IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EMPLOYEE A *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, *et al.*,

Defendants.

No. 8:21-cv-2696

Judge Deborah Chasanow

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

In the face of the most serious public health crisis in at least a century, Plaintiffs—two unnamed federal civilian employees of the Defense Information Systems Agency ("DISA") and the Food and Drug Administration ("FDA")—seek to preliminarily enjoin an executive order that, subject to legally required exceptions, mandates that federal employees receive COVID-19 vaccinations. The Court should decline to grant such extraordinarily broad relief in Plaintiffs' challenge to the terms and conditions of their federal employment because Plaintiffs fail to satisfy any of the requirements for a preliminary injunction.

To start, Plaintiffs face no imminent threat of irreparable harm. The primary harm they identify—loss of federal employment—is not irreparable because it can be redressed, including by reinstatement and back pay, if Plaintiffs ultimately prevail on the merits. And that harm is neither certain nor imminent, as it could only be imposed at the conclusion of progressive disciplinary proceedings, and Plaintiffs have the option of seeking an exception to the vaccination requirement that could make such proceedings unnecessary. In any event, Plaintiffs' claims are precluded by the Civil Service Reform Act ("CSRA"), which sets forth the exclusive procedures for resolving challenges by federal employees to the conditions of their employment.

Plaintiffs' claims are also wrong on the merits. The challenged executive order is a lawful exercise of the President's authority to prescribe conditions of federal employment, and is prohibited by neither the Tenth Amendment nor the separation of powers. Plaintiffs' claim based on the right to privacy and the right to bodily integrity fails because, for more than a century, courts have uniformly upheld vaccination requirements as rationally related to the government's legitimate interest in promoting health and safety. And Plaintiffs' procedural due process claim is meritless because they cite no evidence that their employers will fail to comply with their statutory obligations under the CSRA—and the Due Process Clause requires nothing additional.

Finally, the equities and the public interest weigh heavily against preliminary relief. An injunction against the challenged executive order would harm important public interests in slowing the spread of COVID-19 within the federal workforce and among the millions of Americans whom it serves, promoting the efficiency of the federal civil service, and handling government employment disputes through administrative procedures created by Congress. In contrast, denying the motion will not irreparably harm Plaintiffs because they do not face an imminent prospect of discipline and could obtain adequate remedies if their discharge were found to be unlawful.

BACKGROUND

I. The COVID-19 Pandemic

In January 2020, the emergence of a novel coronavirus later named SARS-CoV-2 caused the Secretary of Health and Human Services ("HHS") to declare a public health emergency, and in March 2020, the President declared a national emergency to contain and combat the virus. *See* Declaring a Nat'l Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). SARS-CoV-2 causes a respiratory disease known as COVID-19, *id.*, which "spreads when an infected person breathes out droplets and very small particles that contain the virus," CDC, How COVID-19 Spreads (updated July 14, 2021), https://perma.cc/9MSV-BS5N.

In July 2021, the United States began to experience "a rapid and alarming rise in . . . COVID-19 case and hospitalization rates," driven by an especially contagious strain of SARS-CoV-2 known as the Delta variant. *See* CDC, Delta Variant: What We Know About the Science (updated Aug. 26, 2021), https://perma.cc/5CAA-WC8A. As of the filing of this brief, community transmission rates of SARS-CoV-2 remain high in 39 states, and substantial in another 10 states and the District of

Columbia.[1] *See* CDC, COVID DATA Tracker – Cases, Deaths, and Testing (updated Nov. 11, 2021), https://perma.cc/DC2E-RPTH.

II. The Development and Authorization of COVID-19 Vaccines

FDA has authority to review and approve "biological products," including vaccines, as safe and effective for introduction into interstate commerce for their intended uses. *See* 42 U.S.C. § 262(a)(1), (i)(1). Under section 564 of the FDCA, 21 U.S.C. § 360bbb-3, FDA may issue an "emergency use authorization" ("EUA") even before such approval, which permits the marketing of vaccines (and other products) "intended for use" in responding to a public health emergency.

In March 2020, the Secretary of HHS determined that "circumstances exist justifying the authorization of emergency use of drugs and biological products during the COVID-19 pandemic." EUA Declaration, 85 Fed. Reg. 18,250, 18,250–51 (Apr. 1, 2020). Based on that determination, FDA issued EUAs in December 2020 for the Pfizer-BioNTech and Moderna vaccines, and a third EUA in February 2021 for the Janssen vaccine. *See* FDA, Letter of Authorization to Pfizer Inc. (Oct. 29, 2021), https://perma.cc/YY3Q-JGW4 ("Pfizer EUA Letter") (revising and reissuing the December 2020 EUA); FDA, Letter of Authorization to ModernaTX, Inc. (Oct. 20, 2021), https://perma.cc/LN7L-AE6D ("Moderna EUA Letter") (same); FDA, Letter of Authorization to Janssen Biotech, Inc., (Oct. 20, 2021), https://perma.cc/R7HA-Z6BD ("Janssen EUA Letter") (revising and reissuing the February 2021 EUA). These EUAs are based on FDA's review of extensive safety and efficacy data, including from a Pfizer clinical trial with approximately 46,000 participants, a Moderna clinical trial with approximately 30,000 participants, and a Janssen clinical trial with approximately 43,000 participants. *See* Pfizer EUA Letter at 4; Moderna EUA Letter at 2; Janssen EUA Letter at 2.

[1] The Court may take judicial notice of these statistics and other factual information available on government websites. *See Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322–23 (2007).

On August 23, 2021, the Pfizer-BioNTech COVID-19 vaccine obtained FDA approval, under the name Comirnaty, for people aged 16 years and older. *See* FDA, Letter Approving Biologics License Application of BioNTech Mfg. (Aug. 23, 2021), https://perma.cc/KD8L-KVLA. This means that the vaccine has completed "the agency's standard process for reviewing the quality, safety and effectiveness of medical products." FDA, News Release – FDA Approves First COVID-19 Vaccine (Aug. 23, 2021), https://perma.cc/J9NV-92VH. In making the determination to approve Comirnaty, FDA noted that the vaccine was 91.1% effective in preventing COVID-19 disease and between 95% and 100% effective in preventing severe COVID-19, based on an analysis of effectiveness data from approximately 20,000 vaccine and 20,000 placebo recipients. FDA, Comirnaty Approved Prescribing Information (revised Aug. 20, 2021) at 7, 15–18, https://perma.cc/53H8-UG3C. FDA concluded that the product is safe based on data from approximately 12,000 vaccine recipients who were followed for safety outcomes for at least six months after their second dose, as well as safety information from the millions of vaccine doses administered under the EUA. *Id.* at 12.

Comirnaty is generally the same formulation[2] as the originally authorized Pfizer-BioNTech vaccine, and the two vaccine products "can be used interchangeably without presenting any safety or effectiveness concerns." Vaccine Information Fact Sheet for Recipients and Caregivers About Comirnaty and the Pfizer-BioNTech COVID-19 Vaccine at 1 n.1 (revised Oct. 29, 2021), https://perma.cc/3PQH-7D8Z ("Comirnaty/Pfizer-BioNTech COVID-19 Vaccine Fact Sheet").

