

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ISRAEL RYDIE, et al.,

Plaintiffs-Appellants,

v.

PRESIDENT JOSEPH R. BIDEN, JR., et al.,

Defendants-Appellees.

No. 21-2359

DEFENDANTS-APPELLEES' MOTION TO PUBLISH OPINION

Pursuant to Local Rule 36(b), defendants-appellees respectfully move to publish this Court's decision filed on April 19, 2022, in the above-captioned case. Counsel for plaintiffs-appellants has stated that plaintiffs-appellants take no position on this motion.

1. In this case, plaintiffs Israel Rydie and Elizabeth Fleming challenge Executive Order 14043, 86 Fed. Reg. 50,989 (Sept. 9, 2021), which requires that all federal employees be vaccinated against COVID-19, subject to "exceptions only as required by law," *id.* at 50,990. Plaintiffs have refused to disclose their vaccination status to their employing agencies and have not sought an exception from the vaccination requirement; instead, they challenged the requirement in district court and

filed a motion for a preliminary injunction, asking that the vaccination requirement be enjoined nationwide. The district court denied the motion, noting that plaintiffs' jurisdictional showing was "questionable at best," as plaintiffs failed to exhaust the procedures prescribed by the Civil Service Reform Act (CSRA). *Rydie v. Biden*, ___ F. Supp. 3d ___, No. 21-2696, 2021 WL 5416545, at *3 (D. Md. Nov. 19, 2021). The district court also concluded that plaintiffs had failed to satisfy any of the requirements for preliminary relief. *Id.* at *2-6.

Plaintiffs appealed, and this Court held that Congress had "divested the district court of jurisdiction to hear [plaintiffs'] claims" by prescribing a specific channel for review under the CSRA. Op. 17. The Court thus vacated the district court's judgment and remanded with instructions to dismiss the case.

2. An opinion is appropriate for publication if, among other things, "[i]t . . . clarifies, or explains a rule of law within this Circuit" or "[i]t involves a legal issue of continuing public interest." Local Rule 36(a). This case satisfies each of these criteria: The Court's thorough opinion addresses an issue of statutory interpretation that is of significant and continuing public interest. Indeed, as this Court has noted, the Fifth Circuit recently issued an opinion that addresses the same issues, *see Feds for Medical Freedom v. Biden*, ___ F.4th ___, 2022 WL 1043909 (5th Cir. Apr. 7, 2022), and the plaintiffs in that case have indicated that they intend to file a petition for rehearing en banc. These same issues are also presented in an appeal pending in the Third Circuit.

See Smith v. Biden, No. 21-3091 (3d Cir.). This Court's opinion clarifies circuit law on important issues, including the CSRA's application to asserted pre-enforcement challenges, and it therefore warrants publication under Local Rule 36(a).

The Court's opinion also warrants publication because it "involves a legal issue of continuing public interest." Local Rule 36(a). The Executive Order at issue in this case applies to over 2 million federal employees, and the issues presented will recur in other courts. Indeed, in this circuit alone, federal employees have filed at least two actions challenging federal workforce COVID-19 testing requirements for unvaccinated employees, and this Court's holding on the preclusive scope of the CSRA should govern those cases. *See, e.g., Doe, et al. v. Wray, et al.*, No. 22-cv-369 (E.D. Va.); *McManus v. Department of Homeland Sec., et al.*, No. 22-cv-346 (E.D. Va.). And a number of cases challenging Executive Order 14043 remain pending in other circuits; publishing this Court's comprehensive opinion would provide useful guidance to those courts. *See, e.g., American Fed'n Gov't Emps. Local 2586, et al. v. Biden, et al.*, No. 5:21-cv-1130 (W.D. Okla.); *Brass v. Biden, et al.*, No. 1:21-cv-2778 (D. Colo.); *Foley v. Biden*, No. 4:21-cv-1098 (N.D. Tex.); *Costin, et al. v. Biden, et al.*, No. 1:21-cv-2484 (D.D.C.); *Doe, et al. v. Austin, et al.*, No. 8:22-cv-121 (M.D. Fla.); *Health Freedom Defense Fund, et al. v. Biden, et al.*, No. 8:21-cv-2679 (M.D. Fla.); *Oklahoma, et al. v. Biden, et al.*, No. 21-cv-1136 (W.D. Okla.); *Payne v. Biden, et al.*, No. 1:21-cv-3077 (D.D.C.); *Rodden, et al. v. Fauci, et al.*, No. 3:21-cv-317 (S.D. Tex.); *State Department Employee #1, et al. v.*

Mayorkas, et al., No. 8:22-cv-364 (M.D. Fla.); *Vierbuchen v. Biden, et al.*, No. 22-cv-1 (D. Wyo.).

Local Rule 36(a) states that “[t]he Court will publish opinions only in cases that have been fully briefed and presented at oral argument.” This case was fully briefed, and the Court calendared it for oral argument on March 9, 2022. On February 17, 2022, plaintiffs filed a motion to submit the case on the briefs without oral argument, explaining that plaintiffs’ counsel was “recovering from an unexpected medical issue.” The happenstance that the Court removed this case from the oral argument calendar due to counsel’s medical issues should not deprive the government of a published opinion on this important issue, which is being actively litigated in courts throughout the country. This Court’s decision to decide this appeal on the briefs, after previously finding the case suitable for oral argument, does not diminish the significance of the issues presented or the thoroughness of the Court’s opinion, which plainly warrants publication.

3. We have contacted plaintiffs’ counsel, who have indicated that plaintiffs take no position on this motion.

CONCLUSION

For the foregoing reasons, the Court's decision filed on April 19, 2022, should be published.

Respectfully submitted,

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April 2022

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify this motion complies with the requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 849 words, according to the count of Microsoft Word.

/s/ Casen B. Ross
CASEN B. ROSS

CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2022, I electronically filed the foregoing with the Clerk of the Court 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/ Casen B. Ross
CASEN B. ROSS