executive Order. Plaintiffs may not circumvent the limitations of the CSRA's comprehensive scheme for adjudicating claims arising from federal employment by launching a preemptive attack in district court. Plaintiffs have the burden of establishing jurisdiction, but they cannot do so. This Court should therefore vacate the preliminary injunction and remand with instructions to dismiss their claims challenging Executive Order 14043. *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)); *National Football League Players Ass'n v. National Football League*, 874 F.3d 222, 225 (5th Cir. 2017) (per curiam) (vacating a preliminary injunction and remanding with instructions to dismiss for lack of jurisdiction).

**A.** In the CSRA, Congress established "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 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.[6]

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

[6] 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).

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," even for constitutional claims. *Id.* at 11-12; *see also Greiner v. United States*, 900 F.3d 700, 702-04 (5th Cir. 2018) (discussing the CSRA's preclusive effect).

This Court has long made clear that a federal employee may not "circumvent th[e] [CSRA's] detailed scheme governing federal employer-employee relations by suing under the more general APA." *Broadway v. Block*, 694 F.2d 979, 986 (5th Cir. 1982); *see also McAuliffe v. Rice*, 966 F.2d 979, 980 (5th Cir. 1992). Nor may a plaintiff seek "extrastatutory review" outside the CSRA framework. *Elgin*, 567 U.S. at 10-11; *see also Guitart v. United States*, 3 F.3d 439, 1993 WL 347206, at *2 (5th Cir. 1993) (unpublished) (per curiam) (refusing to "engraft a nonstatutory remedy onto the comprehensive framework of the CSRA"). This is true even if the CSRA does not provide a remedy for a particular covered employee, or at a particular time: "what you get under the CSRA is what you get." *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.). As the Supreme Court explained long ago, where Congress has not extended the CSRA's "integrated scheme of administrative and judicial review" to a particular class of employees, those employees have no "statutory entitlement" to judicial review "for adverse action of the type governed by" the CSRA. *Fausto*, 484 U.S. at 445, 448-49.

**B.** The district court concluded that the CSRA does not preclude employees who have not yet been subject to adverse employment actions from asserting their

claims in district court. The court reasoned that "the statute says nothing about 'hypothetical' adverse employment actions," and "neither the [MSPB] . . . nor the Federal Circuit (which hears CSRA appeals) has jurisdiction until there is an actual adverse employment action." ROA.1756. That logic is backwards. Employees cannot circumvent the careful limitations of the CSRA scheme by racing to the courthouse before they are disciplined. To the extent that plaintiffs could not seek review immediately within the CSRA framework, that does not confer jurisdiction on the district court to consider employment-related claims. As this Court has previously explained, when Congress enacted the CSRA, it "did not neglect expressly to create a judicial remedy where it wanted one to exist." *Broadway*, 694 F.2d at 984. Congress made certain adverse employment actions reviewable but did not provide for universal review, "balancing conflicting needs for efficiency and employee protection." *Id.* Indeed, as explained above, the CSRA is preclusive even as to employees who are "denied any judicial review." *Gonzalez v. Manjarrez*, 558 F. App'x 350, 354 (5th Cir. 2014) (per curiam); *see Fornaro*, 416 F.3d at 67 ("[W]hat you get under the CSRA is what you get.").

The district court's logic—that plaintiffs' claims are not precluded by the CSRA scheme because they seek broad "pre-enforcement" review in advance of a specific personnel action, ROA.1756 n.3—is also contrary to Supreme Court precedent. In *Elgin*, the Supreme Court rejected the argument that "facial" constitutional challenges should be "carve[d] out [as] an exception to CSRA exclusivity." 567 U.S. at 12. The

