

No. 22-40043

In the
United States Court of Appeals
for the **Fifth Circuit**

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING,
INCORPORATED; RAYMOND A. BEEBE, JR.; JOHN ARMBRUST; ET AL,
PLAINTIFFS-APPELLEES,

v.

JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED
STATES; THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, IN HIS
OFFICIAL CAPACITY AS SECRETARY OF TRANSPORTATION; DEPARTMENT OF
TRANSPORTATION; JANET YELLEN, IN HER OFFICIAL AS SECRETARY OF
TREASURY; ET AL,
DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court for the
Southern District of Texas, Galveston, No. 3:21-cv-356

**MOTION OF AMERICA FIRST LEGAL FOUNDATION FOR LEAVE
TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THE
PLAINTIFFS-APPELLEES' PETITION FOR REHEARING EN BANC**

GENE P. HAMILTON
Counsel of Record
AMERICA FIRST LEGAL FOUNDATION
REED D. RUBINSTEIN
ANDREW J. BLOCK
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org
Attorneys for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 29(b)(2), America First Legal Foundation (AFL) respectfully requests leave to file a brief as amicus curiae in support of the Plaintiffs-Appellees' petition for rehearing *en banc*.

AFL is a public interest law firm that represents two federal employees in separate litigation challenging the same federal employee vaccine mandate at issue in this case. *See Payne v. Biden*, 1:21-cv-03077-JEB (D.D.C. 2021); *Vierbuchen v. Biden*, 22-cv-001-SWS (D. Wyo. 2022). AFL's clients are not parties to this case, nor are they members of any of the organizations that are a party to the case. They do, however, benefit from the nationwide preliminary injunction previously issued by the lower court in this case and have an interest in the continued existence of that preliminary injunction.

AFL's proposed brief is relevant to this case as it provides additional analysis of the panel's discussion of the Civil Service Reform Act and its applicability in this case. This context and analysis will benefit the Court as it considers the petition.

AFL has conferred with the parties and all parties have consented to AFL's filing of an amicus curiae brief at this stage. Accordingly, AFL respectfully requests that the Court grant this motion.

Respectfully submitted,

s/ Gene P. Hamilton

GENE P. HAMILTON

Counsel of Record

VICE-PRESIDENT AND GENERAL COUNSEL

AMERICA FIRST LEGAL FOUNDATION

300 Independence Avenue S.E.

Washington, D.C. 20003

(202) 964-3721

gene.hamilton@aflegal.org

Attorney for Amicus Curiae

America First Legal Foundation

Dated: May 27, 2022

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 32(b), this document contains 202 words according to the word count function of Microsoft Word.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: May 27, 2022

s/ Gene P. Hamilton
GENE P. HAMILTON

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on May 27, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated: May 27, 2022

s/ Gene P. Hamilton
GENE P. HAMILTON

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, INCORPO-
RATED; 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 OFFI-
CIAL CAPACITY AS SECRETARY OF TRANSPORTATION; DEPARTMENT OF TRANS-
PORTATION; JANET YELLEN, IN HER OFFICIAL AS SECRETARY OF TREASURY; ET
AL,

DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court for the
Southern District of Texas, Galveston, No. 3:21-cv-356

**BRIEF FOR *AMICUS CURIAE* AMERICA FIRST LEGAL FOUNDATION IN
SUPPORT OF THE APPELLEES' PETITION FOR REHEARING EN BANC**

GENE P. HAMILTON

Counsel of Record

AMERICA FIRST LEGAL FOUNDATION

REED D. RUBINSTEIN

ANDREW J. BLOCK

300 Independence Avenue S.E.

Washington, D.C. 20003

(202) 964-3721

gene.hamilton@aflegal.org

Attorneys for Amicus Curiae

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

22-40043

Feds for Medical Freedom; et al. v. Joseph R. Biden, Jr.; et al.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae:

America First Legal Foundation (AFL)

Counsel for Amicus Curiae:

Gene P. Hamilton
Vice-President and General Counsel
America First Legal Foundation
Reed Rubinstein
Andrew Block
300 Independence Avenue S.E.
Washington, D.C. 20003
(202) 964-3721
gene.hamilton@aflegal.org

s/ Gene P. Hamilton
GENE P. HAMILTON

TABLE OF CONTENTS

SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS.....	C-1
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICUS CURIAE.....	1
ARGUMENT	2
I. The Panel Opinion Wrongly Characterized the Appellees’ Case as a Claim for “Substantive, Not Structural, Relief.”	2
II. The Vaccine Mandate is Not a CSRA “Working Condition.”	5
III. The Panel Decision Will Break the Federal Employment Sys- tem.....	7
CONCLUSION	9
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases

<i>Armstrong v. Exceptional Child Ctr., Inc.</i> , 575 U.S. 320 (2015).....	2
<i>Carr v. Saul</i> , 141 S. Ct. 1352 (2021)	3
<i>Cochran v. U.S. Sec. & Exch. Comm'n</i> , 20 F.4th 194 (5th Cir. 2021)	3
<i>Dep't of Def. Dependents Schs. v. Fed. Lab. Rels. Auth.</i> , 863 F.2d 988 (1988)	7
<i>Elgin v. Dep't of the Treasury</i> , 567 U.S. 1 (2012)	3, 4, 7, 9
<i>Feds for Med. Freedom v. Biden</i> , 30 F.4th 503 (5th Cir. 2022)	<i>passim</i>
<i>Fort Stewart Schs. v. Fed. Lab. Rels. Auth.</i> , 495 U.S. 641 (1990).....	6
<i>Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.</i> , 561 U.S. 477 (2010).....	2, 3
<i>Freytag v. Comm'r</i> , 501 U.S. 868 (1991).....	5
<i>Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.</i> , 142 S. Ct. 661 (2022)	6
<i>Payne v. Biden</i> , 2022 WL 1500563 (D.D.C. May 12, 2022).....	1

<i>Plaut v. Spendthrift Farm, Inc.</i> , 514 U.S. 211 (1995).....	4
<i>SEC v. Cochran</i> , No. 21-1239, 2022 WL 1528373 (U.S. May 16, 2022)	3, 4, 5
<i>Turner v. U.S. Agency for Glob. Media</i> , 502 F. Supp. 3d 333 (D.D.C. 2020)	7
<i>Vierbuchen v. Biden</i> , 22-cv-001-SWS (D. Wyo. 2022).....	1
Statutes	
5 U.S.C. § 7513	9
15 U.S.C. § 78y	3
28 U.S.C. § 1131	3
28 U.S.C. § 2201	3
Other Authorities	
<i>Annual Performance Report for FY 2020 and Annual Performance Plan for FY 2021 (Final) & FY 2022 (Proposed)</i> , U.S. Merit Sys- tems Protection Board, May 28, 2021, available at https://bit.ly/3yPP130 (last visited May 24, 2022).....	8
The White House, <i>Press Release: Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees</i> (Dec. 19, 2021), https://bit.ly/3wDruRn	8

INTEREST OF AMICUS CURIAE¹

America First Legal Foundation (AFL) is a public interest law firm dedicated to vindicating Americans' constitutional and common law rights, protecting their civil liberties, and advancing the rule of law.

AFL believes that the federal civilian employee COVID-19 vaccine mandate violates the separation of powers and constitutionally protected personal liberties. It represents two federal civilian employees, one an engineer with the Department of Defense and the other an Assistant United States Attorney with the Department of Justice, in cases challenging the federal government's authority to mandate vaccination. *See Payne v. Biden*, 2022 WL 1500563 (D.D.C. May 12, 2022); *Vierbuchen v. Biden*, 22-cv-001-SWS (D. Wyo. 2022).

The district court in *Payne* cited the Fifth Circuit's opinion in this case as authority for CSRA preclusion and dismissal. *Payne*, at *3. However, AFL believes that the Fifth Circuit's decision is incorrect and should

¹ This brief was not written in whole or in part by counsel for any party, and no person or entity other than the amicus has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this brief.

be revisited. Accordingly, AFL has a strong interest in the outcome of this petition.

ARGUMENT

The Fifth Circuit should grant the petition for rehearing *en banc* because the panel opinion in *Feds for Med. Freedom v. Biden*, 30 F.4th 503 (5th Cir. 2022) was wrongly decided.

The Civil Service Reform Act (“CSRA”) does not explicitly preclude district court review of pre-enforcement separation of powers claims. The panel majority effectively rewrote the statutory text by erroneously mischaracterizing the petitioners’ structural separation of powers claim as “substantive” and the vaccine mandate as “a working condition” reviewable by the Office of Special Counsel. *Id.* at 510. Rehearing *en banc* is necessary here to maintain the Nation’s “long history of judicial review of illegal executive action,” *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), and to prevent the CSRA system from being overwhelmed with claims by thousands of federal workers.