[2] Until very recently, the Pfizer-BioNTech EUA vaccine was always "the same formulation" as Comirnaty. *See* Comirnaty/Pfizer-BioNTech COVID-19 Vaccine Fact Sheet at 1 n.1. On October 29, 2021, however, FDA amended the EUA to include a modified formulation of the Pfizer vaccine for use in children 5 through 11 years old that uses tromethamine (Tris) buffer instead of the phosphate buffered saline (PBS) used in the originally authorized Pfizer-BioNTech COVID-19 vaccine. The agency additionally authorized use of the Tris formulation for those 12 years of age and older. The two formulations of Pfizer-BioNTech COVID-19 EUA vaccine that are authorized for use in individuals 12 years of age and older differ only with respect to the inactive ingredient buffers and have been shown to be analytically comparable. FDA determined that the "12 and older" version of the Tris formulation may be used interchangeably with Comirnaty and the PBS formulation of the EUA vaccine. Pfizer EUA Letter at 3–4.

The Pfizer-BioNTech vaccine remained authorized for emergency use as a two-dose primary series for individuals 12 years of age and older and—whether or not it bears the "Comirnaty" label—the formulation is available for other emergency uses, including as a single booster dose for elderly and high-risk individuals. *See id.* at 1–2.

III. Executive Order No. 14043

On September 9, 2021, President Biden issued Executive Order No. 14043. *See* Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, Exec. Order No. 14043, 86 Fed. Reg. 50,989, 50,989–50990 (Sept. 14, 2021) (the "Executive Order"). The Executive Order reflects the President's determination that the ongoing COVID-19 emergency threatens "[t]he health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact, [which] are foundational to the efficiency of the civil service." *Id.* at 50,989. "[I]n light of public health guidance"—particularly CDC's determination "that the best way to slow the spread of COVID-19 and to prevent infection by the Delta variant or other variants is to be vaccinated"—the Executive Order provides that COVID-19 vaccination will be required for all federal employees, "subject to such exceptions as required by law." *Id.* Accordingly, the Executive Order instructs each federal agency to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its federal employees, with exceptions only as required by law." *Id.* at 50,990. It also directs the Task Force to "issue guidance . . . on agency implementation of this requirement." *Id.*

On September 13, 2021, the Task Force updated its model safety principles to indicate that federal employees who do not receive an exception should be fully vaccinated "no later than November 22, 2021." Task Force, COVID-19 Workplace Safety: Agency Model Safety Principles at 1 (updated Sept. 13, 2021), https://perma.cc/F2MW-HYQE. To meet this deadline, federal employees receiving the Moderna vaccine would have received their first dose no later than October 11, 2021; federal employees receiving the Pfizer-BioNTech vaccine would have received their first

dose no later than October 18, 2021; and federal employees receiving the single-dose Janssen vaccine would have done so no later than November 8, 2021. *See* Task Force, FAQs, Vaccinations, Vaccination Requirement for Federal Employees (last visited Nov. 4, 2021), https://perma.cc/4CUS-TVNC.

Per Task Force guidance, an employee who has not timely complied with the vaccination requirement (and does not have a pending exception request) may be subject to discipline. *See* Task Force, FAQs, Vaccinations, Enforcement of Vaccination Requirement for [Federal] Employees, https://perma.cc/4CUS-TVNC ("Enforcement FAQs"). The Task Force recommends "initiat[ing] an enforcement process" that involves "work[ing] with [these] employees to encourage their compliance." *Id.* The Task Force recommends that this begin with a five-day period of education and counseling, to include providing the employee with information from CDC regarding the benefits of vaccination and ways to obtain the vaccine. *See id.* If the employee does not demonstrate progress toward becoming fully vaccinated, the agency may suspend the employee for up to fourteen days, after which continued noncompliance may result in additional discipline, up to and including removal from federal service. *See id.* However, "[i]f an employee responds at any phase of the discipline by submitting proof of progress toward full vaccination (*i.e.*, completion of a required vaccination dose), the agency should hold the discipline in abeyance to afford the employee a reasonable period of time to become fully vaccinated." *Id.*

IV. This Lawsuit

On October 20, 2021, Plaintiffs filed this lawsuit. *See* Compl., ECF No. 1. One Plaintiff, "Employee A," is a "sixteen-year federal employee with the U.S. Department of Defense," currently employed by DISA. *Id.* ¶ 16. The other, "Employee B," is a federal employee at the FDA. *Id.* ¶ 20. They bring a four-count complaint. Count One alleges a violation of the Tenth Amendment; Count Two alleges a violation of a constitutionally protected privacy interest; Count Three alleges a violation

of the Fifth Amendment; and Count Four alleges a violation of the separation of powers. On October 27, 2021, Plaintiffs moved for a temporary restraining order and preliminary injunction. *See* ECF No. 7 ("Pls.' Br."). Defendants oppose Plaintiffs' motion for the reasons set forth below.

ARGUMENT

I. Plaintiffs Are Not Entitled to the Extraordinary Remedy of a Preliminary Injunction.

A preliminary injunction is an "extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (citation omitted), which "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. "'[A]ll four requirements must be satisfied' to obtain the 'extraordinary remedy' of a preliminary injunction." *JAK Prods., Inc. v. Bayer*, 616 F. App'x 94, 95 (4th Cir. 2015) (citation omitted). Plaintiffs fail each element of this test.

A. Plaintiffs Will Not Suffer Irreparable Harm Absent Preliminary Relief.

As every federal court to consider the question has held, an employee's choice between complying with a COVID-19 vaccination mandate and suffering job-related consequences does not amount to irreparable harm. *See Altschuld v. Raimondo*, No. 21-cv-2779, ECF No. 23, slip op. at 8 (D.D.C. Nov. 8, 2021); *Church v. Biden*, No. 21-cv-2815, ECF No. 17, slip op. at 31–32 (D.D.C. Nov. 8, 2021); *Smith v. Biden*, No. 21-cv-19457, ECF No. 19, slip op. at 26 (D.N.J. Nov. 8, 2021); *We the Patriots USA, Inc. v. Hochul*, --- F. 4th ---, No. 21-cv-2179, 2021 WL 5121983 at *19 (2d Cir. Nov. 4, 2021); *Wise v. Inslee*, No. 21-cv-288, 2021 WL 4951571, at *6 (E.D. Wash. Oct. 25, 2021); *Bauer v. Summey*, --- F. Supp. 3d ----, 2021 WL 4900922, at *18 (D.S.C. Oct. 21, 2021); *Johnson v. Brown*, --- F. Supp. 3d ---, No. 21-cv-1494, 2021 WL 4846060, at *23–25 (D. Or. Oct. 18, 2021); *Mass. Corr. Officers*

v. Baker, --- F. Supp. 3d ---, No. 21-cv-11599, 2021 WL 4822154, at *7 (D. Mass. Oct. 15, 2021); *Harsman v. Cincinnati Children's Hosp. Med. Ctr.*, No. 21-cv-597, 2021 WL 4504245, at *4 (S.D. Ohio Sept. 30, 2021); *Beckerich v. St. Elizabeth Med. Ctr.*, --- F. Supp. 3d ----, 2021 WL 4398027, at *7 (E.D. Ky. Sept. 24, 2021), *reconsideration denied*, 2021 WL 4722915 (E.D. Ky. Sept. 30, 2021). Plaintiffs identify no reason for this Court to depart from this unbroken line of authority. And because Plaintiffs have not met their burden to make a clear showing of irreparable harm, this Court should deny Plaintiffs' motion regardless of how it evaluates the other three elements of the *Winter* test. *See Henderson for Nat'l Lab. Rels. Bd. v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 439 (4th Cir. 2018) (all preliminary injunction factors must be satisfied to obtain relief).

