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

RESPONSE TO PETITION FOR REHEARING EN BANC

BRIAN M. BOYNTON
Principal Deputy 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.
CASEN B. ROSS
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849

CERTIFICATE OF INTERESTED PERSONS

Feds for Medical Freedom v. Biden, No. 22-40043

Under Fifth Circuit Rule 28.2.1, the United States, as a governmental party, need not submit a certificate of interested persons.

/s/ Daniel Winik
Daniel Winik

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Other Authorities:

INTRODUCTION AND SUMMARY

In *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), the Supreme Court held that the framework of administrative and judicial review created by the Civil Service Reform Act (CSRA) is the "exclusive" means for federal employees to challenge adverse personnel actions. That framework generally requires proceeding before the Merit Systems Protection Board (MSPB), with judicial review available in the Federal Circuit. Plaintiffs here sought to circumvent the CSRA framework by suing in district court to enjoin the COVID-19 vaccination requirement for federal employees. *Elgin* makes clear, however, that systemic challenges like this one equally must proceed through the CSRA. The panel therefore correctly held that the district court lacked jurisdiction.

Plaintiffs suggest that the panel opinion conflicts with pre-*Elgin* decisions of this Court, but to the extent those decisions addressed jurisdiction (sub silentio at most), *Elgin* abrogated them. Plaintiffs also suggest that the panel opinion is inconsistent with *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (en banc), *cert. granted*, No. 21-1239 (May 16, 2022), but *Cochran* supports the panel opinion. Finally, plaintiffs suggest that *Elgin* is inapplicable because the challenged policy "coerc[es]" federal employees to take a vaccine. But there is no coercion: Because the CSRA process can provide reinstatement and backpay in a successful challenge to adverse employment action, and because even an employee who does not prevail through the CSRA can avoid discipline by becoming vaccinated at that point, employees who object to the vaccination requirement can challenge it without fear of punishment for doing so. Rehearing is unwarranted.

STATEMENT

A. Statutory Review Framework

The CSRA establishes "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). Subchapter II of Chapter 75 governs review of "major adverse" employment actions, including removal. *Fausto*, 484 U.S. at 447; *see* 5 U.S.C. § 7512. It provides that a covered "employee against whom an action is proposed is" typically entitled to "30 days' advance written notice," an opportunity to be heard, and "a written decision" with "reasons." 5 U.S.C. § 7513(b); *see id.* § 7511 (identifying covered employees). Once an action is "taken," the employee can "appeal to the" MSPB, *id.* § 7513(d), which can "order relief to prevailing employees, including reinstatement, backpay, and attorney's fees," *Elgin*, 567 U.S. at 6. The Federal Circuit can review MSPB decisions. 5 U.S.C. § 7703(a)(1), (b).

B. Executive Order 14,043

Consistent with the President's constitutional role as head of the Executive Branch, Congress has recognized the President's authority to "prescribe regulations for the conduct of employees in the executive branch." 5 U.S.C. § 7301; *see id.* §§ 301, 3302. Presidents have long placed restrictions on federal employees' conduct. In 1986, for example, President Reagan required that federal employees abstain from illegal drugs. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (Sept. 17, 1986).

This case concerns an executive order in response to the COVID-19 pandemic. In addition to having killed more than a million Americans, COVID-19 infections have caused millions to miss work with illness, seriously disrupting American businesses. *White House Report: Vaccination Requirements Are Helping Vaccinate More People, Protect Americans from COVID-19, and Strengthen the Economy* 4 (Oct. 2021), https://go.usa.gov/xtNTB. Many employers have responded by requiring that employees be vaccinated against COVID-19. *Id.* at 9-13.

In September 2021, in an effort to "ensur[e] the health and safety of the Federal workforce and the efficiency of the civil service," the President announced a similar requirement for federal civilian employees. Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 14, 2021). Consistent with "public health guidance" determining that "the best way to slow the spread of COVID-19 and to prevent infection … is to be vaccinated," the order instructed 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 50,989-990.

