No. 21-2359

In the United States Court of Appeals for the Fourth Circuit

ISRAEL RYDIE, AND
ELIZABETH FLEMING
Plaintiff – Appellants

v.

JOSEPH R. BIDEN, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES;
XAVIER BECERRA IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND HUMAN SERVICES;
LLOYD J. AUSTIN III IN HIS OFFICIAL CAPACITY AS SECRETARY OF DEFENSE,
Defendant – Appellees

On Appeal from the United States District Court For the District of Maryland in Case No. 8:21-cv-02696-DKC (Hon. Deborah K. Chasanow, Judge)

OPENING BRIEF FOR PLAINTIFF – APPELLANTS ISRAEL RYDIE AND ELIZABETH FLEMING

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-2359 Caption: Rydie et al. v. Biden et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Israel Rydie
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☒NO

2. Does party/amicus have any parent corporations? ☐YES ☒NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☒NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☒NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☒NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☒NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: Jonathan Bock Date: 12/20/2021

Counsel for: Israel Rydie and Elizabeth Fleming

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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- Counsel has a continuing duty to update the disclosure statement.

No. 21-2359 Caption: Rydie et al. v. Biden et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Elizabeth Fleming
(name of party/amicus)

who is Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☒NO

2. Does party/amicus have any parent corporations? ☐YES ☒NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☒NO
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Signature: Jonathan Bolk Date: 12/20/2021

Counsel for: Elizabeth Fleming and Israel Rydie

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1292 (a)(1) providing, in pertinent part, that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions". The district court in Maryland had jurisdiction pursuant to 28 U.S.C. §1331 and is authorized to award the requested injunctive relief under 5 U.S.C. §706(2) ((A) – (D)).

STATEMENT OF THE ISSUES

1. Whether bodily integrity and the right to refuse medical treatment constitutes a fundamental privacy right, under the Ninth Amendment, particularly where the body is injected with a foreign substance, that warrants heightened scrutiny analysis.

2. Whether the President acted outside of the Legislature's delegated authority by relying on Title 5 Organization of Government provisions to mandate COVID-19 vaccination for the entire Civil Service.

3. Whether Executive Order 14,043 infringes upon the local health and police regulatory power reserved to the States under the Tenth Amendment where many federal employees work in States that have outlawed such mandates.

4. Whether Executive Order 14,043 works to undermine meaningful due process protections afforded to federal employees by unilaterally conditioning employment on an invasive medical treatment.

5. Whether the Article I Legislative power to make rules for the Government and to make all laws necessary and proper for carrying into execution all powers vested in the Government has been usurped by the Executive in Executive Order 14,043.

6. Whether an *ultra vires* executive order substantially altering the conditions of employment for the Civil Service constitutes the exceptional circumstances necessary for immediate judicial review prior to terminations in mass.

7. Whether non-party department heads can be enjoined in the form of a nationwide preliminary injunction where an executive order impacts employees throughout all fifty States and is applied consistently to all federal departments and agencies.

8. Whether the District Court erred in not issuing a Preliminary Injunction by not finding that:

a) the Executive Order on its face implicates and violates a fundamental right; and/or

b) the President clearly acted without the authority of law.

STATEMENT OF THE CASE

Appellants Israel Rydie of the Defense Information Systems Agency and Elizabeth Fleming of the Food & Drug Administration are federal employees who face termination on account of not disclosing their vaccination status for COVID-19 pursuant to Executive Order 14,043 ("Executive Order"). 86 Fed. Reg. 50,989, 50,989 – 50990 (September 14, 2021). *See* sample attestation form in A164. The Executive Order, premised on three Title 5 Organization of Government provisions, absolutely unprecedented in both scope and content, instructed The Safer Federal Workforce Task Force, earlier commissioned by Executive Order 13,991 in January 2021, to issue guidance on implementation to all covered federal agencies and departments. [A96 Sec. 1; *see also* A111 (Memorandum for Heads of Executive Departments and Agencies)]. The resulting guidance [A99] pushed an ambitious schedule requiring federal employees by November 8th to attest they received their final dose in a two-dose regimen or a single dose for a single dose vaccine. If they do not, they will be placed on a fast track to dismissal already laid out for them: 5-day counseling period, followed by a two-week suspension, followed by a notice of proposed removal.[1] The Executive Order is to be carried out with "consistency

[1] The Safer Workforce Task Force published guidance has since extended by two weeks the period of suspension and indicated that notices of proposed removal will not go out until January of 2022. This is consistent with the representation of the Government before the District Court. [Mem Op. A4]

across government in enforcement." [A107 (last line)]. Indeed, as indicated at the hearing, the enforcement process for Appellants' two agencies has already begun. [A43:20-22]. Without immediate intervention, these good employees will be fired for cause:

> Employees covered by Executive Order 14043 who fail to comply with a requirement to be fully vaccinated or provide proof of vaccination and have neither received an exception nor have an exception request under consideration, **are in violation of a lawful order**. Employees who violate lawful orders are subject to discipline, up to and including termination or removal. Consistent with the Administration's policy, agencies should initiate an enforcement process to work with employees to encourage their compliance. Accordingly, agencies should initiate the enforcement process with a brief period of education and counseling (5 days), including providing employees with information regarding the benefits of vaccination and ways to obtain the vaccine. If the employee does not demonstrate progress toward becoming fully vaccinated through completion of a required vaccination dose or provision of required documentation by the end of the counseling and education period, it should be followed by a short suspension (14 days or less). Continued noncompliance during the suspension can be followed by proposing removal.

A107 ¶1-2 (emphasis added).

Neither of the appellants have or will be putting in for an exemption, which represents the same situation for tens of thousands of federal employees who have served their country well. See p. 9, *infra*, statistics reported from government

sources. States that have issued a mandate on their employees have presented them with a *choice*, whether to submit to weekly testing as an alternative, as shown by the Commonwealth of Virginia. [A173 Sec. B]. Appellants and the rest of the Civil Service are given no such choice. With respect, the District Court's interpretation [A3] of the Government's enforcement deadlines [A107 (bottom of page)] is not a fair one. The judge's inference that the requirement is not being enforced immediately and is applied with different escalating enforcement processes at each federal agency is inaccurate. The relevant provision reads as follows: "Unique operational needs of agencies and the circumstances affecting a particular employee may warrant departure from these guidelines if necessary, but **consistency across government in enforcement of this government-wide vaccine policy** is desired, and the Executive Order does not permit exceptions from the vaccination requirements except as required by law." (emphasis added). Any departure from the fast track timelines is the rare exception, not the rule.

This action was filed on October 20, 2021 in the District of Maryland Greenbelt division, the location of agency headquarters for both appellants. Appellants brought a motion for a nationwide preliminary injunction [A115] seeking to enjoin the officers, agents, and employees of the Executive Branch who would attempt to enforce the Executive Order's vaccine mandate and corresponding collection of protected health information. An expedited briefing schedule was

ordered and a non-evidentiary hearing was held on November 18, 2021. The preliminary injunction was denied and this appeal follows.

STATEMENT OF FACTS

The World Health Organization declared COVID-19 to be a pandemic on March 11, 2020.[2] During this past Summer and Fall of 2021 this nation was embroiled in heated debates over COVID-19 vaccines, passports, and mandates, and the direction the nation was going to take. As it turns out there was no consensus reached, and the States were split on whether it should be lawful to allow a COVID-19 passport scheme or mandate within their jurisdictions. See *infra* footnote 15 (sixteen States have either passed laws mandates illegal or issued executive orders against having a passport system). The Biden Administration fell short of its desired goal of an 80% vaccination rate for the American public by July 4, 2021. Executive Order 14,043 Requiring Coronavirus Disease 2019 Vaccination for Federal Employees was issued on September 9, 2021. [A96].

The Executive Order directed a task force set up earlier in 2021 for the purpose of issuing instructions to federal employees regarding the wearing of masks to now draft guidelines for all covered federal departments and agencies to implement the

[2] Jamie Ducharme, *World Health Organization Declares COVID-19 a 'Pandemic',* Time (March 11, 2020), https://time.com/5791661/who-coronavirus-pandemic-declaration/ (last visited December 28, 2021).