Plaintiffs contend that they face irreparable harm from "termination of employment," Compl. ¶ 2, and that their refusal to provide proof of vaccination to their federal employers puts them on "a fast-track to dismissal," Pls.' Br. at 21. But Plaintiffs must show that the harm that they face is truly *irreparable*, "meaning that it 'cannot be fully rectified by the final judgment after trial.'" *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 216 (4th Cir. 2019) (quoting *Stuller, Inc. v. Steak N Shake Enters.*, 695 F.3d 676, 680 (7th Cir. 2012)), *cert denied*, *Givens v. Mountain Valley Pipeline, LLC*, 140 S. Ct 300 (2019). And the loss of employment is fundamentally an "economic loss," *id.*, and when wrongfully incurred, it can be remedied in the ordinary course of administrative or judicial proceedings. *Cf. Garcia v. United States*, 680 F.2d 29, 31 (5th Cir. 1982) (courts have "no right to speculate that the administrative bodies will make erroneous decisions which must be reversed by a court decision."); *see also Mountain Valley Pipeline*, 915 F.3d at 218 ("[F]inancial losses that can be recovered by a prevailing party at the close of litigation ordinarily will not justify preliminary relief."). For this reason, the Supreme Court has held that loss of employment is not irreparable harm, "absent a genuinely extraordinary situation." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974). Plaintiffs present no such "extraordinary situation" here, nor could they, given the possibility that, if terminated,

they may pursue reinstatement and back pay in the appropriate forum pursuant to some combination of the CSRA, Title VII of the Civil Rights Act, and the Back Pay Act.[3]

Even if economic harm were sufficient to establish irreparable harm, Plaintiffs also provide no basis to conclude that termination is certain, let alone imminent, and thus they fail to "make a 'clear showing' that [they] will suffer harm that is 'neither remote nor speculative, but actual and imminent.'" *Mountain Valley Pipeline*, 915 F.3d at 216 (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)). While it is true that federal employees who do not comply with the vaccination requirement are potentially subject to being disciplined as of November 9, 2021, the Task Force guidance sets forth a procedure for progressive discipline that begins with a five-day period of education and counseling, followed by a suspension of up to 14 days and then, if noncompliance continues, additional discipline up to and including potential removal from federal service. *See* Enforcement FAQs. And even when discipline has been initiated, termination of Plaintiffs would be far from certain. Plaintiffs are entitled to additional procedural protections prior to termination, such as 30 days' advance written notice, an opportunity to respond (orally and in writing), and a written decision setting forth the basis for removal. *See generally* 5 C.F.R. § 752.404. Such disciplinary proceedings are necessarily fact- and context-specific, and until such proceedings are resolved in a concrete manner, it is impossible to know with certainty what discipline Plaintiffs would receive. The mere "possibility" of termination will not suffice to support a preliminary injunction. *Di Biase v. SPX Corp.*, 872 F.3d 224, 235 (4th Cir. 2017). Plaintiffs might prefer to avoid what they describe as administrative "machinery" and "bureaucratic entanglements," Pls.' Br. at 21, but that does not change

[3] Given the availability of these remedies, it makes no difference that Plaintiffs complain, without citation, that they will "not even be able to avail themselves of unemployment benefits." Pls.' Br. at 21. And in any event, the Supreme Court has dismissed the notion that similar concerns such as "an insufficiency of savings" can establish irreparable harm in the employment-termination context. *Sampson*, 415 U.S. at 92 n.68.

the fact that the outcome of those administrative procedures is not certain, and they may end with a more favorable result than Plaintiffs fear. *Cf. Sink v. Morton*, 529 F.2d 601, 604 (4th Cir. 1975) ("Irreparable harm, presupposes the absence of an available remedy for relief, whether administrative or judicial.").

What's more, even if the Supreme Court had not foreclosed Plaintiffs' reliance on the mere possibility of termination, their claim of irreparable harm is undermined by the distinct possibility that they may avoid termination in other ways. As noted above, the Task Force guidance provides that federal employees may seek exceptions from the vaccination requirement based on a medical concern or religious objection. If an exception request is granted, then the requesting individual will not be required to receive the COVID-19 vaccine. Moreover, employees are not subject to discipline while a request for an exception is pending. *See also Williams v. Brown*, --- F. Supp. 3d ----, 2021 WL 4894264, *10 (D. Or. Oct. 19, 2021) (finding no irreparable harm when exception requests were pending). Through this process, then, it is possible that Plaintiffs could avoid the consequences they fear by submitting an exception request. *See Pelekai v. Hawai'i*, No. 21-cv-00343, 2021 WL 4944804, at *1 (D. Haw. Oct. 22, 2021) (no injury where plaintiffs' exception requests were granted). Yet Plaintiffs have not alleged whether they can or will submit an exception request nor, if so, whether their request has been adjudicated. "Given the extraordinary nature of the remedy," the Fourth Circuit has found that "a preliminary injunction is not warranted where . . . the moving parties have not shown that they availed themselves of opportunities to avoid the injuries of which they now complain." *Di Biase*, 872 F.3d at 235. Plaintiffs may still have opportunities to avoid termination, and so their motion for preliminary relief should be denied.[4]

[4] The existence of the exception process also reinforces Plaintiffs' failure to establish the actuality and imminence of any harm they might face. As noted above, if an exception request is granted, then the requesting individual will not be required to receive the COVID-19 vaccine. And even if an exception request is denied, Plaintiffs would have a two-week buffer period to obtain any

Plaintiffs attempt to augment their claim of irreparable harm from termination by claiming that follow-on effects of their possible terminations will leave them "forever harmed." Pls.' Br. at 21 n.9. Plaintiffs offer only speculation in support of this claim, but in any event the Supreme Court has made clear that "difficulties in immediately obtaining other employment," like other "external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge itself[,] will not support a finding of irreparable injury, however severely they may affect a particular individual." *Sampson*, 415 U.S. at 92 n.68. And the general reputational effects of discharge are not otherwise sufficient to establish irreparable harm. *See Guerra v. Scruggs*, 942 F.2d 270, 274–75 (4th Cir. 1991) ("Here, the only harm Guerra could suffer is the damage to his reputation during the interim between his discharge and the decision of the board reviewing his discharge. Such an injury does not rise to the *Sampson* level of irreparable injury justifying an injunction."); *Dailey v. Lew*, No. 15-cv-2527, 2016 WL 1558150, at *8 (D. Md. Apr. 18, 2016), *aff'd*, 670 F. App'x 142 (4th Cir. 2016) ("loss of income and damage to reputation as a result of being discharged from employment not sufficient to establish irreparable injury").[5] Thus, Plaintiffs' additional claims of irreparable harm from the

initial inoculation. *See* Task Force Guidance; *see also Williams v. Brown*, 2021 WL 4894264 at *10 (no irreparable harm during the pendency of exception requests). As the Court in *Church v. Biden* found just recently, "[t]hese points of temporal ambiguity call into question the 'imminence' of the harm" Plaintiffs claim to face. *Church*, No. 21-cv-2815, ECF No. 17, slip op. at 29.