The Safer Federal Workforce Task Force issued guidance recognizing that employees may obtain exceptions based on a disability (including medical conditions) or a sincerely held religious belief, practice, or observance. Safer Federal Workforce Task Force, *Vaccinations*, https://go.usa.gov/xe5aC (last visited May 31, 2022). The guidance indicated that employees who request an exception should not be disciplined while the

request is pending and that employees whose requests are denied should have two weeks to begin vaccination before an agency initiates any disciplinary proceedings. *Id.*

If employees refuse vaccination after having been denied an exception (or not having requested one), or refuse to disclose their vaccination status, guidance recommends a period of education and counseling, potentially followed by a letter of reprimand and suspension. *Id.* If noncompliance continues, agencies may impose additional discipline up to and including potential removal. *Id.* Most federal employees enjoy additional procedural protections before termination. *See* 5 C.F.R. § 752.404.

C. This Litigation

Plaintiffs claim that Executive Order 14,043 exceeds the President's authority. In January 2022, the district court granted a nationwide preliminary injunction against the implementation or enforcement of the executive order.

A panel of this Court vacated the preliminary injunction, holding that the CSRA precluded jurisdiction over plaintiffs' challenge. *Feds for Med. Freedom v. Biden*, 30 F.4th 503 (5th Cir. 2022). The panel majority noted that, in *Elgin*, the Supreme Court had rejected a similar "attempt by former federal employees to 'carve out an exception to CSRA exclusivity for facial or as-applied constitutional challenges to federal statutes,'" holding that "'the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional.'" *Id.* at 508 (quoting *Elgin*, 567 U.S. at 5, 12).

The majority explained that "granting the plaintiffs extra-statutory review would 'seriously undermine[]'" "Congress's purpose in enacting the CSRA, which was to establish 'an integrated scheme of review.'" *Id.* at 509 (quoting *Elgin*, 567 U.S. at 14). It rejected plaintiffs' argument that "proceeding through the CSRA's remedial scheme could foreclose all meaningful review," reasoning that the MSPB "can order reinstatement and backpay to any nonexempt plaintiffs who are disciplined for refusing to receive a COVID-19 vaccine." *Id.* at 509-510. And it explained that plaintiffs' claims are not "collateral to the CSRA scheme," because "this case is 'the vehicle by which [plaintiffs] seek to' avoid imminent 'adverse employment action,'" and that plaintiffs' claims fall within "the MSPB's expertise." *Id.* at 510-511.

Judge Barksdale dissented, opining that the "CSRA does not cover pre-enforcement employment actions." *Id.* at 513.

The panel then denied "as moot" the government's motion to stay the nationwide injunction pending this appeal. Four days later, on April 11, the government filed a renewed motion to stay the injunction pending issuance of the mandate. That motion, fully briefed since April 13, remains pending.

ARGUMENT

The panel opinion straightforwardly applies *Elgin* and does not conflict with any decision of the Supreme Court, this Court, or any other circuit. On the contrary, the only other court of appeals to have considered this issue reached the same conclusion that the CSRA precludes district-court jurisdiction over a challenge to the vaccination

requirement. *Rydie v. Biden*, 2022 WL 1153249 (4th Cir. Apr. 19, 2022) (unpublished). Rehearing is unwarranted.

A. The Panel Correctly Applied *Elgin*

1. *Elgin*, like this case, involved a challenge to a policy governing federal employees—there, a provision barring from employment anyone who "knowingly and willfully failed" to comply with the Selective Service registration requirement. 567 U.S. at 7. Four employees discharged under that provision challenged it in district court rather than through the CSRA. *Id.* Applying *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Supreme Court held that the challenge was jurisdictionally barred.

