

1 Vanessa R. Waldref
2 United States Attorney
3 Eastern District of Washington
4 John T. Drake
5 Molly M.S. Smith
6 Assistant United States Attorneys
7 Post Office Box 1494
8 Spokane, WA 99210-1494
9 Telephone: (509) 353-2767

10 UNITED STATES DISTRICT COURT
11 FOR THE EASTERN DISTRICT OF WASHINGTON

12 DAVID G. DONOVAN, *et al.*,

No. 4:21-cv-05148-TOR

13 Plaintiffs,

14 v.

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

15 JOSEPH R. BIDEN, in his official
16 capacity as President of the United States
17 of America, JENNIFER
18 GRANHOLM, in her official capacity as
19 Secretary of the UNITED STATES
20 DEPARTMENT OF ENERGY, BRIAN
21 VANCE in his official capacity as
22 Manager of the UNITED STATES
23 DEPARTMENT OF ENERGY Hanford
24 Site,

25 Defendants.

26 Plaintiffs have not meaningfully addressed the persistent procedural
27 deficiencies in their Second Amended Complaint (SAC). The Court should exercise
28 its discretion to dismiss the SAC with prejudice.

1 **A. Update on Other COVID-19 Vaccine Litigation**

2 Several of Plaintiffs’ assertions regarding developments in other COVID-19
3 vaccine cases warrant an update to this Court. First, contrary to Plaintiffs’ assertions,
4 the federal defendants in *Brnovich v. Biden* have in fact appealed the permanent
5 injunction against enforcement of the Contractor Order, EO 14042, previously entered
6 in the District of Arizona. *Brnovich v. Biden*, No. 2:21-cv-1568-MTL, ECF No. 179
7 (D. Ariz. Apr. 8, 2022) (notice of appeal), *appeal docketed*, No. 22-15518 (9th Cir.
8 Apr. 11, 2022). To the extent Plaintiffs imply that Federal Defendants here have
9 waived or otherwise abandoned arguments based on appellate activity in another case
10 in this circuit, Plaintiffs’ arguments are unpersuasive and factually incorrect.
11
12

13 Second, as Plaintiffs correctly note, the Fifth Circuit recently ordered the
14 preliminary injunction which had enjoined enforcement of the Employee Order on a
15 nationwide basis be vacated.¹ *Feds for Medical Freedom v. Biden*, --- F.4th ---, 2022
16 WL 1043909, at *1 (5th Cir. Apr. 7, 2022). The Fifth Circuit concluded that the
17 district court lacked subject-matter jurisdiction to consider those federal employees’
18 challenges to the Employee Order because their claims were subject to the Civil
19 Service Reform Act of 1978 (CSRA), which requires that review of certain federal
20 employment claims be adjudicated exclusively through the Merit Systems Protection
21
22
23
24

25 _____
26 ¹ The injunction remains in effect while issuance of the Fifth Circuit’s mandate is
27 pending.
28

1 Board (MSPB) and the Federal Circuit. *Id.* at *2–*6; *see also Rydie v. Biden*, No. 21-
2 2359, 2022 WL 1153249, at *3–*8 (4th Cir. Apr. 19, 2022) (unpublished) (holding
3 the same). Although Federal Defendants have not previously raised a CSRA
4 argument in these proceedings, the Fifth Circuit’s reasoning is persuasive and
5 compelling. And importantly, “[c]ourts have an independent obligation to determine
6 whether subject-matter jurisdiction exists, even when no party challenges it.” *Hertz*
7 *Corp. v. Friend*, 559 U.S. 77, 94 (2010); *see also Fort Bend Cty., Texas v. Davis*, 139
8 S. Ct. 1843, 1849 (2019) (“[C]hallenges to subject-matter jurisdiction may be raised
9 by the defendant at any point in the litigation, and courts must consider them *sua*
10 *sponte*.” (internal quotation marks and citation omitted)). *Feds for Medical Freedom*
11 thus provides an additional compelling reason to dismiss the Federal Employee
12 Plaintiffs’ claims here for lack of jurisdiction.

13
14
15
16
17 Finally, Plaintiffs make several references to the Supreme Court’s recent grant
18 of a partial stay of a Fifth Circuit decision in *Austin v. U.S. Navy Seals 1-26*, 595 U.S.
19 ___, 142 S. Ct. 1301 (2022). *Navy Seals* concerns a Department of Defense directive
20 requiring COVID-19 vaccination for military personnel, which is different from the
21 two Executive Orders being challenged in this case. *See U.S. Navy Seals v. Biden*, 27
22 F.4th 336, 339–40 (5th Cir. 2022). Accordingly, any application that *Navy Seals* has
23 here is by analogy only.
24
25
26
27
28