[5] *Roe v. Department of Defense*, 947 F.3d 207 (4th Cir. 2020), as amended (Jan. 14, 2020), is not to the contrary. In that case, two HIV-positive active-duty members of the Air Force had been discharged as "unfit for continued military service" based on their HIV status, notwithstanding that they were both asymptomatic and had undetectable viral loads. *Id.* at 216–217. The district court found discharge under those circumstances to be "a particularly heinous brand of discharge" that was based on "outmoded policies related to" HIV with "no relationship" to the service members' ability to perform their jobs.'" *Roe v. Shanahan*, 359 F. Supp. 3d 382, 419–20 (E.D. Va. 2019). The district court also found it to be "commonsense" that discharge was likely to force the two service members to reveal their condition and incur the "stigma and discrimination facing those living with HIV." *Id.* at 420. The Fourth Circuit found no clear error in these factual findings, which could not be redressed through post-discharge procedures and were sufficient to place the *Roe* plaintiffs within the narrow exception carved out by the Supreme Court in *Sampson*. *See Roe*, 947 F.3d at 229–30. But here, Plaintiffs proffer no remotely comparable allegations that might establish that discharge based on a

"tarnishing" of their personnel files, Pls.' Br. at 21, cannot support the preliminary injunction that they seek.

B. Plaintiffs Are Not Likely to Succeed on the Merits.

1. Plaintiffs' Claims Are Precluded by the Civil Service Reform Act.

Like the vast majority of federal civilian employees, Plaintiffs are covered by the CSRA and may thus appeal adverse actions, including removal decisions, to the Merit Systems Protection Board ("MSPB").[6] The claims Plaintiffs seek to assert in this lawsuit are precluded by the CSRA, and Plaintiffs therefore fail to make the requisite "clear showing" that they are entitled to the "extraordinary remedy" of a preliminary injunction, *Winter,* 555 U.S. at 20.

The CSRA constitutes "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States v. Fausto,* 484 U.S. 439, 445 (1988). It "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Id.* at 443. As the Fourth Circuit has explained, the CSRA "constitutes the exclusive remedy for claims arising out of federal employment," as "Congress intended that the CSRA would operate to the exclusion of all other statutory remedies for claims arising out of the federal employment relationship." *Hall v. Clinton*, 235 F.3d 202, 203, 206 (4th Cir.

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choice to remain unvaccinated is "particularly heinous" or that there is substantial "stigma" facing entirely unvaccinated individuals, who currently comprise approximately 32.5% percent of the population in the United States. CDC, COVID-19 Vaccinations in the United States, https://perma.cc/5HLY-E8UP (updated Nov. 8, 2021).

[6] Some federal employees have no such appeal rights, *see, e.g.,* 5 U.S.C. § 7511(b)(1)-(3) (political appointees), but the Fourth Circuit has explained that employees lacking appeal rights to the MSPB do not possess a "general right to nonstatutory judicial review" outside the CSRA scheme. *Yokum v. U.S. Postal Serv.*, 877 F.2d 276, 280 (4th Cir. 1989); *see also Mann v. Haigh*, 120 F.3d 34, 38 (4th Cir. 1997); *Zimbelman v. Savage*, 228 F.3d 367, 370 (4th Cir. 2000).

2000); *see also, e.g. Bolton v. Colvin*, 674 F. App'x 282, 290 (4th Cir. 2017) ("'[C]ompetitive service employees, who are given review rights by [the CSRA] cannot expand these rights by resort to judicial review outside of the CSRA scheme.'" (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 11 (2012)); *Wirth v. Social Sec. Admin*, 865 F.2d 1262 (4th Cir. 1988) (table) ("A federal employee cannot use the Privacy Act to circumvent the Civil Service Reform Act and collaterally attack a personnel decision.") (citation omitted). Where claims are required to be brought under the CSRA, district courts lack jurisdiction to hear them. *See, e.g.*, *Hall*, 235 F.3d at 207.

Under the CSRA, different administrative and judicial review procedures apply depending on the nature of the challenged employment action and the types of claims asserted. More serious "adverse actions"—removal, suspension for more than 14 days, reduction in grade, reduction in pay, or furlough of 30 days or less, 5 U.S.C. § 7512— may generally be appealed directly to the Merit Systems Protection Board ("MSPB") for adjudication before an MSPB administrative judge, with appeal rights of any adverse MSPB administrative judge decision to the MSPB through a Petition for Review, with additional judicial review of the MSPB's decision in the Federal Circuit. *Id.* §§ 7513(d), 7703(b)(1). Corrective action for a less severe personnel action—e.g., a suspension of 14 days or less—may generally be sought from any agency administrative or negotiated grievance rights, EEOC complaints if an EEO protected basis is alleged, or the Office of Special Counsel ("OSC") if the applicant or employee alleges a prohibited reason for the action. *Id.* § 1214(a)(3); *id.* § 2302.[7] And for

[7] Under the statute, "personnel actions" are defined comprehensively to include, *inter alia,* a disciplinary or corrective action, detail, transfer, reassignment, performance evaluation, pay or benefits decision, or any other "significant change in duties, responsibilities, or working conditions." *See* 5 U.S.C. § 2302(a)(2). Congress authorized OSC to investigate whether a challenged "personnel action" constitutes one or more of thirteen specified "prohibited personnel practices," including failure to provide "[a]ll employees . . . fair and equitable treatment . . . with proper regard for their . . . constitutional rights." 5 U.S.C. §§ 1212(a)(2), 1214(a)(1)(A), 2302(b)(1)–(13); *id.* § 2301(b)(2). OSC thus has jurisdiction to investigate an employee's claim that a personnel action violated the Constitution. *See Fleming v. Spencer*, 718 F. App'x 185, 186 (4th Cir. 2018) (per curiam).

"disciplinary actions which are modest in nature," the Fourth Circuit has recognized a "congressional intent that no judicial relief be available." *Pinar v. Dole*, 747 F.2d 899, 912–13 (4th Cir. 1984).[8] The CSRA thus precludes review outside of the CSRA scheme even where there might ultimately be no remedy under the CSRA. *See Zimbelman*, 228 F.3d at 371 ("'[E]ven if no remedy at all has been provided by the CSRA' federal employee still cannot pursue a *Bivens* claim") (quoting *Lombardi v. Small Bus. Admin*, 889 F.3d 959, 961 (10th Cir. 1989)); *Hall*, 235 F.3d at 205 ("That the CSRA does not provide the remedy that she would prefer is of no moment."). In other words, "so far as review of determinations under the CSRA is concerned, what you get under the CSRA is what you get." *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005) (Roberts, J.).