Executive Order. A96 Section 1. Toward that end, there would be no exceptions unless required by law (religious and medical exemptions) and no alternatives for periodic COVID-19 testing in lieu of the vaccine [A96 Section 1], whereas States that have required their state employees to be vaccinated *do* offer COVID-19 testing as an alternative. [A173 Section B (Governor Ralph Northam, Commonwealth of Virginia)]. The guidance to agency and department heads published by the Safer Federal Workforce Task Force emphasizes consistency of enforcement across the spectrum with very little discretion for departure (exceptional mission-oriented circumstances only). [A107 – 108; A111 – 112].

The schedule and timeframe set up by the Federal Workforce Task Force for compliance with these requirements were as follows:

November 8, 2021	Receive last dose of a single-dose vaccine or second dose of a two-dose vaccine
November 22, 2021	Must be considered fully vaccinated

[A99]

To date, these deadlines have not been altered, which now leaves Appellants and others similarly situated in a state of noncompliance. They are considered to be in violation of a direct order. [A107]. Employees are expected to upload an attestation sheet, such as for DoD civilian employees [A164-165] indicating their date(s) of vaccination, manufacturer, and separately provide documentary proof to their supervisors. A fast-track to dismissal for the noncompliant was set up in three

stages: 5-day counseling; short suspension (14 days or less); and proposal for removal. [A107]. The enforcement provisions have remained intact, as of December 28, 2021, with only slight modifications to the initial period for education and counseling (5-day specification removed) and agencies may piggyback a second suspension period following the first suspension.[3] In light of the foregoing, the Government is clear that only exceptional circumstances will permit departure: "[t]hat said, consistency across Government in enforcement of this Government-wide vaccine policy is desired, and the Executive Order does not permit exceptions of the vaccination requirement except as required by law."[4] Additionally, departments and agencies may initiate the enforcement process for employees who fail to submit documentation to show that they have completed receiving the required doses.[5] Israel Rydie and Elizabeth Fleming have not disclosed their vaccination status to their management; nor have they or will they be filing for an exemption. They and many others have been notified they are now in the counseling phase ("the enforcement has begun," [A43:20-22]) and expect the last two steps of

[3] Office of Personnel Management (OPM). Safer Federal Workforce Task Force, "Enforcement of Vaccination Requirement for Employees (Updated)," ¶¶2-3, *available at* https://www.saferfederalworkforce.gov/faq/vaccinations/ (last accessed on December 28, 2021).
[4] Id., ¶3.
[5] Id., ¶4.

suspension and removal to commence January 2022, by the Government's admission [A4] and as reported by the White House.[6]

As of November 24, 2021, 92% of federal employees received at least one dose of a COVID-19 vaccine. "Update on Implementation of COVID-19 Vaccination Requirement for Federal Employees," *available at* https://www.whitehouse.gov/omb/briefing-room/2021/11/24/update-on-implementation-of-covid-19-vaccination-requirement-for-federal-employees/ (last visited December 28, 2021). Adding the number of exemptions requested (4.5%) we are left with a **noncompliance rate of 3.5%.** *Id.* For a federal workforce of approximately 2 million employees, that comes to 70,000, a number that is sure to rise if the Government starts denying exemption requests. Most federal employees live outside of the D.C. Metro area and are scattered throughout all fifty States. Only a mere 15% reside in the Washington DC Metro Area.[7]

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[6] Jessie Bur, *White House delays federal employee vaccine enforcement until the new year*, Federal Times. November 29, 2021, https://www.federaltimes.com/management/2021/11/29/white-house-delays-federal-employee-vaccine-enforcement-until-new-year/ (last visited December 28, 2021).

[7] Office of Personnel Management. "Policy, Data, and Oversight." Chart showing breakdown by region and State, *available at* https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/ (last accessed December 28, 2021).

Employees receive a Privacy Act statement [A114] that notifies them that their COVID-19 attestation forms and supporting medical documentation could be shared with external sources, including "contractors, grantees, or volunteers as necessary to perform their duties for the Federal Government".

Since the start of the pandemic, pursuant to Executive Order 13,991 issued on January 20, 2021 (86 F.R. 7045), "Protecting the Federal Workforce and Requiring Mask Wearing," the Government has been employing social distancing and mask wearing as well as other measures such as enhanced cleaning, air filtration, and temperature checks. These were for the purpose of "ensur[ing] the continuity of Government services and activities." *Id*. Section 1, *available at* https://www.federalregister.gov/documents/2021/01/25/2021-01766/ protecting-the-federal-workforce-and-requiring-mask-wearing (last visited December 28, 2021). In furtherance of the order, the Department of Homeland Security was instructed to develop a *testing plan* for the Federal workforce (*Id*. Section 5) and address the details such as frequency of testing based on community transmission metrics. Yet, glaringly missing from Executive Order 14,043 is any finding that these measures already employed for a year-and-a-half to two years have not worked, or that a testing plan was not an effective alternative (as utilized in States such as Virginia, [A173]).

The Civil Service was never given an opportunity to weigh in on such a drastic change to their conditions of employment. [A88 (Verified Complaint ¶61)]. Neither was the public even given a notice and comment period.

SUMMARY OF ARGUMENT

Similar to President Harry Truman's *ultra vires* act to take over the steel industry in the name of an emergency in *Youngstown Sheet & Tube*[8], President Biden had no authority to issue Executive Order 14,043, which he plans to enforce effectively January 2022. It is not a law or pursuant to one and neither falls under his enumerated powers nor under the delegated powers of Congress. It is therefore an *ultra vires* act making it immediately reviewable by the Judiciary. The President's circumscribed authority to make general rules for the efficiency of the Civil Service in no way includes the authority to encroach upon the highest and most invasive Right to Privacy: the right to bodily integrity of one's own skin. Indeed, there is nothing more physically invasive than an injection into the veins of an unwanted foreign substance. This is *exactly* the kind of right that the Framers reserved to the People under the Ninth Amendment of the Constitution of the United States. Nor can the Government argue it is Mr. Rydie's and Ms. Fleming's and tens of thousands of federal employees' choice to leave their jobs. The Doctrine of

[8] Likewise, a preliminary injunction case.

Unconstitutional-Conditions will not allow it, and the penalties of staking these people's livelihoods, the certain tarnishing of their personnel records, and in many cases the loss of retirement has *never* been done before and are coercive to the point of compulsion.

The lower court erred by applying a rational basis review standard, thereby inferring that the above right is not a right at all. Had it been properly recognized, the irreparable harm element for the Preliminary Injunction would be satisfied on the constitutional violation alone, as the Executive Order cannot pass strict scrutiny. The method of tiered scrutiny analysis was not yet introduced at the time of the landmark vaccine case, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The very limited progeny of that case went in the direction of elementary school vaccine requirements and is confined to the local or state level. It was not until fifty years following *Jacobson* that the Supreme Court began applying a higher scrutiny standard, particularly in the context of the Right to Privacy and the right to refuse medical treatment. The Court in *Jacobson* did not at the time have the luxury of choosing between two standards of review, which is extremely beneficial in a case like this in which least restrictive means is a central issue.

Since *Jacobson*, there has been no high court or appellate ruling that addresses rights in the context of local or state laws involving vaccine mandates. In any case, the measures against smallpox in the City of Cambridge, MA in *Jacobson* falls

squarely under the state and local health and regulatory authority traditionally reserved to the States under the Tenth Amendment of the Constitution of the United States. The reason why vaccine mandates have always been limited to a matter of State and local concern, not federal, is because of the essential principles that underlie federalism and separation of powers the Framers built into the Constitution. As it relates to health law, Congress (not the President) may act only pursuant to its limited enumerated powers. And it has done so under the Constitution's Spending and Commerce Clauses to create federal health insurance programs, including Medicare, and to enact safety standards in the Food and Drug Act of 1906. When it comes to the States' local health and police power, however, the law is clear that Congress may not commandeer the States into adopting its policy preferences, and it may not require a positive activity to engage in interstate commerce. This is why all the Government's citations relied upon do not reference federal case law. The infringement of State sovereignty by Executive Order 14,043 is made obvious by the fact that the great majority of federal employees (85%) live and work throughout all fifty States, many of which (as in appellant Elizabeth Fleming) work in States that have either made laws against vaccine mandates or issued executive orders precluding a COVID-19 passport scheme.

