No. 22-40043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDS FOR MEDICAL FREEDOM; LOCAL 918, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; HIGHLAND ENGINEERING, INCORPORATED; RAYMOND A. BEEBE, JR.; JOHN ARMBRUST; et al.,

Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; THE UNITED STATES OF AMERICA; PETE BUTTIGIEG, in his official capacity as Secretary of Transportation; DEPARTMENT OF TRANSPORTATION; JANET YELLEN, in her official capacity as Secretary of Treasury; et al.,

Defendants-Appellants.

REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27.3 FOR A STAY PENDING APPEAL

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIT FEATHERSTON
United States Attorney

SARAH E. HARRINGTON
Deputy Assistant Attorney General

MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
LOWELL V. STURGILL JR.
SARAH CARROLL
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-4027

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INTRODUCTION AND SUMMARY

The nationwide preliminary injunction here prohibits the President—"the head of a co-equal branch of government and the most singularly accountable elected official in the country," Stay Order 7 (Feb. 9, 2022) (Higginson, J., dissenting)—from implementing the same measures many other employers have taken to address the employment-related disruptions caused by the COVID-19 pandemic. Plaintiffs' attempts to both minimize and justify the district court's extraordinary incursion on the President's authority to manage the federal workforce fail at every turn.

The requirement that federal employees be vaccinated against COVID-19 falls squarely within the President's broad authorities to improve the efficiency and effectiveness of the federal workforce. Like the district court, plaintiffs strain to engraft limitations onto those authorities, relying primarily on different statutes authorizing the regulation of *private* entities. Plaintiffs fail to distinguish the myriad instances in which past Presidents have lawfully managed federal employees' on- and off-duty conduct.

Plaintiffs largely ignore how the injunction impairs Executive Branch operations by halting the implementation of the vaccination requirement and processes for considering employee exception requests. Plaintiffs' contention that the threat of workplace discipline outweighs any harms to the government and the public cannot be squared with the well-established rule that adverse employment action—

including termination—is not irreparable injury. And plaintiffs provide no plausible reason that nationwide relief was necessary to remedy their injuries.

This Court has thus far failed to rule on the government's emergency stay motion and has given no indication that it intends to resolve that motion before hearing argument and adjudicating the merits during the regular March sitting. The Court should immediately stay the preliminary injunction pending appeal; to defer consideration of the motion for a stay until after determining the merits of the appeal following argument is effectively to deny the emergency stay motion.

I. The Government Is Likely To Prevail On Appeal

A. The District Court Lacks Jurisdiction

The Civil Service Reform Act (CSRA) provides "the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government." *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991). Plaintiffs are civil-service employees who raise work-related controversies, and the CSRA governs. *See* Mot. 7-9.

Plaintiffs mistakenly assert (Opp. 9-10) that courts "uniformly" permit pre-enforcement challenges in district court notwithstanding the CSRA. But in *Elgin v. Department of the Treasury*, the Supreme Court squarely held that "facial" challenges, as much as "as-applied" challenges, are precluded under the CSRA. 567 U.S. 1, 6-8 (2012). Plaintiffs cite decisions from the 1980s, but more recent decisions hold that district courts lack jurisdiction over pre-enforcement challenges. *See, e.g.*, *American*

Fed'n of Gov't Emps. v. Trump, 929 F.3d 748, 752, 755, 761 (D.C. Cir. 2019) (unions must challenge executive orders under CSRA, not seek "'pre-implementation' review"); *Fornaro v. James*, 416 F.3d 63, 68 (D.C. Cir. 2005) (Roberts, J.) (no "alternative route to relief in district court" where plaintiffs bring "systemwide challenge to OPM policy"); Stay Order 5 (Higginson, J., dissenting) ("For this reason alone, I would grant the stay.").