particular "facial" challenge in *Elgin* was brought after the employees had been discharged, rather than before, but nothing turned on that distinction. *See id.* at 15 (explaining that CSRA exclusivity depends on the "type of employee" and personnel action at issue); *cf. Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202 (1994) (holding that a detailed statutory scheme for reviewing agency enforcement actions precluded judicial review of a "pre-enforcement challenge"). Plaintiffs cannot circumvent Congress's carefully reticulated scheme by arguing that they lack a ripe claim under the CSRA. In any event, a federal employee need not necessarily await suspension or discharge to invoke CSRA remedies: plaintiffs could potentially seek review by OSC now, alleging that the vaccination requirement constitutes a "significant change in duties, responsibilities, or working conditions," 5 U.S.C. § 2302(a)(2)(A)(xii), that amounts to a reviewable "personnel action." Or an employee could seek review at an early stage of any still-hypothetical progressive disciplinary process, such as the receipt of a letter of reprimand. *Id.* § 2302(a)(2)(A)(iii).

The district court attempted to support its analysis by asserting that the D.C. Circuit permits "pre-enforcement challenges to government-wide policies" notwithstanding the CSRA. ROA.1756 n.3. As Judge Higginson noted, however, the cases the district court cited "all significantly pre-date *Elgin*." Stay Order 5 n.4 (Higginson, J., dissenting). The D.C. Circuit has since made clear 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); *see American Fed'n of Gov't Emps v. Trump*, 929 F.3d 748, 752, 755 (D.C. Cir. 2019) (holding that unions could not obtain "pre-implementation" review of executive orders affecting federal labor relations and were instead required to challenge the orders pursuant to the Federal Service Labor-Management Relations Statute, which is part of the CSRA). As then-Judge Roberts explained, "[a]llowing an alternative route to relief in the district court because plaintiffs frame their suit as a systemwide challenge to OPM policy would substitute an entirely different remedial regime for the one Congress intended to be exclusive." *Fornaro*, 416 F.3d at 68.

Adopting the district court's contrary view would gut the statutory scheme. Under the court's view, the plaintiffs in *Elgin* could have proceeded outside the CSRA if they had simply sued in district court to challenge the constitutionality of the federal statute at issue before they suffered adverse personnel actions. But Congress did not "exhaustively detail[] the system of review before the MSPB and the Federal Circuit" in "painstaking detail" only to leave such an obvious loophole. *Elgin*, 567 U.S. at 11. Permitting plaintiffs to file preemptive attacks on potential adverse employment actions that might someday result from a broadly applicable policy would also "reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid." *Id.* 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.*

Those harmful consequences would not be limited to preemptive challenges related to Executive Order 14043 or other vaccination requirements; plaintiffs' theory would apply equally to any federal employee who wished to preemptively attack a government-wide policy before suffering any adverse consequences for violating it, or even an employee who wanted to attack an expected or anticipated adverse personnel action that was *not* based on a broader policy. Allowing plaintiffs to circumvent the entire administrative process under the CSRA by bringing pre-enforcement suits would be especially inappropriate where, as here, a challenged policy allows exceptions for individual employees depending on particularized facts and circumstances.

The district court also concluded that adhering to the CSRA would deprive plaintiffs of "meaningful review." ROA.1757. The CSRA, however, "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; *see Thunder Basin*, 510 U.S. at 215 (concluding that "petitioner's statutory and constitutional claims . . . can be meaningfully addressed in the Court of Appeals" after administrative review). Contrary to the district court's assumption, plaintiffs need not "bet the farm" to challenge the vaccine mandate. ROA.1757 (quotation marks omitted). As explained, the CSRA provides for review at various stages of discipline, *see supra* pp. 20-22, and

this Court has long recognized that the remedies available under the civil-service laws constitute "an adequate remedy for individual wrongful discharge after the fact," *Garcia v. United States*, 680 F.2d 29, 31-32 (5th Cir. 1982).

