No. 22-40043

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the U.S. District Court for the Southern District of Texas, No. 3:21-cv-356, Hon. Jeffrey V. Brown presiding

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PETITION FOR REHEARING EN BANC

R. Trent McCotter
Counsel of Record
Jonathan Berry
Michael Buschbacher
Jared M. Kelson
BOYDEN GRAY & ASSOCIATES
801 17th Street NW., Suite 350
Washington, DC 20006
202-706-5488
mccotter@boydengrayassociates.com
Counsel for Plaintiffs-Appellees

CERTIFICATE OF INTERESTED PERSONS

Feds for Medical Freedom v. Biden

No. 22-40043

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Highland Engineering, Inc., is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
2. Local 918, American Federation of Government Employees, is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
3. Feds for Medical Freedom, a/k/a Feds 4 Med Freedom, is a Plaintiff-Appellee. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.
4. Members of Feds for Medical Freedom are interested parties. Feds for Medical Freedom has over 6000 members. *See* L.R. 28.2.2 ("If a

large group of persons or firms can be specified by a generic description, individual listing is not necessary.").

The following are individual named Plaintiffs-Appellees:

5. John Armbrust
6. N. Anne Atkinson
7. Julia Badger
8. Michael Ball
9. Raymond A. Beebe, Jr.
10. Craigan Biggs
11. Laura Brunstetter
12. Mark Canales
13. Michele Caramenico
14. Andrew Chamberland
15. David Clark
16. Diane Countryman
17. Kevin Dantuma
18. Jose Delgado
19. Jordan DeManss
20. George Demetriou

21. Keri Divilbiss

22. Mercer Dunn IV

23. William Filkins

24. Jonathan Gragg

25. Bryon Green

26. Thomas David Green

27. Erika Hebert

28. Peter Hennemann

29. Neil Horn

30. Carey Hunter-Andrews

31. Tana Johnston

32. Tyler Klosterman

33. Deborah Lawson

34. Dan Lewis

35. Melissa Magill

36. Kendra Ann Marceau

37. Dalia Matos

38. Stephen May

39. Steven McComis

40. Christopher Miller

41. Joshua Moore

42. Brent Moores

43. Jesse Neugebauer

44. Joshua Nicely

45. Leslie Carl Petersen

46. Patti Rivera

47. Joshua Roberts

48. Ashley Rodman

49. M. LeeAnne Rucker-Reed

50. Trevor Rutledge

51. Nevada Ryan

52. James Charles Sams III

53. Michael Schaecher

54. Christina Schaff

55. Kurtis Simpson

56. Barrett Smith

57. Jaci ReNee Smith

58. Jarod Smith

59. Jana Spruce

60. John Tordai

61. Sandor Vigh

62. Christine Vrtaric

63. Pamela Weichel

64. David Wentz

65. Jason Wilkerson

66. Patrick Wright

67. Patrick Mendoza York

The following are individual named Defendants-Appellants:

68. Kiran Ahuja, in her official capacities as Director of the Office of Personnel Management and Co-Chair of Safer Federal Workforce Task Force

69. Lloyd J. Austin III, in his official capacity as Secretary of Defense

70. Joseph R. Biden, Jr., in his official capacity as President of the United States

71. Antony Blinken, in his official capacity as Secretary of State

72. Matthew C. Blum, in his official capacity as Federal Acquisition Regulatory Council member

73. William J. Burns, in his official capacity as Director of the Central Intelligence Agency

74. Pete Buttigieg, in his official capacity as Secretary of Transportation

75. Robin Carnahan, in her official capacities as Administrator of the General Services Administration and Co-Chair of Safer Federal Workforce Task Force

76. Leslie A. Field, in her official capacity as Federal Acquisition Regulatory Council member

77. Marcia Fudge, in her official capacity as Secretary of Housing and Urban Development

78. Merrick B. Garland, in his official capacity as Attorney General

79. Jennifer M. Granholm, in her official capacity as Secretary of Energy

80. Deb Haaland, in her official capacity as Secretary of Interior

81. Avril Haines, in her official capacity as Director of National Intelligence

82. Daniel Hokanson, in his official capacity as Chief of the National Guard Bureau

83. Karla S. Jackson, in her official capacity as Federal Acquisition Regulatory Council member

84. Kilolo Kijakazi, in her official capacity as Acting Commissioner of Social Security

85. Jeffrey A. Koses, in his official capacity as Federal Acquisition Regulatory Council member

86. Alejandro Mayorkas, in his official capacity as Secretary of Homeland Security

87. Denis McDonough, in his official capacity as Secretary of Veterans Affairs

88. Bill Nelson, in his official capacity as Administrator of the National Aeronautics and Space Administration

89. Samantha Power, in her official capacity as Administrator of the United States Agency for International Development

90. Gina M. Raimondo, in her official capacity as Secretary of Commerce

91. John M. Tenaglia, in his official capacity as Federal Acquisition Regulatory Council member

92. Tom Vilsack, in his official capacity as Secretary of Agriculture

93. Marty Walsh, in his official capacity as Secretary of Labor

94. Janet Yellen, in her official capacity as Secretary of Treasury

95. Shalanda D. Young, in her official capacity as Director of the Office of Management and Budget

96. Ashish Jha, in his official capacity as co-chair of the Safer Federal Workforce Task Force

The following government entities are Defendant-Appellants:

97. Central Intelligence Agency

98. Department of Agriculture

99. Department of Commerce

100. Department of Defense

101. Department of Energy

102. Department of Homeland Security

103. Department of Housing and Urban Development

104. Department of Interior

105. Department of Justice

106. Department of Labor

107. Department of State

108. Department of Transportation

109. Department of Treasury

110. Department of Veterans Affairs

111. Federal Acquisition Regulatory Council

112. General Services Administration

113. National Aeronautics and Space Administration

114. National Guard Bureau

115. Office of Management and Budget

116. Office of Personnel Management

117. Office of the Director of National Intelligence

118. Safer Federal Workforce Task Force

119. Social Security Administration

120. The United States of America

121. United States Agency for International Development

The following are counsel in the case:

122. Boyden Gray & Associates PLLC: C. Boyden Gray, R. Trent McCotter, Jonathan Berry, Michael Buschbacher, and Jared M. Kelson are counsel for Plaintiffs-Appellees.

123. U.S. Department of Justice: Brian M. Boynton, Sarah Wendy Carroll, Marleigh D. Dover, Brit Featherston, James Gillingham,

Sarah E. Harrington, Casen Ross, Charles W. Scarborough, and Lowell V. Sturgill Jr. are counsel for Defendants-Appellants.

Dated: May 21, 2022

/s/ R. Trent McCotter
R. Trent McCotter
Counsel of Record for Plaintiffs-Appellees

INTRODUCTION AND RULE 35(B)(1) STATEMENT

This case raises a question of exceptional importance on which this Court's precedents are in conflict: Does the Civil Service Reform Act ("CSRA") preclude pre-enforcement challenges to illegal government-wide employment policies imposing ongoing constitutional harms?

Over a dissent by Judge Barksdale, the panel majority answered that question in the affirmative, holding that any such challenge is impliedly precluded by the CSRA, even though that statute says nothing about pre-enforcement challenges to broad policies and instead funnels *individualized* challenges to defined *prior* adverse employment actions through an administrative review scheme.

The majority opinion's view of CSRA preclusion has been labeled "discredited," "meritless," and "completely baseless" by judges ranging from Ruth Bader Ginsburg and Harry Edwards to Robert Bork and Antonin Scalia. *NFFE v. Weinberger*, 818 F.2d 935, 940 (D.C. Cir. 1987); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984).