Under *Thunder Basin*, courts recognize that Congress can "leapfrog[] district courts by channeling claims through administrative review and directly to federal appellate courts," and that when Congress does so, "federal district courts lack subject matter jurisdiction to hear those claims." *Bank of Louisiana v. FDIC*, 919 F.3d 916, 922 (5th Cir. 2019). "To discern an implicit preclusion," courts "first ask whether it is 'fairly discernible' from the 'text, structure, and purpose' of the statutory scheme that Congress intended to preclude district court jurisdiction." *Id.* at 923.

In *Elgin*, the Supreme Court answered that question affirmatively as to the CSRA. It held that "employees to whom the CSRA grants administrative and judicial review" may not sue except under the CSRA. 567 U.S. at 11 (emphasis omitted). And, as to "employees to whom the CSRA *denies* statutory review," the Court explained that "the

CSRA's 'elaborate' framework demonstrates Congress' intent to entirely foreclose judicial review." *Id.* (citation omitted). In other words, Congress meant to make the CSRA scheme "exclusive," "even for employees who bring constitutional challenges to federal statutes." *Id.* at 13.

Where Congress meant to preclude district-court review (as in the CSRA), courts next ask "whether the 'claims at issue are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Bank of Louisiana*, 919 F.3d at 923 (quotation marks omitted). They answer that question by applying "three 'factors,'" known "as the '*Thunder Basin* factors'": first, "whether precluding district court jurisdiction 'could foreclose all meaningful judicial review'" of the claim; second, whether the claim "'is wholly collateral to a statute's review provisions'"; and third, whether the claim lies "'outside the agency's expertise.'" *Id.*

In *Elgin*, the Supreme Court held that requiring adherence to the CSRA framework would not foreclose meaningful judicial review because the Federal Circuit was "fully competent to adjudicate" challenges to the registration requirement. 567 U.S. at 17. It explained that those claims were not "'wholly collateral' to the CSRA scheme" because they were "the vehicle by which" the plaintiffs sought "to reverse" the consequences of "adverse employment action." *Id.* at 22. It elaborated that "reinstatement, backpay, and attorney's fees are precisely the kinds of relief that the CSRA empowers the MSPB and the Federal Circuit to provide." *Id.* And it held that the plaintiffs' claims

were within the MSPB's expertise, including because the MSPB's resolution of "preliminary questions unique to the employment context" could "obviate the need to address the constitutional challenge." *Id.* at 22-23.

2. As the panel recognized, *Elgin* resolves this case. It answers the first *Thunder Basin* question by holding that Congress meant the CSRA framework to be exclusive. 567 U.S. at 11. And as to "whether the 'claims at issue are of the type Congress intended to be reviewed within th[e] statutory structure,'" *Bank of Louisiana*, 919 F.3d at 923 (quotation marks omitted), *Elgin*'s analysis applies here with equal force. Requiring plaintiffs to channel challenges to the vaccination requirement through the CSRA scheme would not foreclose meaningful judicial review because the Federal Circuit is "fully competent to adjudicate" plaintiffs' claims, *Elgin*, 567 U.S. at 17, and because (as the panel noted) plaintiffs can be made whole if they prevail, 30 F.4th at 510. Nor are those claims "'wholly collateral' to the CSRA scheme," because—as in *Elgin*—they are "the vehicle by which" plaintiffs seek to avoid adverse employment outcomes, and any such outcomes could be remediated through the CSRA (including with "reinstatement, backpay, and attorney's fees"). *Id.* at 22. Finally, plaintiffs' constitutional claims do not lie outside the MSPB's expertise for the same reasons as in *Elgin*. *Id.* at 22-23.

B. Plaintiffs' Arguments For Rehearing Are Meritless

1. Plaintiffs attempt to distinguish *Elgin* (at 7-8) on the theory that it "involved individualized 'challenges [to] an adverse employment action,'" not pre-enforcement challenges to policies. But although plaintiffs repeatedly describe the claims in

Elgin as "individualized," those claims were just as systemic as plaintiffs' are. *See, e.g.*, *Elgin*, 567 U.S. at 7 (plaintiffs sought "a declaratory judgment that the challenged statutes are unconstitutional").