## II. Plaintiffs Failed To Demonstrate A Substantial Likelihood of Success On The Merits Of Their Claim That The President Lacked Authority To Issue Executive Order 14043

This Court need not reach the merits in light of this suit's jurisdictional deficiencies. *See* Stay Order 4-5 (Higginson, J., dissenting) (concluding that the government is likely to prevail based on CSRA preclusion alone). But the district court also erred in finding that plaintiffs were likely to succeed on the merits of their claim that the President lacked authority to promulgate Executive Order 14043. ROA.1761-66. As Judge Higginson recently summarized, "the President, as head of the federal executive workforce, has authority to establish the same immunization requirement that many private employers have reasonably imposed to ensure workplace safety and prevent workplace disruptions caused by COVID-19." Stay Order 6 (Higginson, J., dissenting).

### A. The President Had Ample Authority To Issue The Executive Order

"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)). The President's constitutional authority thus includes "general administrative control of those executing the laws." *Seila Law*, 140 S. Ct. at 2197-98 (quoting *Myers v. United States*, 272 U.S. 52, 163-64 (1926)). And 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) (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 600 (2008)).[7]

Congress has also enacted various statutory provisions that confirm the President's broad power to regulate the federal workforce. 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; 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(1); and to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought," *id.* § 3301(2).

As numerous courts have recognized, these provisions give the President "broad authority . . . to regulate employment matters." *Clarry v. United States*, 85 F.3d

[7] *Cf. Appointment and Promotion of Women in Federal Civil Service*, 42 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").

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); *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); *DiLuigi v. Kafkalas*, 584 F.2d 22, 24 n.3 (3d Cir. 1978) ("Congress delegated broad power to the President to establish . . . 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.").

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, 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*, 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. *See Brnovich v. Biden*, No. CV-21-1568, 2022 WL 252396, at *12 (D. Ariz. Jan. 27, 2022); *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); *Oklahoma v. Biden*, No. CIV-21-1136, 2021 WL 6126230, at *10 (W.D. Okla. Dec. 28, 2021); *Rydie v. Biden*, No. 21-2696, 2021 WL 5416545, at *3 (D. Md. Nov. 19, 2021). Courts defer to Executive Branch determinations about "[t]he remed[ies] necessary to promote efficiency of civil service." *Giesler v. MSPB*, 686 F.2d 844, 849 (10th Cir. 1982); *see American Fed'n of Gov't Emps. v. Hoffman*, 543 F.2d 930, 938 (D.C. Cir. 1976) (recognizing "the obvious intent of Congress to confer broad discretion upon the President" to set standards that

promote efficiency of the civil service). Recognizing that vaccination reduces the risk of serious workplace disruptions from COVID-19, a wide range of public and private entities have required that their employees be vaccinated, and the requirements have proven effective. *See supra* p. 7; Stay Order 10-11 (Higginson, J., dissenting). The Executive Order reflects the same reasonable judgment by the President in his oversight of the Executive Branch's "internal operation[s]" as "proprietor and manager." *Nelson*, 562 U.S. at 148 (quotation marks omitted).

### B. The District Court's Contrary Conclusions Lack Merit

The district court plainly erred in concluding that the President lacked authority to issue the Executive Order.

**1.** The district court first suggested that the President's Article II authority to manage those who execute the law might be limited to "Officers of the United States." ROA.1765 (quoting *Free Enter. Fund*, 561 U.S. at 486). Contrary to the court's view, the Supreme Court has repeatedly emphasized the President's authority to oversee the Executive Branch more generally, including employees. In *NASA v. Nelson*, for example, the Supreme Court rejected a constitutional challenge to background checks that were a condition of federal employment and included questions addressing sensitive subjects such as drug abuse, financial integrity, and "mental or emotional stability." 562 U.S. at 154 (quotation marks omitted). The Court emphasized that—whatever the limits on the government's "sovereign power 'to regulate or license'"—"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.'" *Id.* at 148; *cf. Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (explaining that the President's authority to "determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to [classified] information flows primarily from th[e] constitutional investment of power in the President and exists quite apart from any explicit congressional grant"). The President's authority presumptively extends to the management of all Executive Branch personnel, except to the extent Congress has narrowed or channeled the President's baseline authority with respect to federal employees. *See, e.g.*, 42 U.S.C. § 2000e-16 (Title VII protections for civil servants); 5 U.S.C. §§ 7503(a), 7513(a) (CSRA); *see also U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557-58 (1973) (noting that, prior to the Civil War, "the spoils system under which federal employees came and went, depending upon party service and changing administrations, rather than meritorious performance," was the "prevalent basis for governmental employment").