B. The Government Is Likely To Succeed On The Merits

The government's appeal is also likely to succeed because "the President, as head of the federal executive workforce, has authority to establish the same immunization requirement that many private employers have reasonably imposed to ensure workplace safety and prevent workplace disruptions caused by COVID-19." Stay Order 6 (Higginson, J., dissenting).[1]

1. As the government explained (Mot. 9-10), Article II of the Constitution authorizes the President to impose reasonable conditions on federal employment. *See Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) ("[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." (quotation marks omitted)). Contrary to plaintiffs' suggestion (Opp. 20-21), the President's authority presumptively extends to

[1] Plaintiffs assert that the government waived various arguments, but the government's preliminary-injunction opposition cited the same statutory and constitutional authorities relied on here, which the district court addressed.

the management of all Executive Branch personnel, not just "Officers of the United States." That is why Congress sometimes limits the President's baseline authority with respect to federal employees. *See, e.g.*, 42 U.S.C. § 2000e-16 (Title VII protections); 5 U.S.C. §§ 7503(a), 7513(a) (CSRA).

The district court searched for a "limiting principle" applicable to the President's constitutional authority. Add. 16. Various statutes governing federal employment establish important limiting principles—including that removal, suspension, and other enumerated discipline may occur only "for such cause as will promote the efficiency of the service," 5 U.S.C. §§ 7503(a), 7513(a), and that the government may not take adverse personnel actions on the basis of race, sex, or other protected traits, 42 U.S.C. § 2000e-16. These statutes not only provide numerous "limiting principles" that the court believed were missing, but also confirm the President's considerable baseline authority over federal employees.[2]

2. In light of the President's broad Article II authority, the relevant question is not whether Congress has authorized the President to impose a vaccination requirement, but whether Congress has *prohibited* it. Far from doing so, Congress has confirmed the President's prerogatives to regulate the federal workforce.

[2] Plaintiffs' contention (Opp. 21) that the government's theory "would render the CSRA itself unconstitutional" is misplaced; there is no dispute that Congress can limit the President's authority. But employees must challenge adverse employment actions through the comprehensive scheme Congress devised.

For one, 5 U.S.C. § 7301 states that the President "may prescribe regulations for the conduct of employees in the executive branch." By its plain terms, that grant of authority is not limited to conduct that occurs in the workplace. In requiring employee drug-testing, President Reagan found that "employees who use illegal drugs, *on or off duty*, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees." Exec. Order No. 12564, 51 Fed. Reg. 32,889, 32,889 (Sept. 15, 1986) (emphasis added). Contrary to plaintiffs' suggestion (Opp. 16), that order was not limited to drug use for which employees faced imprisonment, and section 7301 is not limited to regulating illegal conduct or "employees with 'sensitive positions.'" The order instead rested on President Reagan's determination that off-duty drug use has negative ramifications for federal workplaces.

President Biden made an analogous finding that unvaccinated federal employees are at higher risk of becoming "infected and severely ill," 86 Fed. Reg. 50,989, 50,989 (Sept. 9, 2021), thereby undermining the efficiency of the civil service. Plaintiffs do not, and cannot, take issue with that finding. As the government's stay motion explained (Mot. 3), many private employers have reached a similar conclusion and require their employees to be vaccinated against COVID-19. The President's authority to regulate "the conduct of employees in the executive branch," 5 U.S.C. § 7301, allows the President to prescribe similar measures. The Constitution itself makes the President the head of the Executive Branch, with responsibility—and accountability—for its operations. *See also Bonet v. U.S. Postal Serv.*, 712 F.2d 213 (5th

Cir. 1983) (per curiam) (upholding federal employee's discharge for off-duty misconduct).[3]

Plaintiffs also suggest (Opp. 14) that the Executive Order does not regulate employee "conduct" within the meaning of section 7301 at all. But becoming vaccinated is obviously conduct, just as satisfying President Bush's requirement to satisfy "all just financial obligations" is conduct. Exec. Order. No. 12674, 54 Fed. Reg. 15,159, 15,159 (Apr. 12, 1989). It is therefore unsurprising that the district court did not adopt this argument. *See* Add. 13.[4]

Moreover, 5 U.S.C. § 3301 authorizes the President to "ascertain the fitness of applicants as to age, *health*, character, knowledge, and ability for the employment sought." 5 U.S.C. § 3301(2) (emphasis added). The preliminary injunction bars the government from implementing the Executive Order as to approximately 20,000 new employees each month. Add. 23 ¶ 6. Requiring that new employees be vaccinated against a dangerous and transmissible virus falls easily within section 3301's authority.