Jacobson differs from the present case in several key respects: (1) it involves the health and police power that is reserved to the States; (2) it involves a State law

and a local ordinance, not an executive order; (3) the penalty for noncompliance could not be considered coercive ($5 is approximately $157 value today); and (4) the City of Cambridge is not a federal employer directly accountable to the Constitution, *viz*. the Ninth and Fifth Amendments of the Constitution of the United States.

By unilaterally changing the conditions of employment for the Civil Service, the President attempts to circumvent the normal channels of due process available to employees through the Civil Service Reform Act. What is normally an adjudicative body set up for fact-specific inquiry, based on merit systems principles, is now limited to a single inquiry for tens of thousands that will go no further than, "Did you or did you not take a COVID-19 vaccine?" The liberty interest in one's right to refuse medical treatment is overridden by a coercive penalty (loss of one's livelihood) and the property interest in public employment is denied due process in that it is a *status or state of being* that is enforced against them, as opposed to a *behavior or conduct* according to law.

The Executive Order cannot pass strict scrutiny analysis. As shown in the record, the Commonwealth of Virginia's vaccine mandate on state employees allows for periodic COVID-19 testing as an alternative. Other States are doing the same while still others have no vaccine mandate at all, relying on personal protective equipment, temperature checks, deep cleaning, ventilation, etc. The States have

moved to Phase III operations and many such as Maryland have modified their executive orders to significantly roll back the emergency measures adopted at the height of the pandemic. The absurdity is crowned by how the enforcement has already begun against Ms. Fleming, who is a 100% remote employee in Idaho.

Finally, the harm the Government claims if a preliminary injunction is issued is ethereal compared to the very tangible, real world impact this is going to have on tens of thousands of peoples' lives and their families. In fact, the Government will be benefited by continuing to have the productivity of appellants such as Mr. Rydie and Ms. Fleming. Meanwhile, the collection (and storage) of extremely sensitive, private medical information is ongoing pursuant to a highly questionable executive order. The Government references no investigational findings in the Executive Order that past measures have failed; it merely lays out broad general assertions about COVID-19 vaccines. This is a policy preference. Keeping the status quo is also wise in the sense that it allows a case of first impression and a highly questionable act on the part of a sitting president to be reviewed properly by the Judiciary before so many lives are disrupted. The litigation is already happening very quickly, which it should, given a matter of national importance.

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for abuse of discretion. *WV Ass'n of Club Owners & Fraternal Svcs. Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009). Legal conclusions are reviewed *de novo*. *E. Tenn. Natural Gas Co. v. Sage*, 361 F. 3d 808, 828 (4th Cir. 2004); *Safety-Kleen, Inc. v. Wyche,* 274 F.3d 846, 859 (4th Cir. 2001); *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013) ("we review the district court's factual findings for clear error and its legal conclusions *de novo*"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014) (reviewing court evaluates a preliminary injunction denial for abuse of discretion, reviewing the district court's factual findings for clear error and its legal conclusions *de novo*).

A preliminary injunction may be characterized as being either prohibitory or mandatory. *League of Women Voters, supra* at 235. "Whereas mandatory injunctions alter the status quo, prohibitory injunction "aim to maintain the status quo and prevent irreparable harm while a lawsuit is pending." *Pashby*, 709 F.3d at 319.

ARGUMENT

I THE DISTRICT COURT HAS JURISDICTION OVER A CIVIL RIGHTS CLAIM BY FEDERAL EMPLOYEES WHERE THE UNDERLYING EXECUTIVE ORDER IS *ULTRA VIRES*.

For reasons laid out below, in the section entitled Likelihood of Success on the Merits, the President simply lacks the authority to issue a vaccine mandate for the entire Civil Service. "When an executive acts *ultra vires*, courts are normally available to reestablish the limits of his authority." *Sierra Club v. Trump*, 963 F. 3d 891 (9th Cir.), *vacated on other grounds sub nom., Biden v. Sierra Club*, No. 20-138, 2021 WL 2742775 (U.S. July 2, 2021). *Cf. Chamber of Commerce of the United States v. Reich*, 74 F. 3d 1322, 1325 – 26 (D.C. Cir. 1996).

For example, in the case of the federal Administrative Procedure Act ("APA"), the Ninth Circuit found that Congress expects first and foremost that its limitations upon its delegated authorities be enforced by the courts. "[W]hen Congress limits its delegation of power, courts infer (unless the statute clearly directs otherwise) that Congress expects this limitation to be judicially enforced. The passage of the APA has not altered this presumption. Prior to the APAs enactment courts had recognized the right of judicial review of agency actions that exceeded authority, and nothing in the subsequent enactment of the APA altered that doctrine of review to repeal the review of *ultra vires* actions." *Id*. In like measure, an *ultra*

vires action premised upon provisions of Title 5 Organization of Government that directly affects a vast number of employees simultaneously and in short order, is subject to immediate review by the Judiciary.

The District Court acknowledged that "Congress can limit the scope of the President's discretion in this area" [A9 – A10], referring to regulation of the federal workforce. In fact, Congress has *plenary* authority in this area as derived from the Constitution itself. Article I, Section 8 of the Constitution provides:

> [Congress] shall make **Rules for the Government** and Regulation of the land and naval forces;
>
> [Congress] shall make all laws which shall be **necessary and proper** for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, §8 (emphasis added)

Article II, Section 3 of the Constitution provides:

> [The President] shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such measures as he shall judge necessary and expedient.

U.S. Const. Art. II, §3

For something as drastic and unprecedented as a fundamental change to the conditions of employment for the entire Civil Service to require medical treatment and an injection into the body of a foreign substance, the President would be obliged

to approach Congress[9] for explicit statutory authority. The District Court's reasoning that the President derives constitutional authority for this by virtue of holding the office of the Executive [A9] is unconvincing. A close read of Article II Section 1 says nothing on the subject of management aside from the words "executive [p]ower shall be vested." On the other hand, inclusion of the Constitution's Necessary & Proper clause, *supra*, was clearly a deliberate choice on the part of the Framers to split the power and vest Congress with such rulemaking authority. That is particularly true when it comes to rules of great significance, as shown elsewhere in this Brief.

The President's authority to regulate the Civil Service is constrained by Congress' power to make rules for the Government. U.S. Const. Art. I, Sec. 8. It only follows that this power must be exercised consistently with the structure and purposes of the Congressional statute delegating on the subject matter. The Executive Order relies on longstanding Organization of Government provisions of Title 5, reproduced *infra* p. 34, to lay the foundation to mandate COVID-19 vaccines. But, as one court recently found with the parallel mandate on federal contractors, "it strains credulity that Congress intended the FPASA, a procurement

[9] For reasons outlined below in the section on the Tenth Amendment and Power Reserved to the States, Congress likely lacks this power as well. When the Nation debated the issue over the Summer and Fall of 2021, these discussions would have taken place between Congress and the President. Ultimately, Congress decided not to act with respect to any vaccine mandates.

statute, to be the basis for promulgating a public health measure such as mandatory vaccination." Civ. A. No. 3:21-cv-00055 (E.D. KY) (ECF 50) (Nov. 30 2021). So too in this case- if the Government can reference the Organization of Government articles and use the word "efficiency" in such a broad sense, then any intended constraints of the statute would become illusory. *Cf. Ala. Ass'n of Realtors v. Dpt. Health & Human Svcs.*, 141 S. Ct. 2485, 2488 – 89 (2021). If the Organization of Government articles meant for the Executive to possess the authority to enact invasive health measures, they would have said so explicitly. Another indicator that this is not the case is that there exists no "intelligible principle" contained in the Legislature's delegated statutes to guide the President in framing and setting up such a measure. *Gundy v. U.S.*, 139 S. Ct. 2116, 2123 ("The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion. So the answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides"). The Government is unable to point to anywhere in the relied upon provisions that would remotely be considered to be an intelligible principle. The reason for this is clear- this action is totally without historical precedent, and Congress never contemplated it.