The district court's concern for inventing a "limiting principle" in this context was also misplaced. ROA.1766. As an initial matter, the principal limitation here is that the Executive Order applies only to civilian employees *in the Executive Branch*. The President is not purporting to regulate the conduct of any private citizens, but rather only to impose conditions of employment for the federal workforce that he superintends. Congress has also enacted statutes that establish several important

limiting principles in the federal-employment context. For example, the CSRA requires that removal, suspension, and other enumerated discipline occur only "for such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7503(a), 7513(a). Likewise, Title VII and other anti-discrimination statutes applicable to federal employers prohibit adverse personnel actions taken on the basis of race, sex, and a variety of other protected bases. 42 U.S.C. § 2000e-16. These statutes make clear that Congress can take, and has taken, action to limit the President's authority to set the terms of federal employment. But far from narrowing any authority relevant here, Congress has enacted statutes that specifically recognize and confirm it.

**2.** In light of the President's broad authority under Article II, the question is not whether Congress has expressly or impliedly authorized the President to impose a vaccination requirement in the context of federal employment, but whether Congress has *prohibited* the President from doing so. Far from imposing any relevant prohibition, Congress has enacted various statutes that specifically confirm the President's broad authority to regulate the federal workforce.

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." ROA.1763. 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) ("'[A]bsent provision[s] cannot be supplied by the courts.'" (alteration in original)).

In any event, the Executive Order does relate to "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 Executive Order draws on a historical tradition of presidential regulation of Executive Branch employees' on- and off-duty conduct, *see supra* pp. 29-30, reflecting the commonsense reality that off-duty conduct can have significant implications for employees' workplaces. *Cf. Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam) (looking to the "longstanding practice of [the Executive Branch] in implementing the relevant statutory authorities" in upholding a federal vaccination requirement).

Just as President Reagan concluded that federal employees' off-duty use of illegal drugs could negatively affect their workplaces, Executive Order 14043 reflects a determination that contracting and spreading a contagious virus has obvious negative 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 increase in-person operations. *See* ROA.1806-07 ¶¶ 13-15.

This Court has recognized that employees' off-duty conduct can affect their work performance. In *Bonet v. U.S. Postal Service*, for example, the Court upheld a federal employee's discharge for serious domestic misconduct, affirming the MSPB's conclusion that discharge would promote the efficiency of the civil service because the employee's misconduct "would affect the ability of other employees to work effectively with" him, "adversely affect[ing] the operation of the Postal Service." 712 F.2d 213, 217 (5th Cir. 1983) (per curiam); *see also Shawgo v. Spradlin*, 701 F.2d 470, 483 (5th Cir. 1983) (holding that police officers' discharge for off-duty misconduct did not violate their right to privacy because there was a rational connection between their off-duty conduct and "the exigencies of Department discipline"); *Brown v. Department of the Navy*, 229 F.3d 1356, 1360 (Fed. Cir. 2000) (concluding that substantial evidence supported an administrative finding "of a nexus between [the petitioner's off-duty]

misconduct and both the mission of his agency in general and his job responsibilities in particular").

