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, INC.; 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.

Appeal from the United States District Court for the Southern District of Texas, Galveston, No. 3:21-cv-356

Motion of James Rodden, Isaac McLaughlin, Gabriel Escoto, Michelle Ruth Morton, Waddie Burt Jones, Ryan Charles Biggers, Carole LeAnn Mezzacapo, Edward Bryan Surgeon, Susan Reynolds, Roy Kenneth Egbert II, George Gammon, Doris Forshee, John Luff, April Hanson, Dan Parente and Steven Hanley for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees

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James Rodden, Isaac McLaughlin, Gabriel Escoto, Michelle Ruth Morton, Waddie Burt Jones, Ryan Biggers, Carole LeAnn Mezzacapo, Edward Surgeon, Susan Reynolds, Roy Kenneth Egbert II, George Gammon, Doris Forshee, John Luff, April Hanson, Dan Parente and Steven Hanley ("proposed *amici*") move for leave to file a brief as *amicus curiae* in support of the plaintiffs-appellees and rehearing *en banc*. The parties consent to this motion. A copy of the proposed brief is attached.

A. Interest of the *Amici.*

The proposed amici are the named plaintiffs (and proposed class representatives) in *Rodden v. Fauci*, Ca 3:21-cv-00317 (S.D. Tex.) (Galveston Div.) filed on November 5, 2021 as a class-action suit. All of them (as are all members of the class that they seek to represent in that civil action) are federal employees who have had Covid-19 and have developed antibodies to that virus yet remain subject to the federal employee vaccine mandate, and following the panel's decision in the present case are unable to bring a pre-enforcement challenge to what they believe (and the District Court concluded to be) an unlawful Executive Order. The proposed *amici* have a stronger case on the balance of harms analysis than even the Appellees as the proposed *amici* are all naturally immune to Covid-19. Their interest in the District Court's injunction is far stronger than virtually any group outside of the Plaintiffs-Appellees themselves.

B. *Amici's* relevance to the case.

In light of *amici*'s health status, they bring a particular and unique perspective on how preclusion to pre-enforcement challenges to Executive Order 14043 affects health and constitutional liberties of federal workers. *Amici* offer reasons above and beyond those advanced by Plaintiffs-Appellees for taking this matter *en banc*. *Amici* offer their perspective in hopes that it will assist the Court with its determination as to the propriety of the executive action at issue and appropriateness of the District Court's injunction.

C. Conclusion & Prayer

The proposes *amici* pray that the Court grant them leave to file its attached brief as friends of the court in support of the Plaintiffs-Appellees' petition for rehearing *en banc*. They further pray for all other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 31st, 2022, an electronic copy of the foregoing motion of *amici curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/EFC filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ John J. Vecchione

CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word. *See* Fed. R. App. P. 27(d)(1), 29(a)(3), 32(g)(1). This motion complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 359 words, excluding the parts exempted under Rule 32(f) and 5th Cir. R. 32(b).

/s/ John J. Vecchione

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, INC.; RAYMOND A. BEEBE, JR.; JOHN ARMBRUST; ET AL.,

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Appeal from the United States District Court for the
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Brief Amici Curiae of James Rodden, Isaac McLaughlin, Gabriel Escoto, Michelle Ruth Morton, Waddie Burt Jones, Ryan Charles Biggers, Carole LeAnn Mezzacapo, Edward Bryan Surgeon, Susan Reynolds, Roy Kenneth Egbert II, George Gammon, Doris Forshee, John Luff, April Hanson, Dan Parente and Steven Hanley in Support of Appellees and Re-Hearing *En Banc*

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for *amici curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Amici*:** James Rodden, Isaac McLaughlin, Gabriel Escoto, Michelle Ruth Morton, Waddie Burt Jones, Ryan Biggers, Carole LeAnn Mezzacapo, Edward Surgeon, Susan Reynolds, Roy Kenneth Egbert II, George Gammon, Doris Forshee, John Luff, April Hanson, Dan Parente and Steven Hanley—Class Representatives proposed in *Rodden v. Fauci*, No. Ca 3:21-cv-00317 (S.D. Tex.) (Galveston Div.).

***Counsel for Amici*:** New Civil Liberties Alliance is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c) (3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it. John J. Vecchione, Gregory Dolin, and Margaret A. Little are Senior Litigation Counsel and Mark Chenoweth is President and General Counsel of the New Civil Liberties Alliance.