As in the presidential overreaching found in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952), "[t]he President's order does not direct that a Congressional policy be executed in a manner prescribed by Congress – it directs

that a presidential policy be executed in a manner prescribed by the President." The Executive Order here commissions an already existing task force organized earlier in the year for the purpose of making rules involving wearing masks, and greatly expands the task force's mission to now issue guidance to all the agencies and departments on the implementation of the vaccine mandate, "with exceptions (exemptions) only as required by law." [A96 – 97]. None of this is coming from Congress; it is entirely unilateral action based on the president's policy preference, down to the very details laid out by a task force under his direct control. This, in turn, effectively changes the conditions of employment.

Changing the conditions of employment in this way renders any subsequent hearings before an Article I tribunal meaningless and completely illusory. This violates the procedural due process rights of appellants and those similarly situated. As explained in the district court hearing, the inquiry for Appellants and the many others similarly situated would be limited to nothing more than, "Did you or did you not take a COVID-19 vaccine?" [A40:2-5]. No real hearing *could* take place under these circumstances as appellants would be essentially sent "to the slaughterhouse." [A44:1]. This situation represents an extraordinary exception to practically every other case based on merit systems principles, fact-specific cases unique of their own right. Here we have tens of thousands of exactly the same case that are presenting as a result of a presidential overreach.

It is therefore the *duty* of the Judiciary to step in and correct it at once.

II THE DISTRICT COURT ERRED BY APPLYING A CONVENTIONAL ANALYSIS TO THE IRREPARABLE HARM ELEMENT FOR A PRELIMINARY INJUNCTION WHERE THERE WERE CLEAR CONSTITUTIONAL RIGHTS INVOLVED.

A. Bodily integrity and the right to refuse unwanted medical treatment fall under the right to privacy and implicate fundamental rights.

Appellants Israel Rydie and Elizabeth Fleming, and all others similarly situated within the Federal Government, have a right to their own bodily integrity and to refuse medical treatment. They also have a corresponding right not to disclose Protected Health Information (PHI) that is solicited in violation of their right to bodily integrity and to refuse medical treatment. As laid out below, these rights fall under the Right to Privacy, and have been recognized as fundamental by the Judiciary, particularly since the landmark ruling of *Griswold v. State of Connecticut*. Further than that, however, they are rights that precede the founding of this country, and easily fall into what is implicit in the concept of ordered liberty.[10]

[10] Protecting the natural rights of the People was the object of the Ninth Amendment. As Justice Goldberg's concurrence in *Griswold v. State of Connecticut*, 381 U.S. 479, 488-89 (1965) states, the Ninth Amendment "was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." James Madison, Father of our Constitution, successfully was able to pass the amendment in original form without dispute. *Id.* In the opinion, it states, "the specific guarantees of the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Id*. at 484.

The District Court recognized a person's right to refuse medical treatment as a "fundamental liberty interest" [A12], yet the analysis proceeded no further than to say that making one's job conditioned on taking a COVID-19 vaccine "does not reach the level of coercion necessary to infringe" the interest. *Id*. This was the premise upon which the court suggested a rational basis review analysis as opposed to a heightened scrutiny, clearly warranted here. [A13]. The distinction between the penalty imposed by the City of Cambridge, MA in the case of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) and that of the mandate in the instant case is quite sharp: in *Jacobson* it was a fine with the equivalent of $157 in current value [A217]; here what is at stake is nothing less than Americans' jobs, livelihoods, and the families who rely on them. Contrary to the District Court's conclusion, this level of coercion *does* amount to compulsion; and it implicates a fundamental right of bodily integrity. This runs afoul of the Unconstitutional-Conditions Doctrine in which the Government cannot condition a privilege on the surrender of a constitutional right. And *a fortiori* it certainly cannot do so with respect to a protected property interest in public employment.

Since *Jacobson*, there has been a significant evolution in the case law and how the Judiciary views bodily integrity rights, especially since the landmark holding of *Griswold v. Connecticut* in 1965. The Ninth Amendment reads, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others

retained by the people." U.S. Const. Am. 9. As Justice Goldberg elaborated in his concurrence in *Griswold v. State of Connecticut*, 381 U.S. 479 (1965), "the specific guarantees of the Bill of Rights have **penumbras**, formed by emanations from those guarantees that help give them life and substance." *Id*., at 484 (emphasis added). For further elucidation, he goes on to say, "In sum, the Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. *Cf. United Public Workers v. Mitchell*, 330 U.S. 75, 94 – 95 (1947)." *Id*. at 493.

Since *Jacobson*, the Supreme Court has developed layers of judicial scrutiny of governmental action. Strict scrutiny, first introduced in *Korematzu v. United States*, 323 U.S. 214 (1944), has come to be applied to, *inter alia*, the right to refuse medical treatment. Consider how the Court distinguished the issues at stake in two cases before it, one involving assisted suicide (*Washington v. Glucksberg*, 521 U.S. 702 (1997)) and the other an express wish to forego life-prolonging procedures (*Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990)). In the former, the Court held that the right to assistance in committing suicide has no history of being traditionally protected, whereas the "right to refuse unwanted medical treatment [is] so rooted in our history, tradition, and practice as to require special protection"). *Glucksberg*, 521 U.S. 721 n. 17 (citing *Cruzan*, 497 U.S. at 278 – 79). Accordingly,

the Court applied strict scrutiny analysis to the *Cruzan* case and mere rational basis review analysis in *Glucksberg*. See also Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 Harv. J.L. & Pub. Pol'y 599, 661 (2000) (the fundamental right to refuse medical treatment is based on common law battery and afforded the protections associated with bodily integrity and unwanted physical invasions). By requiring Appellants and all others similarly situated to provide proof of vaccination, Executive Order 14,043 is not only violating their right to refuse medical treatment but their right not to disclose their closely guarded private medical information.

During the latter half of the twentieth century, well *after* the 1905 *Jacobson* decision, the Judiciary recognized and expanded individual liberty and privacy rights. *See Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 270 (1990) (articulating that, until recently, "the number of right-to-refuse-treatment decisions was relatively few"). "[T]he root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . .' " *Canterbury v. Spence*, 464 F. 2d 772, 780 (D.C. Cir. 1972), *quoting Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914).

As one federal district court put it, since the 1970's, "thirteen different courts in ten different jurisdictions have, in the absence of controlling decisions, directly

addressed the question of whether the right to privacy encompasses the decision to obtain or reject medical treatment. *Wensel v. Washington*, supra note 2, at 1159-1160 (Superior Court of the District of Columbia, Civil Division); *Matter of Quinlan*, 137 N.J. Super. 227, 348 A.2d 801, 821-822 (Super. Ct. Civ. Div. 1975), *modified*, 70 N.J. 10, 355 A.2d 647, 662-663 (N.J. 1976) (Superior Court of New Jersey, Chancery Division, and Supreme Court of New Jersey); *Price v. Sheppard*, 307 Minn. 250, 239 N.W.2d 905, 910-912 (1976) (Supreme Court of Minnesota); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 424 (1977) (Supreme Judicial Court of Massachusetts); *Rutherford v. United States*, 438 F.Supp. 1287, 1298-1301 (W.D. Okl.), *affirmed on other grounds*, 582 F.2d 1234 (10th Cir. 1978), *reversed on other grounds*, 442 U.S. 544, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979), *reversed*, 616 F.2d 455 (10th Cir. 1980), *rehearing denied* (April 28, 1980) (United States District Court for the Western District of Oklahoma and United States Court of Appeals for the Tenth Circuit); *People v. Privitera*, 74 Cal.App.3d 936 (Ct. App. 1978), *reprinted in People v. Privitera*, 23 Cal.3d 697, 153 Cal. Rptr. 431, 439, 591 P.2d 919, 927 (1979) (Bird, C. J., dissenting), *reversed*, 153 Cal. Rptr. 431, 433-435, 591 P.2d 919, 921-923 (Cal. 1979) (Court of Appeals of California and Supreme Court of California, En banc); *Satz v. Perlmutter*, 362 So.2d 160, 162-163 (Fla. Dist. Ct. App. 1978) (District Court of Appeal of Florida, Fourth District); *Rennie v. Klein*, 462 F. Supp. 1131,

1144-1145 (D. N. J. 1978) (United States District Court for the District of New Jersey); *Rogers v. Okin*, 478 F. Supp. 1342, 1365-1366 (D. Mass. 1979) (United States District Court for the District of Massachusetts); *In re Eichner*, 73 A.D.2d 431, 456-460, 423 N.Y.S.2d 517, 537-540 (1980) (New York Supreme Court, Appellate Division, Second Judicial Department). Of these, all but two, *see Wensel v. Washington, supra* note 2, [385 A.2d 1148] at 1159-1160, and *People v. Privitera, supra*, 153 Cal.Rptr. at 433-435, 591 P.2d at 921-923 responded in the affirmative. Thus, this Court is merely joining the **clear trend of modern authority** in acknowledging that the decision to obtain **or reject** medical treatment, consisting in the instant case of the decision to obtain acupuncture, **is protected by the right of privacy**." *Andrews v. Ballard*, 498 F.Supp. 1038, 1049 (S.D. Tex. 1980) (emphasis added).