Here, Plaintiffs' complaint could be characterized as a challenge to a current "significant change in duties, responsibilities, or working conditions," 5 U.S.C. § 2302(a)(2)(A)(xii), or as a challenge to a hypothetical future removal or suspension, *see* 5 U.S.C. § 7512. Either way, their remedy for such an action would arise under the CSRA, and there is no jurisdiction in this Court. *See, e.g.*, *Lim v. United States*, No. 10-cv-2574, 2011 WL 2650889, at *6 (D. Md. July 5, 2011) (Chasanow, J.) (claims precluded where "the underlying acts that form the basis of Lim's claims all fall under the umbrella of prohibited personnel actions and are preempted by the CSRA's remedial scheme").

[8] There is one potential exception, insofar as the Fourth Circuit has not definitely resolved whether the CSRA precludes colorable constitutional claims sounding in equity where the plaintiff has no other remedy. *See Fleming*, 718 F. App'x at 188 n.2; *see also Bryant v. Cheney*, 924 F.2d 525, 527-28 (4th Cir. 1991). The Court need not reach that question here given the absence of any allegation that Plaintiffs have attempted to exhaust their administrative remedies under the statute before bringing suit in district court. *See Fleming*, 718 F. App'x at 188-89 (employee bringing constitutional claims must at a minimum exhaust CSRA remedies) (citing *Irizarry v. United States*, 427 F.3d 76 (1st Cir. 2005); *Ferry v. Hayden*, 954 F.2d 658, 660-61 (11th Cir. 1992)).

2. In Any Event, Each of Plaintiffs' Claims Lacks Merit.

a. The Vaccination Requirement Does Not Violate the Tenth Amendment.

Plaintiffs' suggestion that the Executive Order violates the Tenth Amendment should be dismissed out of hand. Fundamentally, Plaintiffs' claim rests upon the incorrect premise that any federal action that addresses a topic that states also have the power to regulate is unconstitutional. But that is not the law. To the contrary, so long as federal action is authorized by the Constitution, "the Tenth Amendment gives way." *United States v. Hatch*, 722 F.3d 1193, 1202 (10th Cir. 2013); *see also, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 291 (1981) ("The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers."). And Plaintiffs do not—and could not—argue that this case presents a situation where "the means of regulation employed . . . impermissibly infringe on state sovereignty," *United States v. Johnson*, 114 F.3d 476, 480-81 (4th Cir. 1997). That would require a showing that the federal government has "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1477 (2018) (citation omitted). Instead, because the President has not regulated "the States as States," but has merely imposed certain conditions on continued federal employment, there is "no Tenth Amendment impediment." *Hodel*, 452 U.S. at 286; *see also Valentine Props. Assocs., LP v. U.S. Dep't of Hous. & Urban Dev.*, 785 F. Supp. 2d 357, 374-75 (S.D.N.Y. 2011) ("The Tenth Amendment is not violated where, as here, HUD requires property owners voluntarily participating in one of its programs to meet certain requirements above and beyond local and state requirements."), *aff'd judgment*, 501 F. App'x 16 (2d Cir. 2012).

As explained in more detail below, the Executive Order is a valid exercise of the President's lawful authority to set the terms and conditions of federal employment. It was issued pursuant to the

President's express statutory power to "prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service," 5 U.S.C. § 3301, "prescribe rules governing the competitive service," *id.* § 3302, and "prescribe regulations for the conduct of employees in the executive branch," *id.* § 7301. *See infra* Part I.B.2.d. Plaintiffs do not challenge the constitutionality of these statutory provisions. Nor do they seriously contend that the Executive Order exceeds the President's broad authority to regulate the civil service. *See id.; see also, e.g.*, *Friedman v. Schwellenbach*, 159 F.2d 22, 24 (D.C. Cir. 1946) ("The United States has the right to employ such persons as it deems necessary to aid in carrying on the public business. It has the right to prescribe the qualifications of its employees and to attach conditions to their employment."). Plaintiffs cite no authority to support their claim that the Executive Order is directed at "the accomplishment of objects not entrusted to the Federal Government." Pls.' Br. at 4. And Plaintiffs' theory—if accepted—would preclude the federal government from setting *any* of its own terms of employment due to states' broad police power to regulate their citizens.

It is therefore irrelevant that "States are split on the issue of vaccine passports to participate in everyday life, including employment." Pls.' Br. at 6. Whatever states decide to do about that issue, the President is not foreclosed from exercising his lawful authority to require that federal employees be vaccinated as a condition of continued employment with the federal government. To the extent there is any conflict between the employment conditions the President imposes and state law, the "Supremacy Clause of the Constitution requires that the federal law preempt the state law." *Petersburg Cellular P'ship v. Bd. of Suppliers of Nottoway Cnty.*, 205 F.3d 688, 701 (4th Cir. 2000). The Court should reject Plaintiffs' baseless Tenth Amendment claim.

b. The Vaccination Requirement Does Not Violate Any Fundamental Right, Including the Right to Privacy.

Plaintiffs further allege that the Executive Order violates a constitutional right to privacy.[9] *See* Compl. ¶¶ 43–52; Pls.' Br. at 7–11. Specifically, Plaintiffs contend that vaccination requirements implicate "the right to refuse medical treatment," triggering strict judicial scrutiny. Pls.' Br. at 8–9. This contention fails. As numerous courts have held, vaccination requirements (or, as here, vaccination conditions on employment) are subject to rational basis review, under which the Executive Order easily passes muster.

The Court's analysis of this claim must begin with "a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also, e.g.*, *Hawkins v. Freeman*, 195 F.3d 732, 739 (4th Cir. 1999) (cautioning against "analyzing the claimed right at too general a level"); *Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007) (court must "adopt a narrow definition of the interest at stake"). Next, the Court must determine whether the narrowly-defined right is "fundamental," *i.e.*, "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 720–21 (citations omitted). "If the asserted interest has been determined to be 'fundamental,' it is entitled in the second step to the protection of strict scrutiny." *Hawkins*, 195 F.3d at 739. "If the interest is determined not to be 'fundamental,' it is entitled only to the protection of rational-basis judicial review." *Id.*

[9] Plaintiffs suggest that this right is rooted in the Ninth Amendment, *see* Pls.' Br. at 7, although it is more commonly treated under the rubric of the Fourteenth Amendment, *see, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973) (describing the "right of privacy" as "founded in the Fourteenth Amendment's concept of personal liberty"); *Hodge v. Jones*, 31 F.3d 157, 163 (4th Cir. 1994) (describing "the foundational concept of individual privacy" as "shielded by the Due Process Clause of the Fourteenth Amendment"). This Court need not address the precise constitutional provision from which the right to privacy emanates, as it does not affect the "fundamental rights" analysis described below. *See Roe*, 410 U.S. at 153 (finding it immaterial whether the "right of privacy" is rooted in the Fourteenth Amendment or the Ninth Amendment).