[3] Indeed, plaintiffs identify (Opp 16) another directive addressing employees' off-duty conduct, instructing agencies to develop policies aimed at domestic violence involving the federal workforce because "[t]he effects of domestic violence spill over into the workplace." 77 Fed. Reg. 24,339, 24,339 (Apr. 23, 2012).

[4] Any regulation of conduct can alternatively be characterized as a regulation of "status," Opp. 14. For example, President Reagan's prohibition on off-duty drug use could be framed as a prohibition on drug *users*; the distinction is semantic.

Plaintiffs do not argue otherwise, effectively conceding that the injunction must be stayed as to new employees.[5]

Plaintiffs' crabbed reading (Opp. 14) of 5 U.S.C. § 3302 is also meritless. They do not dispute that section 3302's first sentence authorizes the Executive Order. The second sentence—which identifies particular matters the President "shall" address—does not cabin this discretionary authority. Nor can section 3302's heading "limit the plain meaning of [the] statutory text." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018).

Plaintiffs likewise err in relying (Opp. 18) on so-called "major questions" principles. The President—"the head of a co-equal branch of government and the most singularly accountable elected official in the country," Stay Order 7 (Higginson, J., dissenting)—is not an "agency" created by Congress. Plaintiffs identify no support for the view that Congress must speak clearly to "delegate" authority to decide important questions to the President, whom the American people elect to make significant decisions for the Nation, and who has independent constitutional authority. Nor is the Executive Order an exercise of "regulatory authority," *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); it is an exercise of the President's

[5] Plaintiffs suggest in passing (Opp. 13) that the Executive Order does not "promote the efficiency of [the civil] service." The Order's express objective is to ensure "the efficiency of the civil service" by protecting federal employees' ability to do their jobs. 86 Fed. Reg. at 50,989; *see* Add. 19 ("vaccines are undoubtedly the best way to avoid serious illness from COVID-19").

proprietary authority to "deal[] with 'citizen employees'" through measures resembling those enacted by many private employers, *NASA v. Nelson*, 562 U.S. 134, 148 (2011). In any event, the statutes at issue unambiguously confirm the President's broad authority to regulate federal employees.

Plaintiffs also incorrectly invoke (Opp. 18-19) federalism considerations. The President has authority to impose conditions to increase federal workforce efficiency, and he may exercise that authority even if it "pre-empt[s] particular exercises of state police power." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 (1981); *see Brnovich v. Biden*, No. CV-21-1568, 2022 WL 252396, at *12 (D. Ariz. Jan. 27, 2022) (rejecting State's challenge to the Executive Order).[6]

II. Equitable Considerations Warrant A Stay Pending Appeal

The government's stay motion also demonstrated that the injunction irreparably harms the public interest. "[T]he public interest is not served by a single Article III district judge, lacking public health expertise and made unaccountable through life tenure, telling the President of the United States, in his capacity as CEO of the federal workforce, that he cannot take the same lifesaving workplace safety measures as . . . private sector CEOs." Stay Order 11 (Higginson, J., dissenting).

[6] The district court rightly rejected plaintiffs' claims under the Administrative Procedure Act (APA). App. 16-17; *cf.* Opp. 22-23. The APA does not permit review of the Executive Order or the Task Force guidance implementing it. In any event, agencies' vaccination requirements exceed "minimum standards of rationality." *Baylor Cty. Hosp. Dist. v. Price*, 850 F.3d 257, 264 (5th Cir. 2017).

Plaintiffs essentially concede (Opp. 8-9) that the injunction usurps the President's power, undermines good order and discipline, and inflicts irreparable harm by halting the processing of exception requests. Their attempts to downplay the injunction's harms to the government and the public are unavailing.