/s/ John J. Vecchione
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INTEREST OF AMICI CURIAE

The proposed *amici* are the named plaintiffs (and proposed class representatives) in *Rodden v. Fauci*, Ca 3:21-cv-00317 (S.D. Tex.) (Galveston Div.) filed on November 5, 2021 as a class-action suit. All of them are federal employees who have had Covid-19 and have developed antibodies to that virus, yet remain subject to the federal employee vaccine mandate. The proposed *amici* have an even stronger case on the balance-of-harms analysis than the Appellees here, as they have all developed natural immunity to Covid-19.[1]

The parties consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT[2]

The President of the United States and the agencies he directs have no power to direct personal medical decisions of federal employees. This is particularly so when the required vaccines are (1) non-sterilizing, that is do not prevent transmission of Covid-19 to other employees, (2) were at the time of filing of the Complaint, and some still are, only authorized for emergency use, and, (3) in any event, less efficacious than natural immunity in preventing reinfection with Covid-19.

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[1] No one other than the *Amici* and their counsel wrote this brief or parts of it. The cost of its preparation was paid for solely by *Amici* and their counsel.

[2] Though *Amici* agree with, and join in Appellees' arguments, this brief avoids repetition of arguments made by Appellees. Loc. R. 29.2.

The panel's decision insulates unlawful government mandates against federal employees from judicial review and permits only case-by-case adjudication of any disciplinary actions. This result is inconsistent with the role of the courts in protecting personal liberty and cabining the Executive Branch's exercise of authority that Congress granted to it.

The panel's refusal to review these executive employment decisions except in the context of individual disciplinary proceedings invites the executive to behave in an arbitrary and oppressive fashion in hopes that most employees will buckle when faced with a threat to their livelihood and career. Additionally, individual challenges to the unlawful exercise of power, even if successful, merely protect a few federal employees from widespread illegal action, rather than placing appropriate limits on the Executive. The panel's decision, if allowed to stand, emasculates the Judiciary and abdicates its role in policing the boundary between the Executive and Legislative branches and protecting individuals from the exercise of unlawful governmental power.

The Civil Service Reform Act of 1978 ("CSRA") does not require such an outcome and the Constitution cannot tolerate it. The *en banc* Court should reconsider the panel's decision, and on reconsideration affirm the District Court's order enjoining the federal employee vaccine mandate.

ARGUMENT

I. THE CSRA DOES NOT BAR PRE-ENFORCEMENT CHALLENGES IN FEDERAL COURT

As the panel recognized, "[t]he CSRA established 'the comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government.'" *Feds for Med. Freedom v. Biden*, 30 F.4th 503, 506 (5th Cir. 2022) (quoting *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991)). What the panel failed to appreciate is that the CSRA is not so broad as to cover every dispute about governmental power over individuals who merely happen to be federal employees. Neither the structure of the Act itself, nor judicial decisions interpreting it are consistent with the panel's approach.

A. The Panel Decision Would Screen Considerable Constitutional Violations from Judicial Review

Under the CSRA only "employee[s] against whom a[] [major disciplinary] action is taken" may petition the Merit Systems Protection Board for review. 5 U.S.C. § 7513(d). In contrast, an employee against whom a "minor" disciplinary action is taken, *i.e.*, suspension of less than fourteen days, does not enjoy such a right, even though the record of discipline remains in his personnel file. *See id.* § 7503. Yet, "a short suspension (generally, 14 days or less)" is exactly the sanction that the guidance implementing the federal employee vaccine mandate applies to individuals who refuse to comply with the requirement. *See* Safer Federal

Workforce Task Force, Vaccinations, Enforcement of Vaccination Requirements for Employees (last visited May 31, 2022), https://go.usa.gov/xe5aC.

The panel's opinion simply ignores this fact. Instead, according to the panel, the affected individuals must not only endure an unlawful order, but also unlawful "minor" discipline, all without recourse to the federal judiciary, or for that matter any review whatsoever. But "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear" because a "'serious constitutional question' . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Nothing in the CSRA's text or structure suggests that Congress meant to preclude constitutional challenges to suspensions lasting less than fourteen days. Because only "major" discipline triggers the right to seek review in the MSPB, and thereafter in the U.S. Court of Appeals for the Federal Circuit, a holding that no pre-enforcement challenges to employment policies are cognizable in district courts would permit an agency to impose short suspensions *seriatim* and entirely evade judicial review. Even if an agency instead imposed progressive discipline, and the Federal Circuit set aside the eventually imposed "major" discipline, it is not obvious that court would have the power to reach back and vacate

the previous "minor" suspensions, which would otherwise remain in the employee's permanent record. Meaningful judicial review is a bulwark against the possibility of such disciplinary gamesmanship causing irremediable reputational damage to thousands of federal employees.