More recently, the Supreme Court held that the privacy interests involved in penetrating the skin and into the veins are so particularly invasive that it amended the Search Incident to Arrest Doctrine to include a clear delineation between breath tests in drunk driving stops and a blood draw for the same evidence, which henceforth requires a warrant from a judicial officer. *Birchfield v. North Dakota*, 579 U.S. ____ (2016). In *Missouri v. McNeely*, the Court's intentions are unmistakable: "We have never retreated from our recognition that any compelled intrusion into the human body implicates significant constitutionally protected

privacy interests." *Missouri v. McNeely,* 569 U.S. 141, 159 (2013). Justice Sotomayor, writing for the majority in that case, found it persuasive that a clear majority of the States placed significant restrictions on when police may obtain a blood sample despite a suspect's refusal, often limiting testing to cases involving accidents resulting in death or serious injury, or prohibit nonconsensual blood tests altogether. *Id*. at 183, n. 9 (state statutes catalogued). The necessary implication is that at least some States, through the manifest will of their citizens, decided that *not even a warrant from a judge* could permit the nonconsensual drawing of blood in the drunk driving context. This means the privacy interest at stake here is exceedingly broad.

The "rights to determine one's own medical treatment […] and to refuse unwanted medical treatment are fundamental rights," and individuals have "a fundamental liberty interest in medical autonomy." *Coons v. Lew*, 762 F. 3d 891, 899 (9th Cir. 2014) ; *Cf. Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (the right to "bodily integrity" is "fundamental" and is "deeply rooted in this Nation's history and tradition").

Executive Order 14,043's vaccine mandate on federal employees must therefore be scrutinized under the heightened review standard of strict scrutiny because the right in question is the right of bodily integrity and to refuse medical treatment.

B. Violation of the Civil Service's constitutional rights is *per se* irreparable harm and is proceeding with breakneck speed to impact tens of thousands of hard-working Americans.

As the 5th Circuit recently held in the sister vaccine mandate targeting employers with 100 or more employees, "the loss of constitutional freedoms 'for even minimal periods of time …unquestionably constitutes irreparable injury.' " *BST Holdings, LLC*, 2021 WL 5279381, at *8 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).[11] That court held that the public interest is served by "maintaining the liberty of individuals to make intensely personal decisions according to their own convictions – even, or perhaps *particularly*, when those decisions frustrate government officials." *Id*., at *20 (emphasis in original). So is it in the case at bar[12]- the enforcement process has already begun for both Plaintiffs' respective agencies [A43:20-22], and the Government has admitted that proposed terminations could be finalized as early as **January 2022** [A4].

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[11] *BST Holdings* is the predecessor case to the 6th Circuit *OSHA Rule* case which ruled differently; nevertheless, the Fifth and Sixth Circuits examined the same evidence and came to different conclusions, constituting a circuit split. The following States are among the petitioners for Supreme Court review: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming.

[12] With one exception, however, that the OSHA Emergency Temporary Standard requiring employees of covered employers to undergo COVID-19 vaccination also provided an alternative choice of weekly COVID-19 testing and wearing a mask. *See BST Holdings, L.L.C.*, No. 21-60845, at *3 (5th Circuit 2021). The vaccine mandate on federal employees allows for no such alternative.

OPM's Safer Federal Workforce Task Force ("SFWTF"), directly vested by Executive Order 14,043 [A96] to issue guidance on implementation has laid out an ambitious, sequential fast track to dismissal that is to be enforced with "consistency" across the broad spectrum of federal agencies and departments [A107 – 108]. The guidance to agency and department heads published by the SFWTF emphasizes consistency of enforcement across the spectrum with very little discretion for departure (only in the case of exceptional mission-oriented circumstances). *Id*. The schedule and timeframe set up by the SFWTF for compliance with these requirements was (and remains) as follows: **November 22**, the deadline by which to be considered fully vaccinated [A99].

To date, this deadline has not been altered, which now leaves Appellants and others similarly situated in a state of noncompliance. They are now considered to be in violation of a direct order [A107] and absent this Court's intervention will be removed for cause. A fast-track to dismissal for the noncompliant was set up in three stages: 5-day counseling; short suspension (14 days or less); and proposal for removal. [A107]. The enforcement provisions have remained intact, as of December 28, 2021, with only slight modifications to the initial period for education and counseling (5-day specification removed) and the possibility of a second period of suspension. *See* updated enforcement guidance, attached as Exhibit A to the Motion to Expedite before this Court.

The District Court failed to appreciate the extraordinary aspects of this case. Sidestepping the substantial right to privacy arguments, and dismissing the coercive penalties amounting to compulsion with respect to these rights, the court merely cited *Sampson v. Murray*, 415 U.S. 61, 89 – 92 & 92 n. 68 (1974) to say that under ordinary circumstances, loss of employment is not an irreparable harm. [A13]. For reasons stated above, this case is so far from ordinary if only by the sheer number of good Americans and their families that are certain to be negatively impacted by the loss of their livelihoods and upcoming retirement. And this, pursuant to a power the President simply does not possess. *See Youngstown Sheet & Tube Co.,* 343 U.S. at *587 ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

Because of the extraordinary aspects that present in this case, and pressing need for uniformity at this time, this Court should issue an immediate nationwide injunction on *all* federal departments from implementing and enforcing Executive Order 14,043 while the important constitutional matters are decided upon by the Judiciary. *Cf. Georgia v. Biden*, Case No. 1:21-cv-163 (S.D. Ga. Dec. 7, 2021), Dkt. No. 94 **(federal contractor mandate nationwide injunction)**; *Com'th of Kentucky v. Biden*, Case No. 3:21-cv-00055 (E.D. KY Nov. 30, 2021), Dkt. No. 50 **(federal contractor mandate regional injunction)**; *State of Louisiana v. Becerra*, Case No. 21-30734 (5th Cir. 2021) (December 15, 2021) **(regional injunction of CMS**

Order); *Missouri, et al v. Biden, et al*., Case No. 4:21-cv-01329 (E.D. Mo. Nov. 29, 2021), Dkt. No. 28 **(regional injunction of CMS Order).**

III LIKELIHOOD OF SUCCESS ON THE MERITS

A. Executive Order 14,043 violates the major rules doctrine as the President unilaterally acts to make new law and usurp the Legislative lawmaking authority.

The separation of powers among the three branches of government – Legislative, Executive, and Judicial – is fundamental to the preservation of liberty. Executive Order 14,043 enormously oversteps the President's circumscribed authority under Title 5 Organization of Government. Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *see also MCI Telecommunications Corp. v. American Telephone & Telegraph Co*., 512 U.S. 218, 231 (1994); *Industrial Union Dpt., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645-46 (1980) (plurality opinion); *Alabama Assoc. of Realtors v. Dpt. Health and Human Svcs*., 594 U.S. ____ at (2021) (holding that the CDC far exceeded the authority Congress granted it in a 1944 statute). The principle applies with even more force and rigor to the President, as the Constitution makes quite clear, it is Congress that "shall make Rules for the Government" and it was Congress that was vested with the authority to "make all laws which shall be necessary and

proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof." U.S. Const. Art. I, Sec. 8. Expedient though it may have been to have the Executive make all of its own rules, the Framers made a deliberate choice here to separate the powers. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty". Baron de Montesquieu, the Spirit of the Laws (London: J. Nourse and P. Vaillant, 1758), Book XI, ch. 6, p. 16. *Cf. Youngstown Sheet & Tube Co*., 343 U.S. 579, 587 (1952) ("The Constitution limits his functions in the lawmaking process to the *recommending* of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute") (emphasis added). The State of the Union, held in April 2021, *after* COVID-19 vaccines became widely available to the public, was an opportunity for the President to make such a recommendation. U.S. Const., Art. II, Sec. 3.