Plaintiffs' argument (Opp. 5-6) that the government acted too slowly in seeking a stay lacks merit. The government filed a notice of appeal the day the injunction was issued, quickly sought a stay, and afforded the district court a reasonable period to consider the request under Fed. R. App. P. 8(a). When the court failed to act, the government promptly sought relief in this Court. The government has not dragged its feet.

Plaintiffs are likewise wrong to criticize (Opp. 6) the government's deferral of most disciplinary action until after the winter holidays. That deferral was intended to allow employees additional time to be counseled or get vaccinated as part of a multi-step enforcement process; agencies must now move to the next disciplinary phase for employees who did not respond to that engagement by complying with vaccination requirements (either because they refused to be vaccinated or lack an approved or pending exception request). The government's carefully calibrated plans to return to physical workspaces with detailed safety protocols will be frustrated if the government cannot implement the Executive Order now.

Plaintiffs will not face irreparable harm absent preliminary relief. Plaintiffs do not dispute that employment-related harms are ordinarily not irreparable because

civil-service laws afford adequate remedies. In *Garcia v. United States*, 680 F.2d 29 (5th Cir. 1982), this Court found it "quite clear" that a preliminary injunction allowing a single federal employee to circumvent CSRA procedures would be "far more disruptive" to the government than "the burden on the employee resulting from a refusal to grant the injunction." *Id.* at 32.

III. At Minimum, The Preliminary Injunction Should Be Substantially Narrowed

The nationwide injunction far exceeds the district court's Article III jurisdiction and equitable authority. Mot. 18-21. Plaintiffs do not engage with these fundamental limitations, and they offer no basis for concluding that nationwide relief is necessary to redress their claims.

Plaintiffs do not dispute that the district court could have granted an injunction limited to FMF and its bona fide members.[7] They suggest (Opp. 25) that such relief might pose difficulties because FMF has many "members" who work for different agencies, but every agency has processes for employees who obtain exceptions from the vaccination requirement, and plaintiffs' practical concerns are no ground for ignoring Article III in any event. Nor is there any basis for plaintiffs' suggestion (Opp. 26-27) that the government would "retaliat[e]" against FMF members. The

[7] Plaintiffs assert (Opp. 25) that the government did not adequately challenge FMF's status as a membership organization below, but standing may be raised at any time. *See Texas Entm't Ass'n, Inc. v. Hegar*, 10 F.4th 495, 504 (5th Cir. 2021).

government acknowledges that federal employees may be legally entitled to exceptions from the vaccination requirement, as bona fide FMF members would be if the injunction were narrowed.

Plaintiffs make no effort to defend the district court's decision to extend relief to plaintiffs with unripe claims. Add. 7; *see Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 434 n.27 (5th. Cir. 2021) (ripeness is assessed "claim by claim"). Nor can plaintiffs defend the district court's encroachment on the authority of the dozen district courts that previously declined to enjoin the Executive Order. Plaintiffs blithely assert (Opp. 27) that another suit pending before the district court that issued the injunction is "[t]he most salient other case." But other courts have issued carefully reasoned decisions denying relief, and they deserve equal solicitude. Indeed, plaintiffs admit (Opp. 28 n.3) that other courts denied relief to some of the plaintiffs *in this case*.

CONCLUSION

The Court should stay the injunction pending appeal or, at minimum, narrow it to extend only as far as necessary to redress the injuries of the named plaintiffs and any bona fide members of FMF when the complaint was filed.

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRIT FEATHERSTON
United States Attorney

SARAH E. HARRINGTON
Deputy Assistant Attorney General

MARLEIGH D. DOVER
CHARLES W. SCARBOROUGH
LOWELL V. STURGILL JR.
SARAH CARROLL

/s/ Casen B. Ross
CASEN B. ROSS
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-1923

FEBRUARY 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this reply complies with the requirements of Federal Rule of Appellate Procedure 27(d) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,586 words according to the count of Microsoft Word.

/s/ Casen B. Ross
CASEN B. ROSS
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that, on February 11, 2022, I electronically filed the foregoing reply with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Casen B. Ross
CASEN B. ROSS
Counsel for Appellants