Judge Barksdale's dissent agreed with those distinguished jurists and argued that the CSRA "does not cover pre-enforcement employment

actions, especially concerning 2.1 million federal civilian employees." Slip Op. 18 (Barksdale, J., dissenting).

Rehearing en banc is warranted for several reasons. *First*, the ability of courts to review the President's unilateral and extraordinary assertion of power over the lives of millions of civilian employees is a matter of exceptional importance. The majority's ruling precludes *any* pre-enforcement challenge in federal court to *any* government-wide employment regulation, regardless of how patently unconstitutional it is, regardless of the ongoing harms it imposes, and regardless of whether the plaintiffs seek individualized relief.

Second, the majority opinion contradicts numerous decisions from this Court and the Supreme Court. This Court's precedents expressly authorize pre-enforcement challenges to government-wide employment policies. *See, e.g.*, *AFGE v. FLRA*, 794 F.2d 1013, 1015–16 (5th Cir. 1986) (citing the CSRA eight times and holding that a plaintiff who "wishes to challenge the validity of [a government-wide federal employment] regulation" can "challeng[e] [the] regulations in district court"). But the majority never addressed those decisions, even though Plaintiffs raised them throughout the litigation.

The majority opinion also contradicts *Thunder Basin Coal Co. v. Reich*, which indicated there would be no preclusion in "a situation in which compliance is sufficiently onerous and coercive penalties [are] sufficiently potent that a constitutionally intolerable choice" is presented. 510 U.S. 200, 218 (1994). This Court has *already* held that government-imposed vaccine mandates—like the one Plaintiffs challenge here—put employees to just such an intolerable choice between "their job(s) and their jab(s)," thereby infringing on their constitutional liberty interests. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). Combined, these two cases confirm there is no preclusion here. But again the majority opinion never cited either decision.

The majority opinion also contradicts this Court's recent decision in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (*en banc*), which held that the government cannot satisfy the heavy burden of implied preclusion regarding claims challenging ongoing constitutional violations that may be lost if not addressed now by a district court.

The Court should grant rehearing, vacate the panel decision, and affirm the injunction. If rehearing is denied, the Court should stay its mandate pending disposition of a petition for a writ of certiorari.

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Whether the Civil Service Reform Act precludes a pre-enforcement challenge to an illegal government-wide employment policy imposing ongoing constitutional harms.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

I. FACTUAL BACKGROUND.

On September 9, 2021, President Biden issued Executive Order 14,043, which states that "it is necessary to require COVID-19 vaccination for all Federal employees, subject to such exceptions as required by law." ROA.785. On September 13, 2021, the Safer Federal Workforce Task Force imposed a deadline of November 22, 2021, for all federal employees to be fully vaccinated, but it was repeatedly extended. ROA.789. The Task Force determined that "[e]mployees … who fail to comply … are in violation of a lawful order" and are subject to discipline, "up to and including termination or removal." ROA.810.

II. DISTRICT COURT PROCEEDINGS.

Lead Plaintiff Feds for Medical Freedom has over 6,000 registered members, most of whom are federal employees. Plaintiffs filed suit on December 21, 2021, and moved for a preliminary injunction the next day.

ROA.65; ROA.746. On January 21, 2021, the District Court enjoined enforcement and implementation of Executive Order 14,043. ROA.1751.

III. FIFTH CIRCUIT PROCEEDINGS.

On February 4, 2022, the government asked this Court to stay the injunction, and on February 9, 2022, a motions panel ordered the motion carried with the case. *See* Slip.Op.4 (attached as Ex. A). The Court ordered expedited merits briefing and oral argument, and the merits panel issued its decision on April 7, 2022. The majority concluded that the CSRA precludes review of Plaintiffs' challenges, Slip.Op.14, but Judge Barksdale dissented, arguing that a "pre-enforcement challenge to a government-wide policy" is not precluded by the CSRA. Slip.Op.17.

STATEMENT OF FACTS NECESSARY TO THE ARGUMENT

No additional facts are necessary to the argument of the issues.

ARGUMENT

I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

The significance of the challenged action in this case and the majority's sweeping holding warrant *en banc* rehearing. The panel majority incorrectly precluded immediate judicial review of any Executive Branch employment policy, no matter how patently unconstitutional the policy or the ongoing harms it imposes.

For example, under the majority's view, no one could obtain immediate judicial review of executive orders requiring—under threat of termination—that civilian federal employees:

- vote for the President's reelection;
- surrender personal firearms;
- temporarily use or forgo birth control; or
- undergo weight-reduction or other surgeries.

The government may claim these are far-fetched, but many would have considered a forced vaccination scheme far-fetched just a few years ago. While some employees would resist these policies, many would feel no choice but to comply to save their livelihoods, allowing the government to carry out an *in terrorem* campaign knowing that it cannot be subjected to immediate judicial review.

Rehearing *en banc* should be granted to maintain the Nation's "long history of judicial review of illegal executive action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015).

II. THE MAJORITY OPINION CONFLICTS WITH THIS COURT'S AND THE SUPREME COURT'S PRECEDENTS

Rehearing *en banc* is also warranted because the majority opinion conflicts with binding precedents.

A. THE MAJORITY OPINION CONFLICTS WITH THIS COURT'S CASES AUTHORIZING PRE-ENFORCEMENT CHALLENGES

Judge Barksdale's dissent persuasively explains that the CSRA simply does not preclude pre-enforcement challenges to government-wide employment regulations, which are as far as imaginable from the types of routine, individualized challenges to prior employment actions covered by the CSRA. Slip.Op.17–18 (Barksdale, J., dissenting).

For nearly forty years, this Court agreed with Judge Barksdale. But the majority opinion effectively overruled those precedents *sub silentio*. Rehearing *en banc* is warranted to address this new conflict.

In 1986, this Court addressed a challenge to a "government-wide regulation promulgated by the Office of Personnel Management," and, while citing the CSRA repeatedly, held that if a plaintiff "wishes to challenge the validity of this … regulation, there are other means available," such as "challenging [the] regulations in district court." *AFGE*, 794 F.2d at 1015–16.

Three years later, when a union of federal employees challenged President Reagan's executive order requiring drug testing of certain federal employees, first in district court and then on appeal, this Court not only decided the challenge to the executive order on the merits, but

expressly authorized additional suits "against the individual agency plans implementing the [executive o]rder" as well. *NTEU v. Bush*, 891 F.2d 99, 102 (5th Cir. 1989).

Between them, *AFGE* and *NTEU* cite the CSRA *over fifteen times*. The opinions provided "explication[s] of the governing rules of law" for bringing such challenges, and thus their statements are binding holdings. *Knight v. Kirby Offshore Marine Pac., L.L.C.*, 983 F.3d 172, 177 (5th Cir. 2020). Plaintiffs relied on *AFGE* and *NTEU* when bringing this lawsuit.

The majority opinion, however, never cited these cases. Instead, it relied exclusively on decisions involving the easily distinguishable scenario where employees challenged their *individualized* prior discipline and sought *standard employment relief* like reinstatement or damages—core CSRA claims that are nothing like the pre-enforcement *ultra vires* challenges here, where Plaintiffs expressly *disclaim* any challenge to individual employment actions or entitlement to relief like reinstatement or backpay. Slip.Op.5–6, 8 n.3.[1]

[1] *See United States v. Fausto*, 484 U.S. 439, 441 (1988) (seeking "backpay" for suspension); *Griener v. United States*, 900 F.3d 700, 702 (5th Cir.