Plaintiffs err in suggesting that the Executive Order implicates any recognized "right to refuse medical treatment" or "right to bodily integrity," Pls.' Br. at 7–9. The principal cases on which Plaintiffs rely involved "forced administration of life-sustaining medical treatment," *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990), and "forced administration of antipsychotic drugs," *Washington v. Harper*, 494 U.S. 210, 236 (1990). *See* Pls.' Br. at 9. Such interventions are far more intrusive than vaccinations, which have long been a common feature of modern life. Moreover, the policies at issue here do not *force* anyone to receive a vaccine; federal employees who do not qualify for an exception may choose to pursue other employment.[10] *See, e.g.*, *Klaassen v. Trs. of Ind. Univ.*, --- F. Supp. 3d ---, 2021 WL 3073926, at *25 (N.D. Ind. July 18, 2021) (public university's COVID-19 vaccination requirement was "a far cry" from forcible provision of medical care), *denying mot. for inj. pending appeal*, 7 F.4th 592 (7th Cir. 2021), *emergency application for relief denied*, No. 21A15 (Barrett, J., in chambers) (Aug. 12, 2021); *Bridges v. Hous. Methodist Hosp.*, ---F. Supp. 3d---, 2021 WL 2399994, at *2 (S.D. Tex. June 12, 2021) (similar), *appeal filed*, No. 21-20311 (5th Cir. June 14, 2021).

It is clear that the American legal tradition does not recognize the purported right to refuse vaccination as a fundamental right. *See, e.g.*, *Valdez v. Grisham*, ---F. Supp. 3d---, 2021 WL 4145746, at *5 (D.N.M. Sept. 13, 2021) ("[F]ederal courts have consistently held that vaccine mandates do not implicate a fundamental right . . . ."), *appeal filed*, No. 21-2105 (10th Cir. Sept. 15, 2021); *Johnson*, 2021 WL 4846060, at *13 ("[T]he right to refuse vaccination is not a fundamental right." (citation omitted)); *Dixon v. De Blasio*, ---F. Supp. 3d---, 2021 WL 4750187, at *8 (E.D.N.Y. Oct. 12, 2021) (same), *appeal filed*, No. 21-2666 (2d Cir. Oct. 22, 2021). Indeed, "vaccination requirements, like other public-health measures, have been common in this nation." *Klaassen*, 7 F.4th at 593; *see also Doe v. Zucker*, 520 F.

[10] For the same reason, there is no merit to Plaintiffs' assertion that the Executive Order violates "informed consent," Pls.' Br. at 11, or the "important liberty interest to make informed medical decisions for oneself," *id.* at 14.

Supp. 3d 217, 249–53 (N.D.N.Y. 2021), *appeal filed*, No. 21-537 (2d Cir. Mar. 5, 2021). And the Supreme Court held more than a century ago "that a state may require all members of the public to be vaccinated against smallpox," under penalty of criminal sanctions. *Klaassen*, 7 F.4th at 593 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)); *see also Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944) (Constitution does not provide "freedom from compulsory vaccination"); *Zucht v. King,* 260 U.S. 174, 177 (1922) (similar). Given that the Constitution permits vaccination requirements directed at the general public, it follows *a fortiori* that the Constitution permits vaccination status to be used as a condition of employment.

Plaintiffs' suggestion that "[t]he Right of Privacy has developed" since *Jacobson*, Pls.' Br. at 8, misses the mark. *Jacobson* has not been abrogated; as the Seventh Circuit recently observed, it remains binding on lower courts. *See Klaassen*, 7 F.4th at 593; *accord Phillips v. City of N.Y.*, 775 F.3d 538, 542 (2d Cir. 2015). Notably, Justice Gorsuch's concurrence in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020), describes *Jacobson* as having correctly "applied rational basis review" to a government-imposed vaccination requirement. Not only are *Jacobson* and its progeny (such as *Zucht* and *Prince*) binding precedent, they are compelling evidence of "this Nation's history and tradition," *Glucksburg*, 521 U.S. at 721 (citation omitted). Tellingly, Plaintiffs fail to reference any history or tradition that might reveal the existence of a fundamental right to avoid vaccination requirements (or conditions). *See Klaassen*, 2021 WL 3073926 at *23-24 (finding a dearth of "historic rules, laws, or traditions" suggesting the existence of such a right, and "declin[ing] the [plaintiffs'] invitation to extend substantive due process to recognize more than what already and historically exists").

In sum, courts—including the Fourth Circuit—have "consistent[ly] use[d] . . . rational basis review to assess mandatory vaccination measures." *Id.* at *24 (citing *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 355–56 (4th Cir. 2011)); *accord, e.g.*, *Williams*, 2021 WL 4894264, at *8; *Valdez*, 2021 WL 4145746, at *5; *Norris v. Stanley*, --- F. Supp. 3d ---, 2021 WL 3891615, at *1–2 (W.D. Mich.

Aug. 31, 2021); *Harris v. Univ. of Mass., Lowell*, No. 21-cv-11244, 2021 WL 3848012, at *6 (D. Mass. Aug. 27, 2021), *appeal filed*, No. 21-1770 (1st Cir. Sept. 28, 2021); *Zucker*, 520 F. Supp. 3d at 249–53. The federal employee vaccination requirement is therefore subject to rational basis review.

To survive rational basis review, the challenged measure "need only be rationally related to a legitimate government interest." *E.g.*, *Star Sci. Inc. v. Beales*, 278 F.3d 339, 348 (4th Cir. 2002). The challenged measure "is presumed constitutional," and "[t]he burden is on the one attacking the [measure] to negative every conceivable basis which might support it." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993) (citation omitted). Here, the Executive Order easily survives rational basis review, as it is plainly related to the government's strong interest in promoting "[t]he health and safety of the Federal workforce, and the health and safety of members of the public with whom they interact" during the COVID-19 pandemic. 86 Fed. Reg. at 50,989; *see, e.g.*, *Klaassen*, 2021 WL 3073926, at *26 (holding that a public university's COVID-19 vaccination requirement furthered its "legitimate interest in promoting the health of its campus communities"). Plaintiffs cite no case holding that a vaccination requirement lacked a rational basis, and Defendants are aware of none.

Plaintiffs also assert that the Executive Order implicates a constitutional right to "privacy of protected health information." Pls.' Br. at 9 (capitalization altered). The lone case they reference regarding this proposition, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), is inapposite as that case involved publication of private information. *See generally id.* (a state may not impose sanctions on a private party for the accurate publication of a rape victim's name obtained from judicial records). Because the vaccination requirement relates instead to an employer's request for information relevant to the employees' performance of their job duties, Plaintiffs' contention is foreclosed by the Supreme Court's decision in *National Aeronautics & Space Administration. v. Nelson*, 562 U.S. 134 (2011). There, the Court assumed without deciding that employment-related background checks "implicate a privacy interest of constitutional significance," but held that any such interest "does not prevent the

Government from asking reasonable questions" of potential employees "subject to the Privacy Act's safeguards against public disclosure." *Id.* at 147–48. Here, as in *Nelson*, the Constitution permits government agencies to make "reasonable, employment-related inquiries that further the Government's interests in managing its internal operations." *Id.* at 151; *see also Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.") (citation omitted). And in any event, the Privacy Act requires that agencies keep this information confidential. *See generally* 5 U.S.C. § 552a(a), (b).

c. The Vaccination Requirement Does Not Violate the Fifth Amendment.