Executive Order 14,043 relies upon three Title 5 provisions[13] of the Organization of Government articles, which have nothing to do with requiring medical treatment as a condition for employment:

[13] 5 U.S. Code §§ 3301, 3302, and 7301 listed at the top of Executive Order 14043. [A96-97]. These provisions find their genesis in Pub. L. 89-554 (1966) [80 Stat. 378], codifying the general

§3301 The President may-
(1) 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;
(2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought; and
(3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

§3302 The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good **administration** warrant, for-

(1) necessary exceptions of positions from the competitive service; and
(2) necessary exceptions from the provisions of sections 2951, 3304(a), 3321, 7202, and 7203 of this title.

Each officer and individual employed in an agency to which the rules apply shall aid in carrying out the rules.

§7301 The president may prescribe regulations for the conduct of employees in the executive branch.

"In order for [the] [E]xecutive . . . to exercise regulatory authority over a major policy question of great economic and political importance [that the Constitution does not preemptively assign to the Executive], Congress must either: (i) expressly and specifically decide the major policy question itself and delegate to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate to

and permanent laws relating to the "organization of the Government of the United States and to its civilian officers and employees."

the agency the authority both to decide the major policy question and to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342, at *1 (Mem) (2019). There can be little doubt that a vaccination mandate on upwards of 2 million Federal Civil Service employees that allows for no alternatives (such as testing as other States do with their state employees) [A173], and on pain of losing their jobs, is a matter of great political and economic significance. Indeed, over this past Summer and Fall the Nation was embroiled in this debate for all five of the Administration's vaccine mandates[14], and continues to this day. The reason for this is twofold: first, it is without precedent and violates the constitutional rights of American citizens and residents; and secondly, it involves the utmost of privacy interests: physical invasiveness into the human body. And the result of these debates has been nothing short of a deep divide in the American people, and between the States[15].

Courts examine the ordinary, contemporary meaning of a statute as well as the meaning of specific words in light of the overall statutory context. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). Additionally, one of the most well-

[14] As of December 21, 2021: Center for Medicare and Medicaid mandate (two regional preliminary injunctions); OSHA mandate (circuit split on nationwide preliminary injunction); Federal Contractor mandate (nationwide injunction); Federal Employee mandate; Military mandate.

[15] At the hearing, states that have either passed laws against the vaccine mandates or issued executive orders making it unlawful to use COVID-19 passports were listed: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Michigan, Montana, New Hampshire, North Dakota, South Carolina, South Dakota, Texas, and Wyoming. *U.S. News & World Report*, June 1, 2021. [Rec., Transcript, A44].

known textual canons of interpretation is that words are known by the company in which they keep. According to Section 3301, *supra*, the President may "prescribe such regulations for the *admission* of individuals into the civil service in the executive branch as will promote the *efficiency* of that service" and to "*ascertain* the fitness of applicants as to age, *health*, character, knowledge, and *ability* for employment sought."

"Efficiency"[16] denotes productivity. A synonym for efficiency is efficacy. This word in conjunction with "Admission" is the basis for the merit system of employment for our Civil Service so as to ensure equitable competition and merit-based appointments. The qualifications and requirements listed at the top of every job listing on usajobs.gov derive their authority from this section. A plain reading of the first section of §3301 makes for a logical segue into the second part, "Ascertaining" candidates with respect to the various jobs available. The GS-11 Special Agent Investigator job series is one such job that always requires stringent "health" and "age" qualifications; an attorney position on the other hand requires admission or pending admission to the bar. In any case, for Plaintiffs and others

[16] Efficiency was also the basis of the Government's reliance in the sister vaccine mandate for federal contractors' employees. *See Georgia v. Biden*, 21-cv-00163 (S.D. Ga. December 7, 2021), where the court found that the States could likely prove that Congress did not clearly authorize the President to issue the mandate, and that it "goes far beyond addressing administrative and management issues in order to promote efficiency and economy in procurement and contracting."

similarly situated who already hold federal jobs, the Government's reliance on a provision that has to do with "Admission" is wholly misplaced.

The phrases "Prescrib[ing] rules governing the competitive service" (§3302) and "regulations for the conduct of employees" (§7301) are to be understood in the context of the traditional American employer-employee relationship, as found in both the public and private sector. *Unlike* the private sector, however, federal employees work for the federal government, which *is* subject to the constitutional restraints involving fundamental rights and due process. The U.S. Government is not a common employer and presents a case that is separate and distinct from any private sector cases that may come before this Court, as further exemplified by the fact that upon being hired, Civil Servants take an oath to support and defend the Constitution.

The Supreme Court has interpreted the code provision "for such cause as will promote the efficiency of the service" as to be construed in light of "longstanding principles of employer-employee relationships, like those developed in the private sector". *Arnett v. Kennedy*, 416 U.S. 134, 160 (1974). The same reasoning would logically carry through to the interpretation of "regulations for the conduct" and "rules governing the competitive service." Prior to the COVID-19 pandemic, the Government can point to no historical precedent whatsoever for such a measure as requiring COVID-19 vaccination, either on the Civil Service or within the context

of private employment, despite the country's long history interfacing with other pandemics.[17] It is indeed a brand-new concept, with serious and far-reaching implications for individual rights. That is the first red flag for the Judiciary: "[T]he most telling **indication of [a] severe constitutional problem** . . . is the lack of historical precedent for some federal action." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (cleaned up) (emphasis added).

The true meaning of an authorization statute can also be known by its exceptions. When §3302 references five other code sections as potential spheres where the president can craft exceptions to the competitive service rules, the management aspect of the kinds of rules in question becomes manifestly clear: §2951 (records keeping requirements of OPM); §3304(a) (temporary appointment conversion to permanent appointment); §3321 (probationary period prior to final appointment); §7202 (equality of benefits based on gender); §7203 (disability accommodations). All of this comports well with the use of the word "administration" up front.

§7301 ("the president may prescribe regulations for the **conduct** of employees in the executive branch") obviously applies in the context of performance and standard operating procedures, and perhaps what the employees may *not* do outside

[17] See, e.g., the H1N1 pandemic of 2009, the Swine Flu pandemic in the 1970's, and the Spanish Flu during World War I.

of the work environment. But to say this vests the President with the authority to make requirements involving the most intimate personal health care choices of the Civil Service goes way too far, and has never before in history been interpreted as such.

At its heart, the above three code provisions relied upon by Executive Order 14,043 are meant for administrative and management issues involved in the day-to-day routine operations of the federal government. They do not open the door for the President to act as doctor and public health regulator for the Civil Service, irrespective of what his own policy preferences may be. There is no clear expression of Congressional intent in the above three provisions relied on by Executive Order 14,043 to convey such broad authority to the President to encroach on the bodily integrity rights of the entire Civil Service.[18]

Previous executive orders touching on the Civil Service fell squarely within workplace regulations that comport with traditional American employment. The smoking restriction imposed by President Clinton in Executive Order 13,058, 62 Fed. Reg. 43,451 (1997), is an example of longstanding principles of the American employer/ employee relationship within the private and public sectors. Regulation of the use of narcotics would be similar. *See* Executive Order 12,564, Drug Free

[18] In *King v. Burwell*, 576 U.S. ____ (2015) (slip op., at 8) the Supreme Court has suggested that *Chevron* deference may be inappropriate in regulatory actions of "deep economic and political significance."