The district court likewise erred in concluding that 5 U.S.C. §§ 3301 and 3302 do not support the Executive Order. 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." *Hoffman*, 543 F.2d at 938. The district court's cursory analysis of section 3301 relied principally on recent decisions concerning whether the federal government can require that employees of federal contractors be vaccinated—not the federal government's authority over its own employees. ROA.1762. Contrary to the court's suggestion, *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 district court also noted that section 3301 refers to "regulations for the admission of individuals into the civil service," while plaintiffs are "current federal employees." ROA.1762. But the Executive Order applies equally to new entrants to federal service, *see Vaccination FAQs*, and 20,000 new employees join the federal government in a typical month, ROA.1805 ¶ 6; *see also* 5 U.S.C. § 3301(2) (expressly authorizing the President to "ascertain" applicants' "fitness" as to "health"). The district court's nationwide injunction forbids the Executive Branch from applying the Order to those newly hired civilian employees without any explanation of why, at

minimum, the injunction could not be more narrowly tailored to allow the President to exercise what the district court viewed as the extent of his authority under section 3301. *See infra* Part IV. And, in any event, the authority to establish requirements for new federal employees logically includes the authority to modify requirements for existing employees.

With respect to section 3302, the district court acknowledged that the provision's grant of authority to "prescribe rules governing the competitive service" "sounds broad." ROA.1762. The court viewed the next sentence, which identifies particular matters that the rules "shall" address, as "quite limited." *Id.* But the second sentence's identification of specific matters the President *must* address does not impliedly prohibit the President from addressing other matters pursuant to the first sentence's broad discretionary authority. 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).

The Executive Order is therefore well within the President's expansive authority. "[C]onsistent with his Article II duty to 'take Care that the Laws be faithfully executed,' the President is performing his role as CEO of the federal workforce, taking executive action in order to keep open essential government buildings; to maintain the provision of vital government services . . . ; and to prevent unvaccinated federal employees from infecting co-workers or members of the public who, whether because of age or infirmity, might be highly vulnerable to

hospitalization and death." Stay Order 7-8 (Higginson, J., dissenting) (footnotes omitted) (quoting U.S. Const. art. II, § 3).

## III. Plaintiffs Failed To Satisfy The Equitable Requirements For Preliminary Injunctive Relief

Because plaintiffs cannot establish a likelihood of success on the merits, they are not entitled to a preliminary injunction. *See Lake Charles Diesel, Inc. v. General Motors Corp.*, 328 F.3d 192, 196 (5th Cir. 2003) ("We have cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." (quotation marks omitted)). But plaintiffs' claims also fail because the injunction inflicts public harms that far outweigh plaintiffs' quintessentially *reparable* alleged harms.

### A. Plaintiffs Have Not Established Any Irreparable Injury

To obtain a preliminary injunction, plaintiffs must demonstrate that they are threatened with "imminent" harm for which they cannot be retroactively compensated. *Humana, Inc. v. Jacobson*, 804 F.2d 1390, 1394 (5th Cir. 1986). Numerous courts have declined to enjoin Executive Order 14043 because the plaintiffs before them could not demonstrate irreparable harm. *See, e.g.*, *Church v. Biden*, Civ. 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 v. Biden*, No. 1:21-cv-19457, 2021 WL 5195688, at *8-9 (D.N.J. Nov. 8, 2021). Indeed,

the same district court that issued the injunction here previously recognized that federal employees with pending exception requests are not "in imminent danger of irreparable harm" and therefore are not entitled to relief. *Rodden v. Fauci*, No. 3:21-cv-317, 2021 WL 5545234, at *2 (S.D. Tex. Nov. 27, 2021).

The most severe penalty that any plaintiff could ultimately face for refusing to become vaccinated is loss of employment. But this Court and the Supreme Court have repeatedly recognized that job loss is not irreparable harm absent a "genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974); *see also Garcia*, 680 F.2d at 31 ("It is practically universal jurisprudence in labor relations in this country that there is an adequate remedy for individual wrongful discharge after the fact of discharge."); Stay Order 8-9 (Higginson, J., dissenting). Even assuming that plaintiffs are ultimately disciplined for refusing vaccination (which is not a foregone conclusion, particularly for plaintiffs who have requested medical or religious exceptions), and even assuming further that plaintiffs ultimately prevail in challenging that discipline, "the remedy by way of reinstatement and back pay is well established and is universally used." *Garcia*, 680 F.2d at 31-32. 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 can therefore be "adequately compensated" for their

alleged injuries if they prevail, rendering a preliminary injunction unnecessary. *Prewitt v. U.S. Postal Serv.*, 662 F.2d 311, 314 (5th Cir. Unit A 1981).