(*footnote continued on next page*)

Moreover, *AFGE* and *NTEU* are correct. As Judge Barksdale notes, the mere "*enactment*" of a government-wide policy "does not constitute an adverse action subject to CSRA." Slip.Op.17 (Barksdale, J., dissenting). And because Plaintiffs launch a "pre-enforcement challenge to a government-wide policy, imposed by the President, that would affect 2.1 million federal civilian workers," the "[r]elief plaintiffs seek does not fall within the purpose of the CSRA." *Id.* This explains why pre-enforcement challenges to policies are simply not precluded.

Distinguished jurists across the spectrum have long agreed with Judge Barksdale and this Court's precedent. For example, Judges Harry Edwards, Robert Bork, and Antonin Scalia labeled as "meritless" the idea that the CSRA "impliedly precludes preenforcement judicial review of rules" imposing "dramatic changes in federal personnel practices relating to reduction in force procedures, performance management systems, and

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2018) (seeking "damage[s]" for termination); *Tubesing v. United States*, 810 F.3d 330, 332 (5th Cir. 2016) (same); *Grisham v. United States*, 103 F.3d 24, 25 (5th Cir. 1997) (same); *Morales v. Dep't of Army*, 947 F.2d 766, 768–79 (5th Cir. 1991) (same); *Rollins v. Marsh*, 937 F.2d 134, 136 (5th Cir. 1991) (seeking "damages" after being disciplined); *Palermo v. Rorex*, 806 F.2d 1266, 1268 (5th Cir. 1987) (seeking "monetary damages" for "wrongfully commenc[ing] disciplinary proceedings"); *Gremillion v. Chivatero*, 749 F.2d 276, 277–78 (5th Cir. 1985) (seeking "damages" for "wrongful discharge").

pay administration." *Devine*, 733 F.2d at 114, 117 n.8. This Circuit expressly relied on *Devine* in *AFGE*. *See* 794 F.2d at 1015–16.

In another case, Judges Edwards and Ruth Bader Ginsburg "discourage[d] any future litigant who might have the effrontery to engage the District Court with th[e] discredited theory of subject matter jurisdiction" adopted by the panel majority here. *Weinberger*, 818 F.2d at 940, 941 n.11 (authorizing constitutional and APA challenges to a government-wide employment regulation); *see NTEU v. Horner*, 854 F.2d 490, 497 (D.C. Cir. 1988) (judicial review of "minor personnel actions" is barred by CSRA, but a challenge to "a major policy decision" is not within the CSRA). The D.C. Circuit has never overruled these opinions.

The majority opinion here instead relied on the Supreme Court's decision in *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), perhaps believing it somehow overruled the cases authorizing pre-enforcement challenges. But the notion that *Elgin* silently overruled decades of uniform circuit precedent is foreclosed by this Court's *en banc* decision holding that *Elgin* "did not break new ground" in the area of preclusion. *Cochran*, 20 F.4th at 206. That is because *Elgin*—like the other cases the majority opinion cited—involved individualized "challenges [to] an

adverse employment action," which the employees sought "to reverse" and "to receive the compensation they would have earned." 567 U.S. at 5, 22. *Elgin* simply held that when an employee challenges an individualized, prior employment action and seeks reinstatement or backpay, the CSRA applies to that employee's constitutional claims. *Id.* at 15. *Elgin* said nothing about pre-enforcement challenges of the type that had been allowed for decades.

"For a Supreme Court decision to override a Fifth Circuit case, the decision must unequivocally overrule prior precedent." *Gahagan v. USCIS*, 911 F.3d 298, 302 (5th Cir. 2018). Not even the government claims *Elgin* satisfies that high standard—nor could it, given how easily *Elgin* is distinguished. Indeed, Justice Scalia apparently found no inconsistency in joining both *Elgin* and *Devine*, where he had labeled as "meritless" the argument that the CSRA precludes broad pre-enforcement challenges.

This Court should grant rehearing *en banc* to resolve its now-conflicting precedents.

B. THE MAJORITY OPINION CONFLICTS WITH *THUNDER BASIN* AND *BST*

Preclusion is especially unwarranted because the government-wide policy here imposes *ongoing* constitutional harms.

In *Thunder Basin,* the Supreme Court identified a paradigmatic example where there would be no preclusion—a "situation in which compliance is sufficiently onerous and coercive penalties [are] sufficiently potent that a constitutionally intolerable choice" is presented. 510 U.S. at 218; *see Cochran*, 20 F.4th at 210 ("[T]he threat of irreparable harm may justify pre-enforcement judicial review under principles of equity.").

This Court's decision in *BST* holds that government-imposed vaccine mandates impose just such an intolerable choice by "threaten[ing] to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)," amounting to "the loss of constitutional freedoms." *BST,* 17 F.4th at 618.

Taken together, *Thunder Basin* and *BST* confirm that there is no preclusion of Plaintiffs' claim of ongoing unconstitutional coercion, which the District Court correctly held Plaintiffs had alleged and proven. *See* ROA.1757; ROA.1760. But the majority opinion never once cited *Thunder Basin* or *BST*, despite their ubiquity in the parties' briefing.

The government's own brief in *Elgin* acknowledged there could be "an employment-related action that would not be judicially reviewable under the CSRA and yet would rise to the level of constitutional significance." Resp.Br.17–18, *Elgin*, 567 U.S. 1. Plaintiffs' claim of unconstitutional coercion is precisely such an action.

C. THE MAJORITY OPINION CONFLICTS WITH *COCHRAN*

The majority opinion also conflicts with this Court's *en banc* decision in *Cochran*, which held that there is a "'strong presumption favoring judicial review'" in district court, which "the Government may rebut only by carrying the 'heavy burden' of showing that the statute's 'language or structure' forecloses judicial review." 20 F.4th at 200. This strong presumption derives from 28 U.S.C. § 1331, which provides district courts with jurisdiction over "all" federal-question suits. "Not some or most—but all." 20 F.4th at 199.

The majority opinion looked at the text, structure, and purpose of the CSRA but did not hold the government to its heavy burden. The majority suggested that the vaccine mandate is a "'proposed'" adverse employment action covered by the CSRA. Slip.Op.9–10 (citing 5 U.S.C. § 7513(b)). In the majority's telling, 2.1 million employees were suddenly

subjected to a "proposed adverse action" when the President issued the vaccine mandate, such that they were immediately entitled to "an opportunity to respond, legal representation, and written reasons supporting the employing agency's decision." *Id.* at 9.

But not even the government raised that argument, and for good reason—it is wrong. Judge Barksdale correctly explains that the CSRA's language about "proposed" actions (1) applies only to actions by "an employing agency," not by the President; and (2) refers to "individual employees" receiving formal notice of a *specific* proposed discipline, not a *general threat* by the President to discipline "an entire class of employees." *Id.* at 18 (Barksdale, J., dissenting). The lack of textual support for the majority's view confirms that Plaintiffs' claims fall within the strong presumption of review under § 1331.

The majority also asserted that Plaintiffs' claims were not "structural" challenges under *Cochran*, Slip.Op.11, but if an ultra vires separation-of-powers challenge to a government-wide executive policy is not a structural challenge, it is difficult to imagine what *would* qualify.

The majority opinion next suggested that allowing a pre-enforcement challenge would open the floodgates of litigation, which

would contravene congressional intent. Slip.Op.10. But again *Cochran* rejected that view, holding that "doctrines, such as standing, ripeness, exhaustion, sovereign immunity, and abstention" would narrow the class of cases subject to district court review. 20 F.4th at 211. As Judge Barksdale recognized, it is the *majority's* position that will "result in the very type of lengthy and haphazard results CSRA was enacted to prevent" because Congress would not have wanted employees trying to bring thousands of separate administrative claims to challenge the *same* underlying government policy when a single lawsuit in district court could uniformly resolve the matter. Slip Op. 17 (Barksdale, J., dissenting).