As the panel recognized, the *Elgin* plaintiffs sued after being terminated. But to the extent plaintiffs here have not yet been disciplined in a manner cognizable under the CSRA, that does not allow them to evade the CSRA framework; it is simply another reason the CSRA forecloses their claims. As *Elgin* explains, to the extent the CSRA "*grants* administrative and judicial review" for a particular type of claim, it forecloses "extrastatutory review"—and to the extent "the CSRA *denies* statutory review" of a given claim, "judicial review" of that claim is "entirely foreclose[d]." 567 U.S. at 11.

The panel dissent therefore drew the wrong conclusion from the premise that the CSRA does not provide for "pre-enforcement" challenges to policies governing federal employees, 30 F.4th at 513. That such challenges cannot be brought through the typical CSRA framework does not mean they can be brought outside the CSRA framework; it means they cannot be brought at all. As then-Judge Roberts put it: "[W]hat you get under the CSRA is what you get." *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005).

Because plaintiffs can use the CSRA to challenge any discipline ultimately imposed on them, they cannot circumvent that framework by suing before any discipline has been imposed. And they cannot evade the CSRA by attempting to characterize their claims as distinct from a challenge to adverse employment actions. Plaintiffs'

standing to bring this suit rests on the prospect of injury from future adverse employment actions. They cannot avoid the exclusive scheme Congress established to remedy such injuries by purporting to disclaim any interest in avoiding the prospective harms that give them standing.

Otherwise, "the plaintiffs in *Elgin* could have avoided the CSRA entirely if they had just sued while their adverse personnel actions were proposed or pending"—which would be a "conspicuous (and unexplained) loophole" in an ""exhaustively detail[ed]"" review framework. *Payne v. Biden*, 2022 WL 1500563, at *8 (D.D.C. May 12, 2022), *appeal pending*, No. 22-5154 (D.C. Cir.). Nothing in *Elgin*'s discussion of the CSRA's "exclusive" framework, 567 U.S. at 5, suggests that such a gaping loophole could exist.

2. Plaintiffs suggest (at 4-8) that the panel opinion is inconsistent with *AFGE v. FLRA*, 794 F.2d 1013 (5th Cir. 1986), and *NTEU v. Bush*, 891 F.2d 99 (5th Cir. 1989). But neither of those decades-old decisions addressed the jurisdictional question here. In *AFGE*, the Court concluded that a labor dispute involving an Office of Personnel Management (OPM) regulation fell outside the parties' duty to bargain and that the Federal Labor Relations Authority could not adjudicate the regulation's validity in reviewing a negotiability dispute. 794 F.2d at 1015-1016. The Court observed in dicta that, if the union "wishe[d] to challenge the validity of th[e] OPM regulation, there [were] other means available," citing a case in which a district court had reviewed a challenge to OPM regulations. *Id.* But the Court did not discuss whether the CSRA would preclude such a challenge. Nor did the Court address CSRA preclusion in

NTEU, where it upheld President Reagan's drug-testing executive order without discussing jurisdiction. A court's resolution of a case notwithstanding "the existence of unaddressed jurisdictional defects has no precedential effect" on the jurisdictional issue. *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996).

In any event, even if *AFGE* and *NTEU* had considered the jurisdictional question presented here, both decisions significantly predate *Elgin*, and this Court is bound by "an intervening Supreme Court case explicitly or implicitly overruling [its] prior precedent." *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999). To the extent *AFGE* and *NTEU* could be read to support jurisdiction here, *Elgin* abrogated them.