Nor does any possible injury meet the Court's "imminen[ce]" requirement. *Humana*, 804 F.2d at 1394. For one thing, the vast majority of individual plaintiffs in this case have requested exceptions from their employing agencies. Those requests remained pending when the injunction was issued, and applicable guidance states that employees with pending exception requests should not be disciplined. *See Enforcement FAQs*. If employees obtain exceptions, they will not be disciplined and will not be required to be vaccinated. Accordingly, as even the district court recognized, ROA.1757, these plaintiffs do not have constitutionally ripe claims, much less an imminent irreparable injury that would warrant a preliminary injunction. *See Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (explaining that a dispute is constitutionally unripe if it is "dependent on contingent future events that may not occur as anticipated, or indeed may not occur at all" (quotation marks omitted)).

Even plaintiffs who have not submitted exception requests cannot demonstrate that they are at imminent risk of discharge. The Task Force guidance encourages 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: 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.[8] The mere possibility that plaintiffs would be terminated after disciplinary proceedings conclude accordingly would not support a preliminary injunction even if plaintiffs' claimed injuries could not be redressed after the fact (which they plainly can). *See Humana*, 804 F.2d at 1394 (requiring "a significant threat of injury from [an] impending action").

Despite the established principle that employment-related harms can be retroactively compensated, the district court concluded that plaintiffs were entitled to preliminary relief because it believed the Executive Order would "bar[]" plaintiffs "from significant employment opportunities in their chosen profession." ROA.1760. 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." By contrast, if plaintiffs here do not receive exceptions, choose to remain

[8] *See Connor v. Department of Veterans Affairs*, 8 F.4th 1319, 1324 (Fed. Cir. 2021) (listing twelve "nonexclusive" factors—which include the "potential for the employee's rehabilitation" and any "mitigating circumstances surrounding the offense"—that a federal agency must consider in determining appropriate workplace discipline under the CSRA (quoting *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 332 (1981))).

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 were threatened with irreparable injury because they faced "a Hobson's choice" between vaccination and discipline. ROA.1760. 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. *See* ROA.118-38. *BST Holdings* is also inapposite because it involved private-sector employees; this Court has repeatedly held that *federal employees* are not irreparably harmed by job loss because they can generally obtain reinstatement and other remedies if they successfully challenge their discharge pursuant to the CSRA. *See White v. Carlucci*, 862 F.2d 1209, 1212-13 (5th Cir. 1989); *Garcia*, 680 F.2d at 31-32; *Morgan v. Fletcher*, 518 F.2d 236, 239-40 (5th Cir. 1975).

### B. The Public Interest And The Balance Of Harms Favor The Government

The district court further erred in finding that the balance of the equities and public interest favor preliminary relief. ROA.1768-69; *see Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that these factors "merge" when relief is sought against the

government). As Judge Higginson explained, the injunction "places federal employees at a greater risk of hospitalization and death, not to mention being unable to work because of illness or the need to quarantine"; "greatly impede[s]" the government's operational efficiency; and leaves "the President of the United States, in his capacity as CEO of the federal workforce," disabled to "take the same lifesaving workplace safety measures as" a broad range of "private sector CEOs." Stay Order 9-11 (Higginson, J., dissenting).

The injunction seriously harms the government and the public. 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. ROA.1805-06 ¶¶ 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." ROA.1805 ¶ 5. In addition, "over 20,000 federal civilian employees are hired in a typical month"; this constant influx of new employees who are not subject to a vaccination requirement would likely reduce the percentage of the federal workforce that is vaccinated. *Id.* ¶ 6. 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. *See* CDC, *COVID-19 Vaccines Are Effective*, https://go.usa.gov/xtEDp (last updated Dec. 23, 2021); ROA.1804-05 ¶ 4. That is why private employers and

other entities throughout the United States have implemented requirements that their employees be vaccinated against COVID-19. *See supra* p. 7.[9] By barring the federal government from enforcing such a requirement, the injunction places new and existing employees at greater risk of becoming seriously ill and unable to work.