Cochran confirms that the text, structure, and purpose of the CSRA all favor Plaintiffs.

As demonstrated next, the majority opinion also contradicted *Cochran* on each of the so-called "*Thunder Basin* factors" for determining whether a statute implicitly limits district court jurisdiction.

Preclusion Would Foreclose Meaningful Judicial Review. The majority opinion grasped at ways for employees to challenge the

ongoing coercion of the vaccine mandate outside of a district court action, but each theory runs headlong into *Cochran*.

The Court first claimed that employees can get fired and then challenge their terminations through the CSRA and up to the Federal Circuit. Slip.Op.11. But that fundamentally misunderstands Plaintiffs' claims and the District Court's holding. Like the plaintiff in *Cochran*, Plaintiffs here challenge *ongoing and irreparable* constitutional harm. *See Cochran*, 20 F.4th at 208 n.12, 209. The District Court correctly held that employees face the "irreparable injury" of ongoing illegal coercion to get vaccinated. ROA.1757. If they give in (as most are compelled to do), they will not be subjected to a CSRA-covered adverse action at all, meaning they "will not be able to obtain judicial review" of their coercion claims "unless the district court hears it now." *Cochran*, 20 F.4th at 203.

The majority opinion therefore erred by pointing to the types of *post hoc* relief Plaintiffs expressly disclaim—"reinstatement, backpay, and attorney's fees," Slip.Op.11—as if those somehow provide a remedy for Plaintiffs' claim of *ongoing* coercion, for which there is no *post hoc* remedy in the CSRA, especially given that employees who reluctantly comply will

be unable to bring a CSRA claim at all. The Merit Systems Protection Board has no power to undo a coerced vaccination.

The majority opinion then posited an especially far-fetched scenario where employees could try to challenge the vaccine mandate by filing petitions with the Office of Special Counsel ("OSC"), which entertains whistle-blower complaints. Slip.Op.12. Under *Cochran*, the test is not whether a court can conjure some theory that might conceivably provide a remote avenue if the stars align. Rather, the test is whether preclusion would "*threaten[]* to deprive [plaintiffs] of the opportunity" to raise their challenges," not whether it would altogether deny "*any possibility* of judicial review." 20 F.4th at 199, 210 n.15 (emphases added).

Thus, even if the OSC route provided a Hail Mary path for relief (and it doesn't, *see* fn.2, *infra*), that is still not enough to warrant preclusion under *Cochran*: "To be sure, it is possible that [an employee] could ultimately wind her way through enforcement proceedings and get some later chance at judicial review—but it is also possible that she could never have that opportunity, *and that is enough to preserve district court jurisdiction*." *Id.* at 210 (emphasis added). Here, it is not just "possible"

but extremely likely that employees will not get a later chance at judicial review, because they will have been coerced into compliance.[2]

Plaintiffs' Claims Are Collateral to the CSRA. *Cochran* held that "whether a claim is collateral to the relevant statutory-review scheme depends on whether that scheme is intended to provide the sort of relief sought by the plaintiff" in his lawsuit. *Id.* at 207.

As *Elgin* and Judge Barksdale have explained, Plaintiffs' claims are collateral to the CSRA review scheme because declaring void an

[2] The OSC route is unavailing. *First*, the drawn-out process is unlikely to stop *ongoing* coercion. *Second*, announcing the vaccine mandate is not a "'significant change in … working conditions,'" Slip.Op.12 (quoting 5 U.S.C. § 2302(a)(2)(A) (xii)), most notably because the government itself has disclaimed that the mandate addresses workplace spread of COVID-19, *see* Gov't.Merits.Reply15. The majority relied on an interpretation of a *different* title of the CSRA, Slip.Op.12 & n.4, but as the District Court explained, "working conditions" as used in 5 U.S.C. § 2302(a)(xii) "generally refers to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources," not mandated medical procedures. ROA.1756 (quoting *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020)). *Third*, even if the mandate were a change in working conditions, there is no free-standing right to challenge that change. The change has to result from one of an enumerated list of actions—none of which applies here. *See* 5 U.S.C. § 2302(b). The majority suggested that § 2302(b)(12) applies, but that requires a violation of a *separate* "law, rule, or regulation" implementing one of the aspirational "principles" from § 2301, yet the majority points to no such "implement[ation]" of such principles that applies to forced vaccination, *see* Slip.Op.12.

executive order that puts millions of employees to an illegal and impossible choice is hardly "relief that the CSRA routinely affords." *Elgin*, 567 U.S. at 22; Slip.Op.17–18 (Barksdale, J., dissenting). To be sure, Plaintiffs' "requested relief would prohibit further use of the [employment] regulation"—as is always the case for pre-enforcement challenges to a regulation—"but [Plaintiffs] do[] not seek individual relief for specific employee claims. The CSRA does not preclude this type of rulemaking challenge." *NTEU v. Whipple*, 636 F. Supp. 2d 63, 69 (D.D.C. 2009).

Agencies Have No Expertise on the Constitutional Issues Here and Cannot Remedy the Coercive Harm. The majority opinion suggests that agencies have sufficient expertise in constitutional issues or might dispose of the case on some preliminary question. Slip.Op.13–14. But *Cochran* noted that agencies "are generally ill suited to address structural constitutional challenges," and held that the potential for resolution on some preliminary question is insufficient when the party must submit to harm—here, unconstitutional coercion—to reach that review, or when resolution on alternate grounds would foreclose judicial review of that harm, 20 F.4th at 208 & n.12.

* * *

The Court should grant rehearing *en banc*, order merits briefing, and set the case for *en banc* argument.

Alternatively, given the Supreme Court's May 16 grant of certiorari in *Cochran*, this Court could hold this case's mandate pending the Supreme Court's decision in *Cochran*.[3]

III. IF *EN BANC* IS DENIED, THE COURT SHOULD STAY ITS MANDATE

If the Court does not grant *en banc* rehearing, the Court should stay its mandate pending the disposition of Plaintiffs' petition for a writ of certiorari because this case raises "a substantial question" (as demonstrated above) and "there is good cause for a stay," Fed.R.App.P.41(d)(1), namely that it would minimize disruption and obviate the need for emergency motions practice at the Supreme Court.

[3] The Fourth Circuit recently issued an unpublished opinion in a non-argued case holding that a challenge brought by two employees was precluded by the CSRA. *Rydie v. Biden*, No. 21-2359, 2022 WL 1153249 (4th Cir. Apr. 19, 2022). The Fourth Circuit does not have binding precedent like this Court's *AFGE*, *NTEU*, and *Cochran* decisions, nor did that court address the coercion point this Court found persuasive in *BST,* nor the "intolerable choice" holding from *Thunder Basin*.

IV. FULL DISMISSAL IS IMPROPER

The majority remanded with instructions to "dismiss the case." Slip.Op.14. But Plaintiffs still have a separate challenge pending against the federal *contractor* mandate, for which there is no plausible claim of CSRA preclusion. ROA.1753. The Court should at least correct the relief ordered.

CONCLUSION

The Court should grant the petition, vacate the panel decision, and affirm the preliminary injunction. If *en banc* review is denied, the Court should stay its mandate pending disposition of a petition for a writ of certiorari.