I. The Panel Opinion Wrongly Characterized the Appellees’ Case as a Claim for “Substantive, Not Structural, Relief.”

In its decision, the panel majority failed to cite any text from the CSRA supporting its finding that the CSRA precluded the Appellees’ claims. Nor could it have, because the CSRA does not function in such a manner. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S.

477, 490 (2010) (construing 15 U.S.C. § 78y). Absent express textual limits on 28 U.S.C. §§ 1131 and 2201, the rule is that district court jurisdiction over structural constitutional challenges is not precluded. *Free Enter. Fund*, 561 U.S. at 489-90 (“Provisions for agency review do not restrict judicial review unless the statutory scheme displays a fairly discernable’ intent to limit jurisdiction, and the claims at issue are of the type Congress intended to be reviewed within to be reviewed within the statutory structure.”) (cleaned up); *see also Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) (“Agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators’ area of technical expertise.”) (cleaned up); *Cochran v. U.S. Sec. & Exch. Comm’n*, 20 F.4th 194, 208 (5th Cir. 2021) *cert. granted sub nom. SEC v. Cochran*, No. 21-1239, 2022 WL 1528373 (U.S. May 16, 2022) (“The key question is why *Free Enterprise Fund* had an outcome different from those in *Thunder Basin* and *Elgin*. The answer is that the *Thunder Basin* and *Elgin* plaintiffs sought substantive relief, while the *Free Enterprise Fund* accounting firm sought structural relief.”).

To avoid the general rule that would provide for district court review of the vaccine mandate, the panel majority declared that the

petitioners' separation of powers challenge is substantive, not structural. 30 F.4th at 510. This declaration, however, is directly contrary to this Court's reasoning and ruling in the recent *en banc* decision in *Cochran*, "Congress gave federal district courts jurisdiction over 'all civil actions arising under the Constitution.' Not some or most—but all." 20 F.4th at 199 (cleaned up). *Cochran* further rejected the government's argument that, "[b]y giving *some* jurisdiction to the courts of appeals, ... Congress implicitly stripped *all* jurisdiction from every other court." *Id.* at 200 (emphasis in original).

The *en banc* decision in *Cochran* speaks directly to this case as well. Inappropriately applying *Elgin v. Dep't of the Treasury*, 567 U.S. 1 (2012), the panel decision mischaracterized the nature of the Appellees' claims and applied the jurisdictional limitations of the CSRA too broadly. "The separation of powers is a structural safeguard rather than a substantive remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). While the Supreme Court's "separation-of-powers jurisprudence generally focuses on the danger of one branch's aggrandizing its power at the expense of another branch," the interests protected "are not those of

any one branch of government but of the entire Republic.” *Freytag v. Comm’r*, 501 U.S. 868, 878, 880 (1991).

By mandating injections for all federal civil service workers through an Executive Order, President Biden—without any statutory authorization—unlawfully aggrandized his power at the expense of Congress and federal civilian workers. Appellees seek pre-enforcement review of Executive Branch overreach. This case, in other words, presents the epitome of a structural constitutional challenge. Consequently, *Cochran* should have controlled, and the panel should have upheld the District Court.

II. The Vaccine Mandate is Not a CSRA “Working Condition.”

The panel opinion avoids jurisdiction on the notion that Appellees may challenge the government’s vaccine mandate elsewhere to obtain meaningful review before filing suit. 30 F.4th at 509. As an alternative to this action, the panel suggests Appellees could have filed a complaint with the Office of Special Counsel “asserting that Executive Order 14043 constitutes a ‘prohibited personnel practice’ affecting a ‘significant change in duties, responsibilities, or working conditions.’” 30 F.4th at 510.

This rationale fails because vaccination is not a workplace duty, responsibility, or condition under the CSRA. The Supreme Court, considering whether the Department of Labor’s Occupational Safety and Health Administration could require vaccines as a regulation of a workplace hazard stated, “[a]lthough COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most.” *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022). The Court continued, “COVID–19 can and does spread at home, in schools, during sporting events, and everywhere else that people gather. That universal risk is no different from the day-to-day dangers that all face from crime, air pollution, or any number of communicable diseases.” *Id.*

So too here. Vaccination is not a daily task or a part of any sort of position description of work activity.