Plaintiffs' third cause of action alleges a violation of procedural due process through misapplication of 5 U.S.C. § 7503(a)—the section of the CSRA discussing cause and procedure for suspensions of 14 days or less. *See* Compl. ¶¶ 53–63; Pls.' Br. at 12–14. According to Plaintiffs, Defendants "seek to implement [Executive Order 14043] by summary dismissal of Plaintiffs . . . without any meaningful opportunity to be heard." Compl. ¶ 58. Plaintiffs are not likely to succeed on this claim because they cite no evidence that their employers, DISA and HHS, will fail to comply with their statutory obligations under the CSRA. *See FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980) ("[U]ntil evidence appears to the contrary, agencies are entitled to a presumption of administrative regularity and good faith."); *see also* 86 Fed. Reg. at 50,990 ("This order shall be implemented consistent with applicable law . . . ."). Nor does the Task Force guidance suggest that the agencies should do so. *See* Enforcement FAQs ("In pursuing any adverse action, the agency must provide the required procedural rights to an employee and follow normal processes. . . .").

Although Plaintiffs cite the Task Force guidance to support their claim that they will be summarily dismissed for failure to comply with their agency's implementation of the Executive

Order,[11] *see* Compl. ¶ 58 & Ex. B, the Task Force guidance does not remotely support that proposition. To the contrary, the Task Force recommends that agencies initiate the enforcement process with a non-disciplinary counseling and education period. *See* Enforcement FAQs. Then, if noncompliance continues, the Task Force suggests that agencies issue a short suspension (14 days or less). *See id.* The Task Force recommends removal only if an employee thereafter refuses to offer proof of vaccination or to make a request for an exception to vaccination. *See id.* Thus, the Task Force guidance encourages agencies to provide robust notice to their employees of the agency's vaccination requirements and hardly promotes summary dismissal of noncompliant federal employees.

Plaintiffs cite nothing in their papers that would suggest that DISA or HHS plan to ignore the CSRA. *See generally* Compl. ¶¶ 53–63; Pls.' Br. at 12–14. And nothing in the Task Force guidance directs the agencies to circumvent the CSRA. *See* Enforcement FAQs. Plaintiffs moreover do not suggest that the CSRA fails to provide due process protections. Nor could they: As discussed above, the CSRA provides adequate opportunity for review of challenged employment actions for most federal civilian employees, including Plaintiffs. *See supra* Part I.B.1. Plaintiffs' procedural due process claim is, therefore, meritless on its face and should be rejected by this Court.

Plaintiffs further suggest that the President lacks the authority to prescribe conditions of employment for federal civilian employees. *See* Pls.' Br. at 13. This argument is baseless: Federal law explicitly (and repeatedly) grants the President the authority to regulate the federal workplace. *See infra* Part I.B.2.d; *see also Serv. Emps. Int'l Union Loc. 200 United v. Trump*, 419 F. Supp. 3d 612, 620–21 (W.D.N.Y. 2019) ("[The President] has broad authority pursuant to 5 U.S.C. §§ 3301 and 7301 to regulate employment matters.") (citing *Clarry v. United States*, 85 F.3d 1041, 1047–48 (2nd Cir. 1996)),

[11] Plaintiffs also cite an Office of Personnel Management memorandum that generally directs agencies to refer to the Task Force guidance. *See* Compl. ¶ 58 & Ex. C.

aff'd, 975 F.3d 150 (2d Cir. 2020). Plaintiffs are not likely to succeed on their claim given their utter failure to grapple with this clear statutory language.[12]

Finally, Plaintiffs suggest that the Executive Order does not regulate employees' workplace "conduct," as is required under 5 U.S.C. § 7301. Pls.' Br. at 13. That is plainly wrong. Although vaccination occurs outside the workplace, the executive order seeks to ensure that *conduct in the workplace* is safe and adequately protects the health of other employees—much like the smoking restrictions cited by Plaintiffs. *See id.* (citing Exec. Order 13058, 62 Fed. Reg. 43,451 (Aug. 9, 1997)). Plaintiffs' insistence that the order is at odds with congressional intent or the "general tenor" of Section 7301, *id.*, is not grounded in any authority or logic.

d. The Vaccination Requirement Does Not Violate the Separation of Powers.

Plaintiffs' final claim is equally unlikely to succeed. Plaintiffs assert that "[t]here is neither express nor implied authorization from Congress for the President to make a sweeping regulation for the entire Federal Civil Service that fundamentally alters the conditions of employment based on a personal health care choice." Compl. ¶ 70. And Plaintiffs argue that in the absence of such congressional action or some present emergency justifying a deviation from the constitutional division of authority, Pls.' Br. at 15, the President is powerless to "enact his policy preferences through executive action," *id.* at 17. Thus, Plaintiffs contend that the President has violated the separation of powers and encroached on Congress's authority by issuing the Executive Order.

[12] To the extent Plaintiffs suggest that 5 U.S.C. § 7503 imposes any limitations on the President's authority to issue vaccination requirements, the President did not rely on that statute in issuing the Executive Order. Moreover, Section 7503 does not purport to exhaust the reasons for which an agency may impose adverse action on an employee; rather, the statute's use of the word *including* implies that there are various justifications for for-cause suspension, not all of which are listed. *See* 5 U.S.C. § 7503(a). And in any case, Executive Order 14043 specifically finds that it would serve the efficiency of the civil service, *see* 86 Fed. Reg. at 50,989, making clear that any discipline for failure to become vaccinated would fall within 5 U.S.C. § 7503(a).

Plaintiffs' claim fails for the simple reason that the President acted pursuant to statutory authorization from Congress, as well as his own constitutional authority, when he ordered each federal agency to "implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law." 86 Fed. Reg. at 50,990. The President is the head of the Executive Branch, and, "[u]nder our Constitution, the 'executive power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (quoting U.S. Const. art. II, § 1, cl. 1 & § 3), *remanded*, 984 F.3d 715 (9th Cir. 2020).[13] To the extent that further authority were necessary to issue the Executive Order, in 5 U.S.C. § 7301, Congress has authorized the President to "prescribe regulations for the conduct of employees in the executive branch." That provision self-evidently permits the President to direct agencies to implement presidentially-determined standards for federal employees' conduct. Congress has further authorized the President to prescribe regulations for the civil service and competitive service. *See* 5 U.S.C. §§ 3301–3302; *see also Conrad v. U.S. Postal Serv.*, 494 F. Supp. 761, 768 (M.D.N.C. 1980) (recognizing that "[t]he President has been granted authority to prescribe such rules governing the competitive service"). These