Elgin likewise abrogated the D.C. Circuit opinions on which plaintiffs rely (at 6-7). *See Rydie*, 2022 WL 1153249, at *6; *Payne*, 2022 WL 1500563, at *7. And the D.C. Circuit's more recent jurisprudence is consistent with *Elgin*. In *Fornaro*, for example, that court held that the CSRA barred a putative class of federal retirees from bringing a "systemwide challenge to" an OPM "policy" that they claimed would diminish future benefit payments. 416 F.3d at 67. Those plaintiffs argued, as plaintiffs do here, "that the CSRA regime's exclusivity for individual … determinations [did] not preclude what they contend[ed] [was] a collateral, systemwide challenge to OPM policy." *Id.* But the court disagreed, explaining that allowing plaintiffs' "systemic challenge" to proceed "would plainly undermine the whole point of" the CSRA scheme. *Id.* at 68-69; *see also AFGE v. Trump*, 929 F.3d 748 (D.C. Cir. 2019) (similar); *AFGE v. Secretary of the Air Force*, 716 F.3d 633 (D.C. Cir. 2013) (similar).

3. Plaintiffs also argue (at 10-17) that the panel opinion conflicts with *Cochran*, but *Cochran* supports the panel opinion. There, the Court held that a challenge to the constitutionality of SEC adjudications was "wholly collateral to the … statutory-review scheme" because it was "structural," not "depend[ent] on the validity of any substantive aspect of the" securities laws, and its outcome would "have no bearing on [the plaintiff's] ultimate liability for allegedly violating the securities laws." 20 F.4th at 207. But here, plaintiffs' challenge *does* "depend on the validity of" the "substantive" policy under which they would be subject to discipline, and the outcome of that challenge would have a "bearing on" (indeed, it would determine) whether they are properly subject to discipline, *id.* In *Cochran*, the Court regarded the challenge as "outside the SEC's expertise" because it did "not depend on a special understanding of the securities industry." *Id.* at 207-208. But the challenge here is within the MSPB's expertise because it depends on "a special understanding of" the authorities for regulating federal employment, *id.* And whereas the Court held in *Cochran* that requiring the plaintiff to proceed through the statutory scheme would deprive her of "meaningful judicial review" because she was "challenging the constitutional authority of" the "adjudicator," *id.* at 208-209, that is not true here.

4. Plaintiffs claim (at 9-10) that the panel opinion conflicts with *Thunder Basin* itself, as well as with *BST Holdings, LLC v. OSHA*, 17 F.4th 604 (5th Cir. 2021), which addressed a safety standard requiring COVID-19 vaccination for employees of large

companies. Plaintiffs' premise is that the vaccination requirement subjects federal employees to "unconstitutional coercion" to receive an unwanted vaccine. Pet. 9.

But the government does not coerce employees to take a COVID-19 vaccine, any more than it coerces them to perform their jobs, respect workplace policies, or fulfill other prerequisites of continued employment. If an employee chooses not to receive a COVID-19 vaccine (and is ineligible for an exception), he simply may no longer be permitted to continue in federal employment, just as an employee would be subject to termination if she chose to stop performing her job or chose to violate workplace policies. Covered employees who are disciplined or terminated for choosing not to take a COVID-19 vaccine (absent an exception) are free to challenge the vaccination requirement through the CSRA, as discussed above.

If they prevail, moreover, then adverse employment actions taken against them can be remediated through "reinstatement, backpay, and attorney's fees," *Elgin*, 567 U.S. at 6—which means no employee should be chilled from pursuing a challenge by the fear that doing so will itself be costly. If an employee does not prevail, and wishes to avoid discipline by complying with the vaccination requirement at that point, he or she can do so. Safer Federal Workforce Task Force, *Vaccinations*, *supra* ("If an employee responds at any phase of the enforcement process by submitting proof of progress toward full vaccination … , the agency should hold the discipline in abeyance to afford the employee a reasonable period of time to become fully vaccinated."). And if an

employee does not prevail and still chooses not to become vaccinated, he or she can hardly complain about being disciplined or discharged for violating a lawful policy.