Second, the CSRA-prescribed review mechanisms kick into gear only after one of the major disciplinary actions "*is* taken." 5 U.S.C. § 7513(d) (emphasis added). Thus, an employee who is faced with an unlawful order does not have an opportunity to challenge the order before the MSPB or in the Federal Circuit unless and until he (a) violates the order and (b) major discipline *is* imposed for such violation. In this sense, the system is similar to the one established by the Securities Exchange Act of 1934, 15 U.S.C. § 78y, which this Court discussed extensively in *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (*en banc*). In *Cochran*, the *en banc* Court explained that "jurisdiction 'becomes exclusive' in the court of appeals only after (1) the SEC issues a final order, (2) an aggrieved party files a petition, and (3) the SEC submits its administrative record." *Id.* at 201. If a final order has not been entered, district courts retain jurisdiction over disputes between citizens and the agency. *See id*. at 199. ("Congress gave federal district courts jurisdiction over "*all* civil actions arising under the Constitution. Not some or most—but all. …

Moreover, … when a federal court has jurisdiction, it also has a virtually unflagging obligation to exercise that authority.") (emphasis in original; cleaned up).

The same logic ought to govern this dispute. *If* major discipline is imposed on a federal employee, *then* the dispute must proceed through the MSPB with review (if any) in the Federal Circuit. However, absent such a final disciplinary order, MSPB does not possess jurisdiction to do anything, and according to the panel's majority, neither does any federal court. This Court, sitting *en banc*, was "loath to reach such a result" in the context of the Exchange Act. *Id*. at 201. It should be similarly reluctant to do so in the CSRA context.

The panel majority tried to elide this distinction by pointing out that even prior to the discipline being imposed, "[e]mployees … are entitled to notice, an opportunity to respond, legal representation, and written reasons supporting the employing agency's" proposed discipline. *Feds for Med. Freedom*, 30 F.4th at 507 (citing 5 U.S.C. § 7513(b)). However, the panel majority starts its timeline at the wrong place. A "proposed" action is not a policy that delineates what the consequences for any particular misbehavior might be. Rather, a "proposed" action is a specific charge of violating the rules and a specific penalty the agency deems commensurate with the alleged misconduct. It is akin to an indictment triggering various procedural rights. In contrast, Executive Order 14043 and the Task Force

guidance are more similar to a criminal statute that generally sets out penalties for noncompliance. The present challenge is thus analogous to a facial challenge to a criminal statute, not to a particular indictment. The fact that a number of procedural safeguards may be available once a charge is brought does not shield an unconstitutional statute or regulation from direct, pre-enforcement, judicially cognizable facial attack.

B. The Panel Ignored this Court's Previous Decisions

The judicial decisions on which the panel majority relies further confirm the CSRA's designated process becomes exclusive only *after* a disciplinary case against a federal employee is brought. Thus, in *Elgin v. Dep't of Treasury*, the Supreme Court observed that "the CSRA prescribes in great detail the protections and remedies applicable to *adverse personnel actions* against federal employees." 567 U.S. 1, 11 (2012) (emphasis added; cleaned up). Petitioners in *Elgin* lost because they did "not dispute that they are employees who suffered adverse actions covered by the [relevant] provisions of the CSRA." *Id.* at 12. Plaintiffs-Appellees and *Amici*, on the other hand, do dispute that they have suffered adverse personnel actions. Instead, they allege that "the Mandate threatens to substantially burden the[ir] liberty interests" by putting them to an unlawful Hobson's choice "between their job(s) and their jab(s)." *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). Because neither Plaintiffs-Appellees nor *Amici* have suffered an "adverse personnel

action," there is nothing for MSPB to adjudicate, and therefore, *Elgin*'s logic is inapplicable to the present case.