[13] The Supreme Court long has recognized that the President bears "responsibility for the efficient operation of the Executive Branch." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974). More recently, it has emphasized that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789). Thus, the President may supervise agencies' employment practices within the lawful boundaries set by Congress. To the extent that Plaintiffs' claim could be construed to assert that the Executive Order violates the separation of powers by directing action inconsistent with existing congressional authorizations, that claim too would fail. *See* Pls.' Br. at 14 (suggesting limits that might be imposed by the Health Insurance Portability and Accountability Act). This Court can presume that agencies will follow all applicable laws in implementing the President's directives. *Cf. U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies . . . ."). "The mere possibility that some agency might make a legally suspect decision . . . does not justify an injunction" against an Executive Order. *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 33 (D.C. Cir. 2002).

provisions give the President "broad authority . . . to regulate employment matters." *Clarry*, 85 F.3d at 1047. And they serve as the basis for many familiar conditions of federal service, including the requirement that federal employees abstain from the use of illegal drugs, both on and off duty. *See* Drug-Free Federal Workplace, Exec. Order No. 12564, 51 Fed. Reg. 32,889 (Sept. 15, 1986). Thus, the President's issuance of the Executive Order was "not an impermissible exercise of legislative power, but a function of the President's role as head of the executive branch and his associated broad statutory authority to regulate executive branch employment policies." *Serv. Emps. Int'l Union*, 419 F. Supp. 3d at 620–21. No further congressional authorization was required for the President to act.

C. The Injunction Plaintiffs Seek Is Contrary to the Public Interest.

Where a plaintiff challenges a government policy, the third and fourth elements of the test for preliminary relief "merge" into a single consideration. *Roe*, 947 F.3d at 230 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). This factor tilts decisively in the government's favor.

First, enjoining the Executive Order would harm the public interest in slowing the spread of COVID-19 among millions of federal employees and the members of the public with whom they interact. As the Supreme Court has recognized, "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Cuomo*, 141 S. Ct. at 67. Accordingly, numerous courts reviewing "executive action designed to slow the spread of COVID-19" have concluded that "[t]he public interest in protecting human life—particularly in the face of a global and unpredictable pandemic—would not be served by" an injunction. *Tigges v. Northam*, 473 F. Supp. 3d 559, 573–74 (E.D. Va. 2020); *see also, e.g., Altschuld*, No. 21-cv-779, ECF No. 23, slip op. at 11; *Church*, No. 21-cv-2815, ECF No. 17, slip op. at 38–40; *Smith*, No. 21-cv-19457, ECF No. 19, slip op. at 27–28; *Am.'s Frontline Drs. v. Wilcox*, No. EDCV 21-1243, 2021 WL 4546923, at *8 (C.D. Cal. July 30, 2021); *Valdez*, 2021 WL 4145746, at *13, *Harris*, 2021 WL 3848012, at *8; *Williams*, 2021 WL 4894264, at *10–11; *Wise*, 2021 WL 4951571, at *6; *Mass. Corr. Officers*, 2021 WL 4822154, at *7–8; *Johnson*, 2021 WL

4846060, at *26–27; *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 840–41 (W.D. Tenn. 2020); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 543 (E.D.N.C. 2020).

Second, a preliminary injunction would harm the public interest by hampering the efficiency of the federal civil service. The COVID-19 pandemic has interfered with numerous aspects of the government's work by, *e.g.*, forcing office closures; hampering employees' access to paper-based records; limiting official travel; and causing staffing shortages. *See generally* Pandemic Response Accountability Committee, Top Challenges Facing Federal Agencies (June 2020), https://perma.cc/754N-56S9. Thus, enjoining the Executive Order would likely interfere with the government's ability to resume normal, pre-pandemic operations.

Third, a preliminary injunction would harm the government's interest in handling employment disputes through the administrative procedures established by Congress. As discussed more fully above, the CSRA creates comprehensive procedures for work-related controversies involving most federal civil servants. *See supra* Part I.B.1. In *Garcia v. United States*, for example, a federal employee "discharged for violation of work rules" sought to preliminarily enjoin his discharge without first exhausting his administrative remedies. 680 F.2d at 30–31. The Fifth Circuit found it "quite clear" that granting the requested injunction "would have a far more disruptive effect on the administrative processes established by the government to handle cases such as these than would, on balance, be the burden on the employee resulting from a refusal to grant the injunction." *Id.* at 32. So too here.

By comparison, any harm Plaintiffs might experience absent a preliminary injunction is relatively minor. Plaintiffs do not face an imminent prospect of workplace discipline, much less removal. They may avoid further (or potentially any) discipline by receiving a COVID-19 vaccination prior to or during any disciplinary proceeding. They also have the option of requesting an exception to the vaccination requirement, which might be granted; and they will not face discipline as long as such a request is under consideration. Accordingly, granting the pending motion would harm the

public interest far more than denying the motion would harm Plaintiffs, and the motion should therefore be denied.

II. Any Relief Should Be Narrowly Tailored.

If the Court disagrees with Defendants' arguments, any relief should be no broader than necessary to remedy the injuries of the specific Plaintiffs in this case. "A plaintiff's remedy must be tailored to redress the plaintiff's particular injury," *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). To the extent that nationwide injunctions are ever appropriate, they must be necessary to "meet the exigencies of the particular case," *HIAS, Inc. v. Trump*, 985 F.3d 309, 326 (4th Cir. 2021) (quoting *Roe*, 947 F.3d at 231)—a standard that Plaintiffs do not attempt to meet here.

Nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch." *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring); *see also, e.g.*, *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808, 815 (D.C. Cir. 2002) ("Allowing one circuit's statutory interpretation to foreclose . . . review of the question in another circuit would squelch the circuit disagreements that can lead to Supreme Court review."). The Executive Order at issue here has been challenged in numerous other cases, underscoring why this Court should not attempt to decide its legality for all parties and for all time. *See Foley v. Biden*, No. 21-cv-1098 (N.D. Tex.); *Jensen v. Biden*, No. 21-cv-5119 (W.D. Wa.); *Altschuld v. Raimondo*, No. 21-cv-2779 (D.D.C.); *Costin v. Biden*, No. 21-cv-2484 (D.D.C.); *Church v. Biden*, No. 21-cv-2815 (D.D.C); *Navy Seal 1 v. Biden*, No. 21-cv-2429 (M.D. Fla.); *Brnovich v. Biden*, No. 21-cv-1568 (D. Ariz.); *Smith v. Biden*, No.

21-cv-19457 (D.N.J); *Rodden v. Fauci*, No. 21-cv-317 (S.D. Tex.).[14]

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a temporary restraining order and preliminary injunction should be denied.

November 12, 2021

Respectfully submitted,

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[14] Finally, because any relief could run against subordinate Executive Branch officials who are Defendants to this action, under separation of powers principles, no relief should run against President Biden. *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867); *accord Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (plurality opinion); *id.* at 826-29 (Scalia, J., concurring in part and concurring in the judgment).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EMPLOYEE A *et al.*,

Plaintiffs,

vs.

JOSEPH R. BIDEN, *et al.*,

Defendants.

No. 8:21-cv-2696

PROPOSED ORDER

Upon consideration of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, ECF No. 7, it is this _____ day of _____, 2021, hereby

ORDERED, that the Motion is **DENIED**.

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DEBORAH K. CHASANOW
United States District Judge