The opportunity for redress through the CSRA distinguishes this case from *BST Holdings*, which addressed a requirement for private-sector employees not covered by the CSRA's "'integrated scheme of administrative and judicial review,'" *Elgin*, 567 U.S. at 13-14. And because there is no coercion here, it is irrelevant whether preclusion would apply in "a 'situation in which compliance is sufficiently onerous and coercive penalties [are] sufficiently potent that a constitutionally intolerable choice' is presented," Pet. 9 (quoting *Thunder Basin*, 510 U.S. at 218).

5. Finally, plaintiffs suggest (at 3) that the panel opinion would leave federal employees without immediate recourse to challenge obviously unlawful directives, such as orders requiring them to "vote for the President's reelection" or "use or forgo birth control" as conditions of continued federal employment. Such hypotheticals bear no resemblance to the order challenged here, which simply imposes on the federal work-force the same precaution that many private companies have required. In any event, there are at least two ways plaintiffs might challenge such unlikely requirements.

One is that Congress has authorized the Office of Special Counsel (OSC) to investigate whether a challenged "personnel action"—a phrase defined broadly, see 5 U.S.C. § 2302(a)—constitutes a "prohibited personnel practice." *Id.* §§ 1212(a)(2), 1214(a)(1)(A); *see id.* § 2302 (enumerating prohibited personnel practices). If OSC finds a prohibited personnel practice, it can petition the MSPB for corrective action, *id.*

§ 1214(b)(2)(B)-(C), and the MSPB's decision is reviewable by the Federal Circuit, *id.* §§ 1214(c), 7703(b)-(c). *See Rydie*, 2022 WL 1153249, at *5 (discussing this process).

The second is that, under the All Writs Act, a court of appeals that would have jurisdiction to review agency action under a statutory review scheme—here, the Federal Circuit—could have jurisdiction to issue writs of mandamus. *See, e.g.*, *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1379-1380 (Fed. Cir. 2021); *see also, e.g.*, *JTB Tools & Oilfield Servs., LLC v. United States*, 831 F.3d 597, 599-601 (5th Cir. 2016) (similar). Such relief is "drastic and extraordinary," but it may be warranted where the party seeking relief has "no other adequate means to attain the relief he desires," the "right to issuance of the writ is clear and indisputable," and "the issuing court, in the exercise of its discretion," is "satisfied that the writ is appropriate." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-381 (2004) (quotation marks omitted). Those requirements might be satisfied in the case of such obviously unlawful requirements as plaintiffs posit.

C. The Mandate Should Not Be Stayed

Finally, the Court should not indulge plaintiffs' requests (at 17) to "hold this case's mandate pending the Supreme Court's decision in *Cochran*" or to stay the mandate pending the disposition of a petition for certiorari if rehearing is denied. Those are strategic efforts to delay the disposition of this case given the panel's mistaken denial "as moot" of our motion to stay the nationwide injunction against enforcement of the vaccination requirement. They are also meritless. The panel opinion is consistent with

Cochran, as discussed above, so there is no need to wait to see whether the Supreme Court affirms that decision. And plaintiffs cannot qualify for a stay of the mandate pending certiorari. Since the panel opinion follows from Supreme Court precedent and does not conflict with a decision of any other court of appeals, plaintiffs cannot show "'a reasonable probability" of review, much less "'a significant possibility of reversal,"' *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983)). And since employees can obtain redress if they prevail in any CSRA challenge to the vaccination requirement, plaintiffs cannot show the requisite "'likelihood"' of "'irreparable harm" if a stay is denied, *id.*

CONCLUSION

The petition for rehearing en banc should be denied.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy 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.
CASEN B. ROSS

/s/ Daniel Winik
DANIEL WINIK
Attorneys, Appellate Staff
Civil Division, Room 7245
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530
(202) 305-8849
Daniel.L.Winik@usdoj.gov

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 35(e) because it contains 3,900 words. This response 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 14-point Garamond, a proportionally spaced typeface.

/s/ Daniel Winik
Daniel Winik