B. The Vast Majority of Plaintiffs Lack Standing

1
2 Plaintiffs' response seeks to avoid addressing their constitutional standing
3
4 problems by conflating them with the concept of administrative exhaustion. That
5 some Plaintiffs "have begun the EEOC complaint process," ECF No. 81 at 4, is
6 nonresponsive to their standing issues for two reasons: First, Plaintiffs' exhaustion of
7
8 EEO remedies is irrelevant because Plaintiffs no longer assert Title VII claims in the
9 SAC. ECF No. 74. Second, even if they were asserting Title VII claims, exhaustion
10
11 of EEO administrative remedies is a statutory requirement, not a satisfaction of Article
12
13 III's constitutional standing requirements. *See* 42 U.S.C. § 2000e-5 (Title VII
14
15 enforcement provisions). For similar reasons, Plaintiffs' arguments about RFRA
16
17 exhaustion are not compelling. Regardless of what procedural exhaustion
18
19 requirements must be met to assert certain statutory claims, Plaintiffs lack
20
21 *constitutional* standing to sue. As previously argued, nearly all of the 314 Plaintiffs in
22
23 this case have claims that are either unripe, lack a sufficient constitutional injury, arise
24
25 from self-inflicted injuries, or are insufficiently pled to establish standing.² ECF No.
26
27 79 at 8–16.
28

² Plaintiffs also mischaracterize Federal Defendants' motion as admitting that seven PNNL employees have been terminated or placed on indefinite leave without pay. ECF No. 81 at 3. This is not a correct characterization of Federal Defendants'

1 Plaintiffs attempt to flip the procedural burden by arguing that it is Federal
2 Defendants who have not affirmatively identified to the Court those Plaintiffs who
3 have not suffered a constitutional injury to their religious liberty. ECF No. 81 at 7.
4
5 Aside from disregarding Federal Defendants’ extensive briefing of Plaintiffs’ standing
6 deficiencies identified by individual paragraph number in the SAC, Plaintiffs misstate
7 the burden of proof: it is *Plaintiffs* who bear the burden of pleading facts to establish
8 standing. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 411–12 (2013). Plaintiffs
9 have alleged that they face an injury in the form of “imminent and wrongful
10 termination” from their employment with the federal government or a federal
11 contractor based on their refusal to receive the COVID-19 vaccine. ECF No. 74 at
12 ¶ 8. But the policies they challenge provide exemptions to this requirement.
13 Plaintiffs’ failure to plead facts that indicate they have standing to challenge this
14 policy despite the availability of exemptions is fatal to their SAC, regardless of other
15 statutory exhaustion requirements.
16
17
18
19
20
21
22
23

24 argument, which accepts Plaintiffs’ factual allegations as true for the purposes of the
25 present motion, nor is it a correct recitation of the specific allegations Federal
26 Defendants cited from Plaintiffs’ SAC.
27
28

1 **C. The Court Should Not Reach Plaintiffs’ Merits Arguments in Light of**
2 **Their Procedural Deficiencies**

3 Plaintiffs reassert their substantive arguments in support of the merits of their
4 legal challenges to the two Executive Orders. ECF No. 81 at 9–21. But Plaintiffs are
5 once again putting the cart before the horse. Plaintiffs have not addressed the
6 significant procedural flaws in their SAC, namely that they have not asserted their
7 claims via cognizable causes of action, that they have named improper defendants for
8 their claims, and that they have failed to plead sufficient facts to support the
9 individualized claims being raised by 314 unique Plaintiffs. *See* ECF No. 79 at 16–
10 29. Plaintiffs are, in many instances, asking for Federal Defendants to defend against,
11 and the Court to ultimately enter judgment on, causes of action that do not exist. And,
12 even where Plaintiffs have identified cognizable causes of action, they have named
13 legally improper defendants for those claims and fail to plead specific, non-conclusory
14 factual allegations in support of those claims. The Court need not consider Plaintiffs’
15 substantive arguments in light of these fundamental procedural defects.

16 **D. Plaintiffs’ Response Demonstrates They Should Not Be Granted Leave**
17 **to Amend**

18 Plaintiffs should not be afforded another opportunity to amend. Plaintiffs are
19 apparently determined to obtain a judicial decision on their policy grievances, but they
20 have repeatedly failed to conform their pleadings to the basic requirements of the
21 Federal Rules of Civil Procedure and Article III’s justiciability requirements. Despite
22 multiple rounds of briefing now, in which Federal Defendants have repeatedly raised

1 the same procedural arguments, as well as the Court’s identification of several
2 procedural defects during the TRO stage of the case, Plaintiffs continually fail to offer
3 meaningful responses to these procedural deficiencies. Although leave to amend a
4 complaint generally should be freely given, here, a Third Amended Complaint would
5 be futile considering Plaintiffs’ ongoing failure to comply with even simple
6 procedural and jurisdictional requirements. The Court should dismiss the SAC with
7 prejudice.
8
9

10 DATED this 21st day of April, 2022.

11
12 Vanessa R. Waldref
13 United States Attorney

14 s/ Molly M.S. Smith
15 John T. Drake
16 Molly M.S. Smith
17 Assistant United States Attorneys
18 Attorneys for Federal Defendants
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

NAME & ADDRESS	Method of Delivery
Nathan J. Arnold, WSBA No. 45356 Arnold & Jacobowitz PLLC 2701 First Avenue, Suite 200 Seattle, WA 98121 nathan@CAJlawyers.com	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other: _____
Simon Peter Serrano, WSBA No. 54769 Silent Majority Foundation 5426 N. Rd. 68, Ste. D, Box 105 Pasco, WA 99301 pete@silentmajorityfoundation.org	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other: _____

s/Molly M.S. Smith
 Molly M.S. Smith, AUSA