The injunction impedes the efficiency of federal operations in additional ways. 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*. Numerous agencies are in a maximum-telework posture and have developed detailed plans to increasingly return employees to physical workplaces. The injunction significantly complicates reentry as agencies must revise the plans to account for more unvaccinated employees. ROA.1806-07 ¶¶ 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

[9] Indeed, various federal courts have required that their staff members be vaccinated. *See, e.g.*, General Order 95-01 (10th Cir. Jan. 11, 2022), https://go.usa.gov/xtH7y; General Order 53 (11th Cir. Dec. 27, 2021), https://go.usa.gov/xtsUD (vaccination or regular testing); U.S. Court of Appeals for the Fourth Circuit, *COVID-19 Building Requirements* (Dec. 22, 2021), https://go.usa.gov/xtmzw (same); General Order 21-009 (7th Cir. Aug. 25, 2021), https://go.usa.gov/xtEM2. And as Judge Higginson noted, courts that choose not to require vaccination can—unlike most or all executive agencies—"close [their] buildings to the public, allowing [them] to rely on other, less effective infection-fighting measures, such as mandatory mask-wearing and testing." Stay Order 8 n.8 (Higginson, J., dissenting).

mission-related activities—all to the detriment of taxpayers and the public at large. ROA.1805-09 ¶¶ 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 the injunction represents "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 from the vaccination requirement, as federal law requires. ROA.1808 ¶ 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 in the litigation, with no apparent benefit to plaintiffs.

The preliminary injunction also disrupts the elaborate and exclusive scheme Congress established for handling employment disputes. *See supra* Part I. The injunction "seriously undermine[s]" 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. This Court found it "quite clear" that a preliminary injunction allowing a single 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." *Garcia*, 680 F.2d at 32. The disruption from the nationwide injunction here is obviously far greater.

The district court minimized the public interests the Executive Order serves, declaring "without evidence or citation," Stay Order 11 (Higginson, J., dissenting), that the public interest can "be served via less restrictive measures than the mandate, such as masking, social distancing, or part- or full-time remote work," ROA.1769. But the district court is not a public health expert. *See* Stay Order 11 (Higginson, J., dissenting). The Executive Order, by contrast, 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.

## IV. At Minimum, The Preliminary Injunction Must Be More Narrowly Tailored

The district court also erred in enjoining the Executive Order nationwide, as to millions of federal employees who are not parties to this case. Such universal injunctions transgress both Article III and equitable principles by affording relief that is not necessary to redress any injury to the parties in the case. They also frustrate the development of the law. Even assuming that it could otherwise be sustained, the district court's injunction should be vacated to the extent that it exceeds what is necessary to redress the injuries of the named plaintiffs and any bona fide members of FMF when the complaint was filed.

"[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 also "be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). The Supreme Court has thus narrowed injunctions that extended relief beyond the harms to "any plaintiff in th[e] lawsuit." *Lewis v. Casey*, 518 U.S. 343, 358 (1996).

Those constitutional limitations are reinforced by principles of equity. A court's authority to award relief is generally confined to relief "traditionally accorded by courts of equity" in 1789. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund,*

*Inc.*, 527 U.S. 308, 318-19 (1999). And it is settled 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); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) (explaining that English and early American "courts of equity" typically "did not provide relief beyond the parties to the case").

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," ROA.1770, provided no license for the court to exceed the bounds of its Article III jurisdiction or its equitable authority.