Federal Workplace, 51 Fed. Reg. 32,889 (1986). These rules properly involve prohibited "conduct," which is nothing like the physical invasiveness of a vaccine mandate that implicates fundamental rights. There is no fundamental right to smoke and certainly no fundamental right to take drugs.

Four years prior to the enactment of Section 7301 and the other Organization of Government Title 5 provisions at issue in this case, the Supreme Court addressed the fundamental distinction between the word "conduct" and "status" in striking down a state statute that criminalized the status of narcotic addiction. *Robinson v. California*, 370 U.S. 660, 666 (1962). The Legislature in 1966 would have been fully aware of this pronouncement and could have chosen different wording had it truly intended the President to be able to regulate a status, as in vaccination status. In criminal law, only conduct may be punished. The instant case presents a similar dilemma for the President- under Section 7301 only *conduct* may be *regulated*. Words have meaning and Congress, as rulemaker for the Government, drew this line in the sand most likely to avoid a runaway train like we see today. Courts "usually presume" that "differences in language" convey "differences in meaning." *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018). It is not the judicial function to "treat alike subjects that . . . [Congress] ha[s] chosen to treat differently." *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991).

The President's action here amounts to nothing short of lawmaking, which is the role of the Legislature, and finds its precedent in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In both this case and in *Youngstown* the President claimed exigency as the basis, and in both cases "there is no statute that expressly authorizes the President . . . [n]or is there any act of Congress to which our attention has been directed from which such a power can fairly be implied." *Id*. at 585. As the Fifth Circuit recently held in *BST Holdings, L.L.C.*, No. 21-60845 at p. 20 (November 12, 2021), "[f]or more than a century, Congress has routinely used this [legislative] power to delegate policymaking specifics and technical details to executive agencies charged with effectuating policy principles Congress lays down." The federal employee vaccine mandate could hardly be considered to fall under the realm of "technical details" and "specifics." Congress could never have contemplated such an unprecedented, unilateral action and so it must fail. "[T]he reviewing court [must] reasonably be able to conclude that the grant of authority contemplates the regulations issued." *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979). The President's actions are way out of bounds.

COVID-19 vaccines are an issue that has been thoroughly debated all Summer and Fall. The President could well have informally sought a statutory grant of authority from Congress, and Congress could have engaged in parliamentary debate on the subject. But, for similar reasons laid out below in the Tenth Amendment

arguments, Congress can only act pursuant to its enumerated powers under Article I. Premising such an action on the Taxing & Spending power or the Interstate Commerce Clause would be unsuccessful.

B. The penalties for noncompliance encroach upon a protected liberty interest and amount to unlawful coercion and run afoul of the Unconstitutional Conditions Doctrine.

The Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of life, *liberty*, or property, without due process of law". U.S. Const. Am. 5 (emphasis added). As stated earlier, the District Court recognized the fundamental aspect of the liberty interest at stake, the right to make informed choices about one's own medical treatment. [A12]. Nevertheless, the court failed to appreciate the level of coercion involved here to find infringement. One obvious evidence of the coercion is the already significantly higher-than-average uptake of COVID-19 vaccines by federal employees. On pain of losing their jobs, many will succumb, as shown by many personal testimonies uploaded onto social media from both private and public sector employees.

Under the Doctrine of Unconstitutional-Conditions, the government may not condition employment in such a way that it infringes constitutionally protected interests. "[A]n overarching principle, known as the unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up". *Koontz v. St. Johns River*

Water Mngt. Dist., 570 U.S. 595, 604 (2013). The Court in *Koontz* applied the doctrine in the context of the Fifth Amendment. The Government may not coerce Appellants and others similarly situated into relinquishing their constitutional right of privacy and fundamental liberty interest of bodily integrity by threatening to fire them for exercising those rights. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983).

C. The Executive Order infringes the local health and police powers reserved to the States under the Tenth Amendment because many federal employees reside in States that have made mandates unlawful.

The D.C. Metro Area only accounts for 15% of the Federal Civil Service, with the remainder scattered in every one of the States and the last 1% working overseas.[19] This fact underscores the nationwide impact of this case and the pressing need for a *nationwide*, not just a regional, injunction against the enforcement of Executive Order 14,043. Many federal employees, such as Appellant Elizabeth Fleming, reside in States that have either (1) made laws against the issuance of COVID-19 mandates; or (2) issued executive orders outlawing the use of COVID-19 passports. *See* Footnote 15. Ms. Fleming lives in Idaho, whose governor on April 7, 2021 issued

[19] Office of Personnel Management (OPM) - Policy, Data, Oversight Data, Analysis & Documentation - Federal Civilian Employment: Total, as of September 2017, available at https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-civilian-employment/ (last visited December 9, 2021). This Court is asked to take judicial notice of official government publications.

an executive order banning the development or use of a COVID-19 passport scheme.[20] Idaho, and the fifteen other States making this decision, are fully within their authority under the local police and health regulatory powers reserved to the States under the Tenth Amendment. The President of the United States, on the other hand, bears no such authority on his own.

The President of the United States must act pursuant to one of the enumerated powers of Article II. Aside from the administrative and management duties inherent in the executive role, the District Court could point to no enumerated executive power that could fairly be inferred to touch upon the most intimate, personal bodily integrity choices of the Civil Service. [A9-10]. On the other hand, those are exactly the kind of major rules that fall under the Legislature's Article I enumerated power. Art. I, Sec. 8 ([Congress] shall make Rules for the Government). Nevertheless, the Legislature's authority to make rules for the Government is itself constrained by the Constitution, of particular concern in a case like this where a fundamental right is at stake. Any law passed by Congress enacting a COVID-19 vaccine mandate on Americans, federal employees or otherwise, still needs to pass strict scrutiny analysis. For reasons laid out below, the vaccine mandate contained in Executive Order 14,043 will not be able to pass the strict scrutiny test.

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[20] Executive Department, State of Idaho, Boise. Executive Order No. 2021-04 *Banning Vaccine Passports*, available at https://gov.idaho.gov/wp-content/uploads/sites/ 74/2021/04/eo-2021-04.pdf (last visited December 9, 2021).

Vaccine mandates on the Civil Service as a whole represent a case of first impression before this Court. The case relied upon by the court below for the Government acting as employer, *NASA v. Nelson*, 562 U.S. 134 (2011), addressed an *informational* privacy right claimed in the context of conducting employment-based background checks. Markedly different, the instant case involves a physical invasiveness privacy right (which has long been recognized) as well as a conditional job requirement that is brand new and is nowhere to be found in the history of the American employer-employee relationship outside of the health care industry. Rather, this Court should look to how First Amendment rights have been addressed in the federal employment setting. *See United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), holding unconstitutional Section 501(b) of the Ethics Reform Act of 1989 which banned federal employees from accepting compensation for making speeches or writing for publication. "As the magnitude of the intrusion on employees' interests rises, so does the Government's burden of justification." *Id*. at *483. In her concurrence to the opinion Justice O'Connor says this: "the bare assertion of interest in a wide-ranging prophylactic ban here, without any showing that Congress considered empirical or anecdotal data pertaining to abuses by lower-echelon executive employees, cannot suffice to outweigh the substantial burden on the 1.7 million affected employees." *Id*. at *484-85. In the instant case, not only was there no debate on the House or Senate floors, as there

should be for such a vigorously disputed national subject, the President set forth to issue a sweeping declaration on the entire Civil Service by a mere 600-word executive order that cites to no empirical data, only broad assertions. [A96].

Appellants and others similarly situated are subject to their own States' health regulations, and it has always been this way. "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." *Linder v. United States*, 268 U.S. 5, 17 (1925). Federalism, an essential aspect to the design of our Constitution, has it so that National and State governments constitute separate sovereigns, and the health and regulatory power is an area traditionally reserved to the States. As it stands, Ms. Fleming in Idaho is being placed in the absurd predicament of being required to comply with this mandate while working in a 100% remote work arrangement [A80 (Verified Complaint)] in a State that has made the COVID-19 passport scheme unlawful. Certainly this is an instance where, as the Court warned in *Linder*, the executive order is "not naturally and reasonably adapted" to any of the President's enumerated powers.