May 21, 2022

Respectfully submitted,

/s/ R. Trent McCotter
R. Trent McCotter
Counsel of Record
Jonathan Berry
Michael Buschbacher
Jared M. Kelson
BOYDEN GRAY & ASSOCIATES
801 17th Street NW, Suite 350
Washington, DC 20006
202-706-5488
mccotter@boydengrayassociates.com

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served today with a copy of this document via the Court's CM/ECF. All parties in this case are represented by counsel consenting to electronic service.

/s/ R. Trent McCotter

R. Trent McCotter

CERTIFICATE OF COMPLIANCE

I hereby certify that this petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,900 words, excluding the parts of the petition exempted by Rule 32(f). This petition complies with the typeface and typestyle requirements of Rule 32(a)(5)–(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word.

/s/ R. Trent McCotter

R. Trent McCotter

EX. A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 7, 2022
Lyle W. Cayce
Clerk

No. 22-40043

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

Plaintiffs—Appellees,

versus

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.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 3:21-CV-356

Before BARKSDALE, STEWART, and DENNIS, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

On September 9, 2021, President Biden issued Executive Order 14043, which mandates COVID-19 vaccination for all executive branch employees, subject to medical and religious exceptions. Several plaintiffs filed suit, alleging that the President exceeded his authority. The district court found that the plaintiffs were likely to succeed on the merits of their claim and that the equities favored them. It therefore preliminarily enjoined enforcement of the Order nationwide. The Government appealed.

For the following reasons, we VACATE the district court's preliminary injunction and REMAND to the district court with instructions to DISMISS for lack of jurisdiction.

I. FACTS & PROCEDURAL HISTORY

Executive Order 14043 provides that "[e]ach agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law." Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, 86 Fed. Reg. 50,989, 50,990 (Sept. 9, 2021). The Order directed the Safer Federal Workforce Task Force to publish guidance on implementing the vaccine mandate. *Id.* at 50,989. President Biden issued the Order "[b]y the authority vested in [him] as President by the Constitution and the laws of the United States of America, including" 5 U.S.C. §§ 3301, 3302, and 7301. *Id.*

On September 13, 2021, the Task Force published guidance directing agencies to apply their usual processes for evaluating religious and medical exceptions to the mandate. *See* Safer Federal Workforce Task Force, Vaccinations, https://go.usa.gov/xe5aC (last visited April 7, 2022). It also required non-exempt employees to be fully vaccinated by November 22,

2021, *id.*, but the Government later postponed that deadline to early 2022. Under the guidance, non-exempt employees who either refuse vaccination or fail to disclose whether they have received a vaccine face escalating disciplinary procedures that include counseling, suspension, and termination. *Id.* Employees are not subject to discipline while their exception requests are pending, and they have two weeks after an exception request's denial to receive their first (or only) dose of a COVID-19 vaccine. *Id.*

On December 21, 2021, a 6,000-member organization called "Feds for Medical Freedom," along with several other organizations and individual plaintiffs, challenged Executive Order 14043 in federal court. They moved for a nationwide preliminary injunction, alleging that the Order likely exceeds the President's authority. The district court agreed and granted preliminary injunctive relief on January 21, 2022. It recognized that "the federal-worker mandate had already been challenged in several courts across the country."[1] *Feds for Med. Freedom v. Biden ("Feds for Med. Freedom I")*, No. 3:21-CV-356,

[1] At least twelve district courts previously rejected challenges to Executive Order 14043 for various reasons. *See Brnovich v. Biden*, No. CV-21-1568, --- F. Supp. 3d ----, 2022 WL 252396 (D. Ariz. Jan. 27, 2022); *Oklahoma v. Biden*, No. CIV-21-1136, --- F. Supp. 3d ----, 2021 WL 6126230 (W.D. Okla. Dec. 28, 2021); *Brass v. Biden*, No. 21-cv-2778, 2021 WL 6498143 (D. Colo. Dec. 23, 2021) (report and recommendation), *adopted*, 2022 WL 136903 (D. Colo. Jan. 14, 2022); *AFGE Local 501 v. Biden*, No. 21-23828-CIV, --- F. Supp. 3d ----, 2021 WL 6551602 (S.D. Fla. Dec. 22, 2021); *Donovan v. Vance*, No. 21-CV-5148, --- F. Supp. 3d ----, 2021 WL 5979250 (E.D. Wash. Dec. 17, 2021); *McCray v. Biden*, No. 21-2882, 2021 WL 5823801 (D.D.C. Dec. 7, 2021); *Navy Seal 1 v. Biden*, No. 21-cv2429, --- F. Supp. 3d ----, 2021 WL 5448970 (M.D. Fla. Nov. 22, 2021); *Rydie v. Biden*, No. 21-2696, --- F. Supp. 3d ----, 2021 WL 5416545 (D. Md. Nov. 19, 2021); *Altschuld v. Raimondo*, No. 21-cv-2779, 2021 WL 6113563 (D.D.C. Nov. 8, 2021); *Church v. Biden*, No. 21-2815, --- F. Supp. 3d ----, 2021 WL 5179215 (D.D.C. Nov. 8, 2021); *Smith v. Biden*, No. 21-cv-19457, 2021 WL 5195688 (D.N.J. Nov. 8, 2021); *Foley v. Biden*, No. 21-cv-1098, 2021 WL 5750271, ECF No. 18 (N.D. Tex. Oct. 6, 2021); *see also Feds for Med. Freedom v. Biden ("Feds for Med. Freedom II")*, 25 F.4th 354, 355 (5th Cir. 2022) (Higginson, J., dissenting) ("[A] dozen district courts have rejected requests to enjoin this order.").

--- F. Supp. 3d ----, 2022 WL 188329, at *2 (S.D. Tex. Jan. 21, 2022). However, the district court attempted to distinguish those cases as having fallen victim to "procedural missteps by the plaintiffs or a failure to show imminent harm." *Id.*

The district court rejected the Government's argument that the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101 *et seq.*, deprived it of jurisdiction. *Id.* at *2–3. Specifically, it held that the CSRA did not apply because this case involves a "challenge [to] the mandate pre-enforcement," whereas the CSRA contemplates review after an employee suffers an adverse employment action. *Id.* The district court also held that some of the plaintiffs had ripe claims because those who were not seeking exemptions "face[d] an inevitable firing." *Id.* at *3. As to the merits, the district court broke with every other court to consider the issue and held that the plaintiffs were likely to show that neither the Constitution nor federal statute authorized Executive Order 14043. *Id.* at *4–6. It also found that the plaintiffs were likely to suffer irreparable harm absent an injunction and that the equities and public interest favored the plaintiffs. *Id.* at *4, *7. The district court therefore enjoined enforcement of Executive Order 14043 nationwide.

The Government appealed. Meanwhile, the Government moved the district court for a stay of its order, which the district court eventually denied. While that motion remained pending in the district court, the Government separately moved this court for a stay. A divided panel carried the Government's motion with the case and expedited this appeal. *Feds for Med. Freedom v. Biden ("Feds for Med. Freedom II")*, 25 F.4th 354, 355 (5th Cir. 2022).

II. Standard of Review

"This court reviews the grant or denial of a preliminary injunction for abuse of discretion, with any underlying legal determinations reviewed

de novo and factual findings for clear error." *Topletz v. Skinner*, 7 F.4th 284, 293 (5th Cir. 2021).