As an initial matter, it is far from clear that any substantial portion of FMF's alleged 6,000 members would have Article III standing in their own right to obtain the injunctive relief granted by the district court. FMF does not allege that its members are all current federal employees, let alone employees facing imminent adverse personnel actions. *Cf.* ROA.74 ¶ 10 (alleging "over 6,000 members" who are "employees of *or contractors for*" the federal government) (emphasis added)). Indeed, FMF does not apparently require anything to join as a "member" other than providing a name and email address. *See* FMF, *Become a Member!*, https://feds4medfreedom.org/joinus/ (last visited Feb. 14, 2022); *cf. Funeral Consumers*

*All., Inc. v. Service Corp. Int'l*, 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").

Nor did the court make any effort to explain why relief tailored to identifiable members of FMF would be unworkable: the court could easily direct FMF to notify the government of its members' names and employing agencies, subject to a protective order if necessary, and agencies could grant temporary litigation-related exceptions to any appropriate plaintiffs. Any practical concerns with administering such an injunction do not justify allowing a single district judge to dictate national policy for an "order affecting millions of federal employees." Stay Order 3 n.3 (Higginson, J., dissenting). And in any event, even if there were practical obstacles, 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.

As for the court's observation that FMF "is actively adding new members," ROA.1770, neither the district court nor plaintiffs cited any authority suggesting that 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. *Cf. American Pipe & Constr. Co. v. Utah*,

414 U.S. 538, 547 (1974) (rule against one-way intervention prevents potential parties from "await[ing] developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests"). If plaintiffs wished to broaden the scope of this litigation to other unnamed federal employees, they could seek to represent a class. But the current complaint does not even allege that plaintiffs could satisfy the requirements for doing so, let alone demonstrate any entitlement to class-wide relief.

The district court's decision to grant a nationwide injunction is also irreconcilable with its recognition that the claims of plaintiffs with pending exception requests are "arguably unripe." ROA.1757; *see also Rodden*, 2021 WL 5545234, at *3 (conclusion by the same district court that employees with pending exception requests are not entitled to injunctive relief because they lack ripe claims); *Donovan v. Vance*, No. 4:21-CV-5148, 2021 WL 5979250, at *4-5 (E.D. Wash. Dec. 17, 2021) (finding similar claims unripe); *Church*, 2021 WL 5179215, at *8-9 (same). The district court made no effort to explain why it could contravene the limits of Article III and grant relief to plaintiffs over whom it lacked jurisdiction, much less to federal employees at large. *See Town of Chester*, 137 S. Ct. at 1650 ("[S]tanding is not dispensed in gross." (quotation marks omitted)); *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 434 n.27 (5th. Cir. 2021) (ripeness is assessed "claim by claim").

The injunction here also casts in particularly stark relief the "toll" that nationwide injunctions have "on the federal court system." *Hawaii*, 138 S. Ct. at 2425

(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 in the grant of stay). 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 Executive 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* First Amended Complaint at 1, *Altschuld v. Raimondo*, No. 21-cv-2779, ECF No. 5 (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) (per curiam). The district court failed to exercise appropriate restraint here in granting a nationwide injunction that essentially nullified a dozen sister courts' decisions.

## CONCLUSION

The preliminary injunction should be vacated in full or, at a minimum, narrowed 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,

BRIAN M. BOYNTON
*Acting Assistant Attorney General*

BRIT FEATHERSTON
*United States Attorney*

SARAH E. HARRINGTON
*Deputy Assistant Attorney General*

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

*/s/ Casen B. Ross*
CASEN B. ROSS
*Attorneys, Appellate Staff*
*Civil Division, Room 7270*
*U.S. Department of Justice*
*950 Pennsylvania Avenue NW*
*Washington, DC 20530*
*202.514.1923*
*casen.ross@usdoj.gov*

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## CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

*/s/ Casen B. Ross*
Casen B. Ross

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,569 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/ Casen B. Ross*
Casen B. Ross

# ADDENDUM

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**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.

Each officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.

**5 U.S.C § 7301**

**§ 7301. Presidential regulations**

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