Although the CSRA does not define the term, the Supreme Court has said it “more naturally refers, in isolation, only to the ‘circumstances’ or ‘state of affairs’ attendant to one’s performance of a job,” and not to the agreed-upon terms of employment. *Fort Stewart Schs. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 645 (1990). Likewise, the D.C. Circuit, interpreting

the same provision, has found that “working conditions” as a term of art “ordinarily calls to mind the day-to-day circumstances under which an employee performs his or her job.” *Dep't of Def. Dependents Schs. v. Fed. Lab. Rels. Auth.*, 863 F.2d 988, 990 (1988). In other words, these courts have determined that the term “working conditions” generally refers to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources. *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020) (internal citations omitted).

III. The Panel Decision Will Break the Federal Employment System.

The panel’s decision to preclude federal court jurisdiction rests, almost entirely, on *Elgin*, 567 U.S. at 1. As Judge Barksdale persuasively demonstrated in his dissent, however, *Elgin* does not preclude the petitioners’ separation of powers claims. 30 F.4th at 512-13 (Barksdale, J., dissenting). And importantly, the panel decision is at odds with itself: the opinion’s practical consequences undermine the stated purpose of its rationale.

The panel majority stated that, “[p]ermitting [the plaintiffs] to [seek review] would ‘reintroduce the very potential for inconsistent

decisionmaking and duplicative judicial review that the CSRA was designed to avoid.” 30 F.4th at 509. But that is backwards. If the panel majority’s decision stands, and if the underlying Constitutional question remains unresolved, then the result will be a flood of CSRA claims and litigation. This not only guarantees “inconsistent decisionmaking and duplicative judicial review,” 30 F.4th at 509, it will break the system.

The Biden Administration stated that as of December 8, 2021, “92.5% of employees hav[e] received at least one COVID-19 vaccination dose.” The White House, *Press Release: Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees* (Dec. 19, 2021), <https://bit.ly/3wDruRn>. The federal government employs approximately 2.1 million civilian workers. Assuming this statistic is accurate, then as many as 157,500 individuals are at risk of discharge. The Merit System Protection Board has a five-year backlog, totaling approximately 3,200 cases. *See Annual Performance Report for FY 2020 and Annual Performance Plan for FY 2021 (Final) & FY 2022 (Proposed)*, U.S. Merit Systems Protection Board, May 28, 2021, available at <https://bit.ly/3yPP130> (last visited May 24, 2022). Even assuming only one out of every five individuals at risk of termination brings an action to protect his or her

livelihood, that means over *thirty thousand* new claims may be filed, each one requiring individualized adjudication including specific notice, counsel, an opportunity to respond, a written decision, and an appeal to the Board. 5 U.S.C. § 7513.

On the other hand, by granting rehearing *en banc*, and reaching the merits, this Court will ensure consistent decisionmaking, prevent duplicative judicial review, and ensure that federal workers facing proposed employment actions obtain the uniform, integrated review Congress intended them to receive. *Elgin*, 567 U.S. at 11.

CONCLUSION

The panel's decision in this case is flawed. As a result, the decision is at odds with precedent from the Supreme Court and this Circuit. Simply put, the CSRA does not cover pre-enforcement separation of powers actions challenging a vaccine mandate for 2.1 million federal civilian employees. 30 F.4th at 513 (Barksdale, J., dissenting). Therefore, this Court should grant the Plaintiffs-Appellees' petition for rehearing *en banc*.

Respectfully submitted,

s/ Gene P. Hamilton

GENE P. HAMILTON

Counsel of Record

VICE-PRESIDENT AND GENERAL COUNSEL

AMERICA FIRST LEGAL FOUNDATION

REED D. RUBINSTEIN

ANDREW J. BLOCK

300 Independence Avenue S.E.

Washington, D.C. 20003

(202) 964-3721

gene.hamilton@aflegal.org

Attorneys for Amicus Curiae

America First Legal Foundation

Dated: May 27, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and 29(b)(4), the undersigned counsel certifies compliance with Fed. R. App. P. 29(b)(4), that the brief is under two thousand six hundred (2,600) words in length and follows the required font and formatting regulations.

Dated: May 27, 2022

s/ Gene P. Hamilton
GENE P. HAMILTON

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and 5th Cir. R. 25.2.5, I hereby certify that on May 27, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

Dated: May 27, 2022

s/ Gene P. Hamilton
GENE P. HAMILTON