III. Discussion

The Government argues that the district court erroneously granted the plaintiffs preliminary relief from Executive Order 14043. "A preliminary injunction is an extraordinary remedy." *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 219 (5th Cir. 2010). A court should issue one only if the movant establishes the following: "(1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted; and (4) the injunction will not disserve the public interest." *Id.*

A. Jurisdiction

We first consider the Government's argument that the CSRA precluded the district court's subject matter jurisdiction. "When courts lack subject matter jurisdiction over a case, they lack the power to adjudicate the case." *Nat'l Football League Players Ass'n v. Nat'l Football League*, 874 F.3d 222, 225 (5th Cir. 2017). Accordingly, this court examines "jurisdiction whenever subject matter jurisdiction appears 'fairly in doubt.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009)).

i. Background on the CSRA

The CSRA established "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). Before the CSRA, administrative and judicial review under the civil service system was "haphazard," resulting from the "outdated patchwork of statutes and rules built up over almost a century." *United States*

v. Fausto, 484 U.S. 439, 444 (1988) (quoting S. REP. NO. 95–969, at 3 (1978)). This pre-existing system drew "widespread" criticism, including that it produced inconsistent judicial decisions on similar matters due to the "concurrent jurisdiction, under various bases of jurisdiction, of district courts in all Circuits and the Court of Claims." *Id.* at 445. In response, Congress enacted the CSRA, which imposed "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.*

"Under the [CSRA], certain federal employees may obtain administrative and judicial review of specified adverse employment actions." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 (2012). "Subchapter II of Chapter 75 governs review of major adverse actions taken against employees 'for such cause as will promote the efficiency of the service.'" *Id.* (quoting 5 U.S.C. §§ 7503(a), 7513(a)). These provisions apply to employees in the competitive service and to certain excepted service employees.[2] 5 U.S.C. § 7511(a)(1). They provide procedural protections when eligible employees face major adverse actions, which includes removals, suspensions for more than fourteen days, pay or grade reductions, and furloughs lasting thirty days or less. *Id.* § 7512.

[2] The CSRA provides three general categories of civil service employees: Senior Executive Service employees, competitive service employees, and excepted service employees. *Elgin*, 567 U.S. at 5 n.1. Senior Executive Service employees are high ranking employees who do not require Presidential appointment or Senate confirmation. *Id.* "Competitive service employees . . . are all other Executive Branch employees whose nomination by the President and confirmation by the Senate are not required and who are not specifically excepted from the competitive service by statute," along with certain other included employees. *Id.* (alteration omitted) (citing 5 U.S.C. § 2102(a)(1)). Employees "who are not in the Senior Executive Service or in the competitive service" are excepted service employees. *Id.* (citing 5 U.S.C. § 2103(a)).

The CSRA distinguishes between employees facing "proposed" adverse action and those who have already suffered adverse action. *See* 5 U.S.C. § 7513(b), (d). Employees facing "proposed" action are entitled to notice, an opportunity to respond, legal representation, and written reasons supporting the employing agency's decision. *Id.* § 7513(b). Once an employing agency finalizes an adverse action, however, the aggrieved employee may appeal to the Merit Systems Protection Board ("MSPB"). *Id.* § 7513(d). If the employee prevails on appeal, the MSPB can order the agency to comply with its decision and award "reinstatement, backpay, and attorney's fees." *Elgin*, 567 U.S. at 6 (citing 5 U.S.C. §§ 1204(a)(2), 7701(g)). "An employee who is dissatisfied with the MSPB's decision is entitled to judicial review in the United States Court of Appeals for the Federal Circuit" under § 7703. *Id.* at 6. The Federal Circuit's jurisdiction over such appeals is "exclusive." 28 U.S.C. § 1295(a)(9). If an employee appeals to the Federal Circuit, then that court must "review the record and hold unlawful and set aside any agency action, findings, or conclusions" that are "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c)(1)–(3).

This remedial scheme is "elaborate," establishing "in great detail the protections and remedies applicable to" adverse personnel actions against federal employees, "including the availability of administrative and judicial review." *Fausto*, 484 U.S. at 443. The Supreme Court has thus explained that, "[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Elgin*, 567 U.S. at 11–12.

In *Elgin*, the Court considered an attempt by former federal employees to "carve out an exception to CSRA exclusivity for facial or as-applied constitutional challenges to federal statutes." *Id.* at 12. In rejecting that attempt, the Court emphasized that the CSRA's text and structure demonstrated that "[t]he availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue," not whether a challenged action is constitutionally authorized. *Id.* at 12–13. The CSRA's purpose—to "creat[e] an integrated scheme of review"—further confirmed that "the statutory review scheme is exclusive." *Id.* at 13. Thus, the Court concluded that "the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." *Id.* at 5. This court has also recognized that the CSRA precludes district court adjudication of federal statutory and constitutional claims.[3]

[3] *See, e.g.*, *Gremillion v. Chivatero*, 749 F.2d 276, 279 (5th Cir. 1985) (dismissing an IRS employee's *Bivens* suit because the employee had access to a comprehensive administrative remedial system established by the CSRA); *Palermo v. Rorex*, 806 F.2d 1266, 1270–71 (5th Cir. 1987) (holding that a federal employee cannot seek damages for an unconstitutional adverse personnel action, even though the administrative review system would not allow plaintiff complete recovery); *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991) (holding that a federal employee's FTCA claims were precluded by the CSRA); *Morales v. Dep't of the Army*, 947 F.2d 766, 769 (5th Cir. 1991) (dismissing an employee's suit because all of the employee's claims were personnel decisions arising out of his relationship with the federal government and were therefore controlled by *Bush v. Lucas*, 462 U.S. 367 (1983), and *Rollins*, 937 F.3d at 139); *Grisham v. United States*, 103 F.3d 24, 26 (5th Cir. 1997) (holding that a federal employee's First Amendment and FTCA claims were precluded by the CSRA); *Tubesing v. United States*, 810 F.3d 330, 332 (5th Cir. 2016) (holding that a federal employee's FTCA claims were precluded by the CSRA); *Griener v. United States*, 900 F.3d 700, 702 (5th Cir. 2016) (holding that a part-time federal employee's FTCA claim was precluded by the CSRA).

ii. Application of the CSRA

The Government contends that, under *Elgin*, the district court erroneously held that the CSRA does not apply until the plaintiffs suffer an adverse employment action. It urges that adopting the district court's logic would allow federal employees to circumvent the CSRA by filing suit before their employer disciplines or discharges them, thereby "gut[ting] the statutory scheme." This, it argues, would be inconsistent with Congress's intent to limit judicial review through the CSRA. *See id.* at 11. The Government acknowledges that the *Elgin* plaintiffs, unlike the current plaintiffs, had already suffered an adverse employment action—termination—when they filed suit. But it disputes that *Elgin* "turned on that distinction." Meanwhile, the plaintiffs, like the district court, attempt to distinguish *Elgin* and other cases applying the CSRA's jurisdictional provisions by arguing that those cases concerned challenges to individual adverse employment actions.

The CSRA's "text, structure, and purpose" support the Government's position. *See id.* at 10. Starting with the text and structure, the CSRA guarantees an MSPB appeal to only "[a]n employee against whom an action is taken." 5 U.S.C. § 7513(d). In contrast, "[a]n employee against whom an action is proposed is entitled to" the protections listed above. *Id.* § 7513(b). The Supreme Court recognized as much in *Elgin* when it observed that the CSRA offers an employee the right to a hearing before the MSPB "[i]f the agency takes final adverse action against the employee" and that the statute separately "sets out the procedures due an employee prior to final agency action." *Elgin*, 567 U.S. at 6, 11. Critically, in this case, any adverse action against the plaintiffs remains "proposed." They are thus entitled to "notice, representation by counsel, an opportunity to respond, and a written, reasoned decision from the agency" under § 7513(b), not administrative review under § 7513(d). *Id.* at 6. In other words, the plaintiffs

are "employees to whom the CSRA *denies* statutory review." *Id.* at 11 (emphasis in original). Congress intended "to entirely foreclose judicial review to" such employees. *Id.*; *Griener*, 900 F.3d at 703.

