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February 23, 2022

VIA CM/ECF

Lyle W. Cayce, Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place Suite 115
New Orleans, LA 70130-3408

RE: *Feds for Medical Freedom v. Biden*, No. 22-40043 (5th Cir.)
Oral argument scheduled for March 8, 2022

Dear Mr. Cayce:

The federal defendants respectfully respond to plaintiffs' February 22, 2022 letter citing this Court's unpublished, per curiam disposition in *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610 (5th Cir. Feb. 17, 2022).

As an initial matter, plaintiffs' reliance on *Sambrano* is misplaced. Pursuant to Circuit Rule 47.5, the panel in that case "determined that this opinion should not be published and is not precedent," Op. 2 n.*, which is why the government did not cite that memorandum opinion in its reply brief. *See also id.* at 2 n.1 (describing panel's unanimous decision not to publish).

In any event, *Sambrano* supports the government, not plaintiffs. The plaintiffs in *Sambrano* sought religious accommodations exempting them from United Airlines' vaccination requirement, and challenged that requirement under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2. Both the panel majority and the dissent confirmed the well-established rule "that harms flowing from an adverse employment action are not irreparable," given "attractive postjudgment remedies, including back pay and reinstatement." Op. at 42 (Smith, J., dissenting); *compare id.* at 13. But the panel majority recognized a limited new category of irreparable injury where an employer attempts to "coerce" its employees "into violating their religious convictions." *Id.* at 16. In dissent, Judge Smith argued that this "ongoing coercion" theory was "completely fabricated" and contrary to precedent. *Id.* at 36 (Smith J., dissenting).

Even assuming the *Sambrano* majority’s new “coercion” theory is viable, it does not apply to this case. Plaintiffs’ sole claim here is that the President lacks authority to establish a vaccination requirement for federal employees. They have asserted no religious-liberty claims under the Constitution or the Religious Freedom Restoration Act—the only plaintiffs with ripe claims are those who elected *not* to seek religious exceptions to the vaccination requirement. Plaintiffs thus cannot identify any coercion of the sort the panel majority in *Sambrano* believed was sufficient to constitute irreparable injury. They simply face the prospect of discipline or job loss that this Court and the Supreme Court have long held does not qualify as irreparable injury.

Respectfully submitted,

/s/ Charles W. Scarborough
Charles W. Scarborough
Civil Division, Appellate Staff
U.S. Department of Justice

cc: Counsel of Record (via CM/ECF)

CERTIFICATE OF COMPLIANCE

This letter complies with the type-volume limit of Federal Rule of Appellate Procedure 28(j) because the body of the letter contains 346 words. This letter also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(c)(2) because it was prepared using Microsoft Word 2013 in CenturyExpd BT 14-point font, a proportionally spaced typeface.

/s/ Charles W. Scarborough

CHARLES W. SCARBOROUGH

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Charles W. Scarborough

CHARLES W. SCARBOROUGH