All of the cases cited by the Government were in reference to district court holdings on vaccine mandates involving *state* action (public school employees and students, etc.). [A206-207]. This is in keeping with *Jacobson v. Massachusetts,* 197 U.S. 11 (1905), a *state* law, and its very limited progeny in the area of elementary school immunization requirements.

D. The Executive Order fails the "least restrictive means" test in a strict scrutiny analysis.

In order to survive the strict scrutiny test, the means employed to achieve the Government's objective must be the least restrictive means available. Further, the "[g]overnment must show that it '**seriously undertook** to address the problem with less intrusive tools readily available to it.'" *Agudath Israel of Am*., 983 F.3d 620, 633 (2d Cir. 2020) (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)). As stated earlier, these employees work all throughout the country, and Executive Order 14,043 makes no reference to exploring less invasive ways of protecting the federal workforce or to the diverse work environments and locations that may benefit from tailored health safety approaches. The order simply relies on broad conclusory statements about vaccination and invokes federal emergency health authorities, even while the States are uniformly moving to lesser restrictions through Phase III (and some, even those hard-hit like Colorado and Florida [A146], have declared an end to the public health emergency altogether). *Cf. Roman Catholic Diocese of*

Brooklyn, 141 S. Ct. 63, 67 (2020) (finding tailoring requirement unsatisfied where, *inter alia*, the challenged restriction was "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic").

Executive Order 14,043 is also unquestionably more restrictive than most of the States, which offer their public servants an option for periodic COVID-19 testing as an alternative. *See*, e.g., Executive Directive No. 18 of the Governor of Virginia, effective 1 September 2021. [A173]. "To meet the requirement of narrow tailoring the government must demonstrate that alternative measures imposing lesser burdens on [a fundamental right] would fail to achieve the government's interests, not simply that the chosen route was easier." *Agudath Israel of Am.*, 983 F.3d at 633. Over the past year-and-a-half to two years, the various federal government agencies have been using personal protective equipment (PPE), maximum telework, and other proper protocols. Nowhere in the body of the Executive Order is there a finding that these extensive efforts have been unsuccessful.

IV THE DISTRICT COURT FAILED TO RECOGNIZE THE MAGNITUDE OF THE HARM TO PLAINTIFFS AND OTHERS SIMILARLY SITUATED ABSENT IMMEDIATE INTERVENTION.

Enjoining Executive Order 14,043 would do nothing more than maintain the status quo; the Government will continue to operate under the same PPE precautions and social distancing protocols that it probably would continue to do even if it achieved 100% vaccination. On the other hand, declining to issue a preliminary

injunction would result in Israel Rydie, Elizabeth Fleming, and **tens of thousands of our public servants** to be terminated for cause. [A219-A220]. Like Israel Rydie, many have invested over 15 years in government service and are counting on the Federal-retirement system, after foregoing other career tracks in the private sector and developing specialized skills in the government. Mr. Rydie and Ms. Fleming also face the stigma of having to disclose, on every job application, that they were terminated from their previous employment. Their cases are sufficiently representative of tens of thousands similarly situated in the federal government.

The Government has made no showing, nor even a claim, that the protocols (mask wearing, social distancing, deep cleaning, and ventilation) set up by the Safer Federal Workforce Task Force in January 2021 were ineffective. Significantly, the Task Force was indeed directed to conduct such studies as discussed earlier, so one is left to inquire why the findings were conspicuously left out of Executive Order 14,043. Contrary to the District Court's opinion that the government would be hampered [A15], it is far more in the public interest to keep the status quo while getting productivity out of these fine employees and avoiding service disruptions that would be sure to follow. In the meantime, they would of course abide by the protocols they have been following for a year-and-a-half going on two years now. Any abstract harm the Government claims here is greatly outweighed by the very real harms faced by tens of thousands of federal employees and their families.

As the 5th Circuit aptly put it, "[T]he principles at stake when it comes to the Mandate are not reducible to dollars and cents. The public interest is also served by maintaining our constitutional structure and maintaining the liberty of individuals to make intensely personal decisions according to their own convictions – even, or perhaps *particularly*, when those decisions frustrate government officials." *BST Holdings*, 17 F.4th at 618-19 (Nov. 12, 2021) (emphasis in original). Nationwide injunction therefore presents as the only clear solution while the constitutionality of Executive Order 14,043 is decided by the Judiciary.

V THE ONGOING COLLECTION AND STORAGE OF VACCINATION STATUS VIOLATES THE SPIRIT AND THE LETTER OF CONGRESS' INTENT TO KEEP PROTECTED HEALTH INFORMATION WITHIN THE WALLS OF THE HEALTH CARE INDUSTRY AND UNDER INDIVIDUAL CONTROL.

Federal employees were required by November 22, 2021 to provide date of vaccination, manufacturer, and documentary proof to management. [A164-165]. Refusal to provide such, as in the case of Israel Rydie and Elizabeth Fleming, is considered a state of noncompliance. The information is supposedly protected under the Privacy Act of 1974 [A113], though it leaves little comfort to know that the Privacy Act disclosure opens the door for *contractors, grantees, and volunteers* to have access to this Protected Health Information.

The authoritative definition of "Individually Identifiable Health Information" is found in the Health Insurance Portability and Accountability Act of 1996

(HIPAA). It is information that "relates to the provision of health care to an individual" and "that identifies the individual." 45 CFR §160.103. Prior to a unanimous vote by the Senate and a 421-2 vote by the House, the two chambers met in conference on an important clarification that centered on individual rights. The conference report states the following:

> The conference agreement also includes a requirement that the Secretary [Health & Human Services] submit detailed recommendations on standards with respect to the privacy of individually identifiable health information no later than 12 months after enactment. The recommendations would be required to address at least: (1) the rights an individual should have relating to individually identifiable health information; (2) the procedures that should be established for the exercise of such rights; and (3) the uses and disclosures of such information that should be authorized or required.[21]

The resulting final rule, commonly known as HIPAA's Privacy Rule, responded to vehement **concern raised by the public about employer access** to any health information they do not choose to provide. "We learned from the comments that access to and use of Protected Health Information by employers is of particular concern to many people." Federal Register/ Vol. 65, No. 250/ Dec. 28, 2000/ Rules and Regulations, p. 82592. "We agree that employer access to health

[21] 142 Cong. Rec. H 9473 – 03, 1996 WL 432674, Proceedings and Debates of the 104th Congress, 2nd Session, Report on Health Insurance Portability and Accountability Act of 1996 (July 31, 1996).

information is of particular concern. In this final regulation, we make significant changes to the NPRM[22] and clarify and provide additional safeguards governing when and how the health plans covered by this regulation may disclose health information to employers." *Id*. at 82566.

HIPAA's Privacy Rule, available at https://www.hhs.gov/hipaa/for-professionals/privacy/index.html, is first and foremost to protect the individual. All the administrative safeguards, physical safeguards, technical safeguards, organizational requirements, and penalties for noncompliance were directed at covered entities within the health care industry to protect the privacy rights of the individual. Congress *never* contemplated an employer ever demanding protected health information, which is why no similar protective structure was set up for them in the first place. Two million federal employees are thus left with protections only afforded by the Privacy Act pursuant to an *ultra vires* executive order.

To threaten these employees with termination for cause is to coerce them into giving up the individual rights of privacy that Congress clearly intended them to have.

CONCLUSION

A nationwide preliminary injunction should issue immediately.

[22] Notice of Proposed Rulemaking (NPRM).

LOCAL RULE 34(a) STATEMENT

Pursuant to Local Rule 34(a), Appellants request oral argument. Given the presence of time-sensitive questions of first impression before this Court and the magnitude of the number of individuals affected, oral argument would assist this Court's consideration.

December 29, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 21-2359 **Caption:** Rydie et al. v. Biden et al.

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(s) _____

Party Name Israel Rydie and Elizabeth Fleming

Dated: 12/21/2021

CERTIFICATE OF SERVICE

I certify that on this 29th day of December 2021, a copy of the foregoing OPENING BRIEF FOR THE APPELLANT was filed through the Fourth Circuit CM/ECF electronic document filing system. Notice of this filing will be sent to the following counsel and all parties for whom counsel has entered an appearance:

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