This construction is consonant with Congress's purpose in enacting the CSRA, which was to establish "an integrated scheme of review." *Elgin*, 567 U.S. at 14. As the facts of this case reveal, granting the plaintiffs extra-statutory review would "seriously undermine[]" that goal. *See id.* Allegedly, the plaintiffs who are not pursuing exception requests are "threatened with imminent discipline unless they give in and get vaccinated." The district court concluded that those plaintiffs had ripe claims because they "face an inevitable firing." *Feds for Med. Freedom I*, --- F. Supp. 3d at ----, 2022 WL 188329, at *3. It added that "[m]any of these plaintiffs already have received letters from their employer agencies suggesting that suspension or termination is imminent, have received letters of reprimand, or have faced other negative consequences." *Id.* Accordingly, these plaintiffs' terminations were "actual and imminent, not conjectural or hypothetical." *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)). That finding, which the Government does not dispute, underscores that by filing this suit on the eve of receiving discipline, the plaintiffs seek to circumvent the CSRA's exclusive review scheme. Permitting them to do so would "reintroduce the very potential for inconsistent decisionmaking and duplicative judicial review that the CSRA was designed to avoid." *Elgin*, 567 U.S. at 14. We therefore decline their invitation.

Next, the plaintiffs contend that, even if Congress intended to limit judicial review through the CSRA, Congress did not intend to limit review of their claims. Specifically, they suggest that this court should "presume that Congress [did] not intend to limit jurisdiction" here because (1) "a finding of preclusion could foreclose all meaningful judicial review," (2) their suit is "wholly collateral to [the CSRA's] review provisions," and (3) their "claims

are outside the agency's expertise." *See Cochran v. U.S. Sec. & Exch. Comm'n*, 20 F.4th 194, 206 (5th Cir. 2021) (en banc) (quotation omitted). The district court agreed, holding that "[t]o deny the plaintiffs the ability to challenge the mandate pre-enforcement, in district court, is to deny them meaningful review." *Feds for Med. Freedom I*, --- F. Supp. 3d at ----, 2022 WL 188329, at *3. On appeal, the Government maintains that these arguments are meritless.

We agree with the Government. The plaintiffs assert that district court review is necessary because proceeding through the CSRA's remedial scheme could foreclose all meaningful review. But the CSRA "merely directs that judicial review . . . shall occur in the Federal Circuit," which is "fully capable of providing meaningful review." *Elgin*, 567 U.S. at 10. In *Elgin*, the Supreme Court held that "even if [the MSPB] was incapable of adjudicating a constitutional claim, meaningful judicial review was still available in the court of appeals." *Cochran*, 20 F.4th at 208. That was because the plaintiffs "sought substantive relief"—reinstatement, backpay, and attorney's fees—that "would have . . . fully redressed" the harm they suffered. *Id.* at 208–09. In contrast, where a plaintiff asserts a claim for "structural relief" from a remedial scheme, that scheme will be declared inadequate. *Id.* at 208 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010)). The plaintiffs here seek to avoid discipline for failing to comply with Executive Order 14043. That is a claim for substantive, not structural, relief. Indeed, the MSPB can order reinstatement and backpay to any nonexempt plaintiffs who are disciplined for refusing to receive a COVID-19 vaccine. *Elgin*, 567 U.S. at 6 (citing 5 U.S.C. §§ 1204(a)(2), 7701(g)). And "[r]emedies for discharge under the federal civil service laws are . . . an adequate remedy for individual wrongful discharge after the fact of discharge." *Garcia v. United States*, 680 F.2d 29, 31 (5th Cir. 1982).

The plaintiffs also argue that the CSRA will deny meaningful review to any of them who comply with Executive Order 14043 because they will never suffer an adverse employment action. However, the plaintiffs could have challenged an agency's proposed action against them before filing this suit and certainly before getting vaccinated. Specifically, they could have filed a complaint with the Office of Special Counsel ("OSC"), an independent agency, *see* 5 U.S.C. § 1211, asserting that Executive Order 14043 constitutes a "prohibited personnel practice" affecting a "significant change in duties, responsibilities, or working conditions."[4] *Id.* § 2302(a)(1), (a)(2)(A)(xii). The CSRA prohibits agencies from taking any "personnel action" that treats employees "without . . . proper regard for their privacy and constitutional rights." *Id.* §§ 2301(b)(2), 2302(b)(12). If OSC receives a complaint and determines that a "prohibited personnel practice has occurred," it is authorized to report that finding and to petition the MSPB for corrective action. *Id.* § 1214(b)(2)(B)–(C). An employee who is harmed by the MSPB's disposition of the petition can appeal to the Federal Circuit. *Id.* §§ 1214(c), 7703(b)–(c). There is no dispute that the plaintiffs have not attempted to avail themselves of this potential CSRA remedy, which could provide meaningful review.

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[4] Although the CSRA does not define "working conditions," the district court concluded that the "term would not encompass a requirement that employees subject themselves to an unwanted vaccination." *Feds for Med. Freedom I*, --- F. Supp. 3d at ----, 2022 WL 188329, at *2 (citing *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 367 (D.D.C. 2020)). But, in construing Title VII of the CSRA, the Supreme Court has stated that the term "'working conditions' . . . naturally refers . . . to the 'circumstances' or 'state of affairs' attendant to one's performance of a job." *Fort Stewart Schs. v. Fed. Lab. Rels. Auth.*, 495 U.S. 641, 645 (1990). Executive Order 14043 qualifies as a significant change to the circumstances attending the job performance of federal employees. Indeed, the Order is explicit that whether an employee has received a COVID-19 vaccine affects "the efficiency of the civil service." 86 Fed. Reg. at 50,989.

We also reject the plaintiffs' argument that their claims are wholly collateral to the CSRA scheme. "[W]hether a claim is collateral to the relevant statutory-review scheme depends on whether that scheme is intended to provide the sort of relief sought by the plaintiff." *Cochran*, 20 F.4th at 207. The plaintiffs emphasize that they are not challenging any individual employment actions or prior discipline, which they say is "water under the bridge." Instead, the plaintiffs purportedly request only to have Executive Order 14043 declared void. But although the plaintiffs are not attempting to reverse any previous discipline, their challenge "ultimately [seeks] to avoid compliance with"—and discipline for violating—the Order. *Id.* at 207. Put differently, this case is "the vehicle by which they seek to" avoid imminent "adverse employment action," which "is precisely the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme." *Elgin*, 567 U.S. at 22. At bottom, the relief the plaintiffs seek is, in effect, to avoid discharge for refusing to comply with Executive Order 14043. This sort of employment-related relief is "precisely the kind[] of relief that the CSRA empowers the MSPB and the Federal Circuit to provide." *Id.*

Finally, the plaintiffs' claims do not exceed the MSPB's expertise. To show otherwise, the plaintiffs state only that their claims involve constitutional issues and "questions of administrative law, which the courts are at no disadvantage in answering." *See Cochran*, 20 F.4th at 207–08 (quoting *Free Enter. Fund*, 561 U.S. at 491). But the Supreme Court has recognized that "many threshold questions . . . may accompany a constitutional claim" and that "the MSPB can apply its expertise" to those questions. *Elgin*, 567 U.S. at 22. Further, there are often "preliminary questions unique to the employment context [that could] obviate the need to address the constitutional challenge." *Id.* at 22–23. For example, an employing agency may only take an adverse action against an employee "for

such cause as will promote the efficiency of the service." 5 U.S.C. §§ 7503(a), 7513(a). If the MSPB, reviewing an employee's appeal, determines that the employee suffered adverse action inconsistent with that requirement, it could order corrective action on that basis and avoid any other issues. Additionally, "an employee's appeal may involve other statutory or constitutional claims that the MSPB routinely considers," any of which "might fully dispose of the case" if the employee receives a favorable decision from the MSPB. *Elgin*, 567 U.S. at 23. The MSPB thus has expertise that it can "br[ing] to bear" on the plaintiffs' claims, and "we see no reason to conclude that Congress intended to exempt such claims from exclusive review before the MSPB and the Federal Circuit." *See id.*

* * *

We conclude that the CSRA precluded the district court's jurisdiction. Accordingly, the plaintiffs' claim for preliminary injunctive relief fails because they have not shown a substantial likelihood of success on the merits. We do not reach the parties' arguments regarding the other requirements for a preliminary injunction.

IV. Conclusion

For the foregoing reasons, we VACATE the district court's preliminary injunction and REMAND to the district court with instructions to DISMISS the case.

RHESA HAWKINS BARKSDALE, *Circuit Judge*, dissenting:

My esteemed colleagues hold: The Civil Service Reform Act (CSRA), 5 U.S.C. § 1101 *et seq.*, precludes the district court's having subject-matter jurisdiction for this action challenging Executive Order 14043 (EO), which mandates COVID-19 vaccination for all federal civilian employees. I respectfully dissent.

I.

In September 2021, President Biden promulgated the EO, mandating vaccination for federal civilian employees. Pursuant to the EO, "[e]ach agency shall implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of its Federal employees, with exceptions only as required by law". Exec. Order No. 14043, 86 Fed. Reg. 50,989 (9 Sept. 2021). President Biden based issuance of the EO on "the authority vested in [him] as President by the Constitution and the laws of the United States of America, including sections 3301, 3302, and 7301 of title 5, United States Code". *Id.*

Accordingly, the Safer Federal Workforce Task Force issued agencies guidance on evaluating religious and medical exceptions to the mandate. *Vaccinations*, SAFER FEDERAL WORKFORCE, https://www.saferfederalworkforce.gov/faq/vaccinations/ (last visited 6 April 2022). Non-exempt employees were required to be vaccinated by 22 November 2021 (later postponed to 2022). *Id.* Non-exempt employees who fail to get vaccinated or fully disclose vaccination status face disciplinary procedures, including counseling, suspension, and termination. *Id.*

On 21 December 2021, Feds for Medical Freedom, a 6,000-member organization, challenged the EO in federal court, claiming, *inter alia*, the EO is a violation of Article I of the Constitution. After plaintiffs' requested nationwide preliminary injunction was granted on 21 January 2022, the

Government appealed and moved for a stay pending appeal. Our court ordered the motion carried with the case and expedited the appeal. *Feds for Med. Freedom v. Biden*, 25 F.4th 354, 355 (5th Cir. 2022). Oral argument was held on 8 March.

II.

CSRA, enacted in 1978, "comprehensively overhauled the civil service system creating an elaborate new framework for evaluating adverse personnel actions against [federal employees]". *United States v. Fausto*, 484 U.S. 439, 443 (1988) (alteration in original) (citation omitted). Prior to CSRA's enactment, review of personnel actions was "haphazard", "lengthy", and "outdated" to the point that "managers [in the civil service] often avoid[ed] taking disciplinary action against employees even when it was clearly warranted". *Id.* at 444–45 (alteration in original) (citation omitted). Congress responded with CSRA, which created "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration". *Id.* at 445.

Title 5 of the United States Code governs Government Organization and Employees and contains CSRA. Part III, 5 U.S.C. § 2101 *et seq.*, governs Employees, and Subpart F of Part III, 5 U.S.C. § 7101 *et seq.*, covers Labor-Management and Employee Relations. As discussed in *Fausto*, three sections within CSRA govern "personnel actions": Chapter 43, 5 U.S.C. §4301 *et seq.*, "governs personnel actions based on unacceptable job performance"; Chapter 23, 5 U.S.C. § 2301 *et seq.*, "establishes the principles of the merit system of employment"; and Chapter 75, 5 U.S.C. § 7501 *et. seq.*, "governs adverse action taken against employees for the efficiency of the service". *Fausto*, 484 U.S. at 446–47 (citation omitted).

Chapter 75, in Subpart F, includes, *inter alia*, adverse actions: suspension for 14 days or less; removal; suspension for more than 14 days; reduction in grade or pay; and furlough for 30 days or less. 5 U.S.C. §§ 7501–43. Along that line, Subchapters 1, 2, and 5 include an "actions covered" section. 5 U.S.C. §§ 7502, 7512, 7542. Chapter 75 Subchapter 2, 5 U.S.C. §§ 7511–15, is pertinent to this case. It "governs . . . major adverse actions taken against employees". *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 (2012). The covered adverse actions are: removal; suspension for more than 14 days; reduction in grade or pay; and furlough for 30 days or less. 5 U.S.C. § 7512.

The EO's *enactment*, however, does not constitute an adverse action subject to CSRA. The case at hand is instead a pre-enforcement challenge to a government-wide policy, imposed by the President, that would affect the 2.1 million federal civilian workers, including the 6,000 members of Feds for Medical Freedom. Relief plaintiffs seek does not fall within the purpose of CSRA. Enacting the EO and then requiring federal civilian employees who may later receive adverse action to seek relief now through CSRA would result in the very type of lengthy and haphazard results CSRA was enacted to prevent.

Seeking to rely upon *Elgin*—the primary opinion by which the majority attempts to find supporting authority—the majority holds at 9: CSRA's "text, structure, and purpose" support the Government's position. But, as noted by the majority at 9, plaintiffs in *Elgin* had already received adverse action (termination) when they filed suit. *Elgin*, 567 U.S. at 7. Further, plaintiffs in *Elgin* were terminated for violating the Military Selective Service Act, requiring certain male citizens to register for the Selective Service. *Id.* at 6–7. *Elgin*, therefore, pertains only to plaintiffs whose employment was terminated after they knowingly violated a statute, whereas here, plaintiffs have not received adverse action, but are instead

being told they could be, *inter alia*, terminated if they do not get vaccinated as required by the EO.

The majority at 9 also states: In *Elgin*, the Court recognized that employees "against whom an action is proposed" still fall under CSRA, focusing on the language that it, "sets out the procedures due an employee prior to final agency action". *Elgin*, 567 U.S. at 11 (citing 5 U.S.C. § 7513). But, the Court in *Elgin* also noted: "When an *employing agency* proposes a covered action against a covered employee, . . . CSRA gives the employee the right to notice, representation by counsel, an opportunity to respond, and a written reasoned decision from the agency". *Id.* at 6 (emphasis added) (citing 5 U.S.C. § 7513(b)).

Section 7513 does not apply to plaintiffs. First, it applies to federal employees facing proposed actions by "an employing agency". 5 U.S.C. § 7513. CSRA's language, which the majority references at 9, also refers to action taken by an "agency". *See id.* Here, there is no agency action. Rather, the President is attempting to impose a sweeping mandate against the federal civilian workforce. Again, no adverse action has been proposed or taken by an agency. In short, *Elgin* does not control the case at hand.

Section 7513 references individual employees; here, the President seeks to require an entire class of employees to be vaccinated or be subject to an adverse action. Simply put, CSRA does not cover pre-enforcement employment actions, especially concerning 2.1 million federal civilian employees. The district court, therefore, had subject-matter jurisdiction to hear plaintiffs' claims.

III.

For the foregoing reasons, I respectfully dissent.