This understanding reflects the Supreme Court's decision in *United States v. Fausto*, 484 U.S. 439 (1988). There, the Court explained that § 2302 of the CSRA "establishes the principles of the merit system of employment, and forbids an agency to engage in certain 'prohibited personnel practices,' including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers." *Id.* at 446 (citations omitted).[3] It is not a "catch-all" provision, however, consigning all disputes between federal employees and agency employers to the MSPB process. Rather, § 2302 applies to and prohibits only specific types of conduct, *e.g.*, racial discrimination (5 U.S.C. § 2302(b)(1)), coercion of political participation (§ 2302(b)(3)), granting of preferences not authorized by law, (§ 2302(b)(6)), nepotism, (§ 2302(b)(7)), retaliation for whistle-blowing, (§ 2302(b)(8)), etc.[4] That such actions would be covered by the CSRA makes

[3] The Court also recognized that the CSRA governs "personnel actions based on unacceptable job performance," and "adverse action taken against employees … based on misconduct." *Fausto*, 484 U.S. at 445–46. It is undisputed that neither Plaintiffs-Appellees nor *Amici* have yet had "personnel actions" taken against them for "unacceptable job performance" or "misconduct." Thus, the only way CSRA could preclude their claims is if the federal employee vaccine mandate fits into the "principles of the merit system of employment" category as defined by § 2302.

[4] Furthermore, the structure of § 2302 strongly suggests that it applies when an illegal action is targeted at an individual federal employee who then suffers adverse

perfect sense. After all, claims under § 2302 are invariably fact-laden (*e.g.*, was a particular action taken for an illegal discriminatory or retaliatory reason, or was it taken for an entirely appropriate, neutral legal reason), and the resolution of such factual questions can be committed to agency adjudication. *See Elgin*, 567 U.S. at 19. By contrast, the challenge here involves the legality of the whole policy, not the factual basis for an adverse action taken against a specific employee.

In short, the panel majority relies on precedent standing for an anodyne proposition—challenges to adverse agency actions that have already been taken against particular federal employees must satisfy the administrative process. But these cases do not hold that unlawful government conduct in the employment context cannot be heard by a federal court prior to MSPB's adjudication of the grievance.

As the *en banc Cochran* court recognized, *Elgin* "did not break new ground," 20 F.4th 206, and there remains "a strong presumption favoring judicial review of administrative action that the Government may rebut only by carrying the heavy burden of showing that the statute's language or structure forecloses judicial review." *Id.* at 200 (cleaned up). As in *Cochran*, the Executive here also failed to

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consequences. Not only is the section written in singular (*e.g.*, "any employee," "any individual," "any person"), but also such a reading would be consistent with those sections of the CSRA that discuss punitive actions for misconduct or inadequate job performance, all of which are also directed at individual employees.

rebut the strong presumption of jurisdiction because the CSRA's wording analyzed above does not strip federal courts of jurisdiction over constitutional questions.

II. THE PANEL'S DECISION ABDICATES THE FUNDAMENTAL ROLE OF COURTS

The Supreme Court has "long recognized" that the federal judiciary is a "guardian of individual liberty and separation of powers … ." *Stern v. Marshall*, 564 U.S. 462, 495 (2011). The panel majority, however, has refused to exercise the power and responsibility that Article III vested in it. In so doing, it permits the Executive to continue encroaching on individual liberty and the Legislature's domain, all in violation of its duty to keep those powers separate.

Under the majority's reasoning, even absent Congressional authorization, the Executive could, without fear of judicial intervention, require federal employees to, for example, contribute a percentage of their income to charity, obtain a U.S. passport, buy a particular brand of automobile, or wear glasses rather than contact lenses. The Federal Circuit may eventually find such orders unlawful, but only after an employee is disciplined under § 7513, and the MSPB sustains the discipline. Absent employees' immediate recourse to courts to challenge such unlawful policies, the Executive will be incentivized to promulgate such policies in hopes of "buying time," *see e.g.*, *Remarks by President Biden on Fighting the COVID-19 Pandemic*, White House (Aug. 3, 2021), https://bit.ly/3LMoeJ1, and meanwhile illegitimately securing compliance from those who may lack knowledge of their

rights or fortitude to withstand threatened disciplinary actions and the MSPB process. Early judicial intervention is necessary to ensure that policies promulgated by the Executive do not infringe federal employees' rights nor overstep the authority granted the Executive by Congress.

III. THE CASE MERITS *EN BANC* CONSIDERATION

"[T]his case hits the *en banc* bull's-eye, posing 'question[s] of exceptional importance,'" *Mance v. Sessions*, 896 F.3d 390, 397 (5th Cir. 2018) (Willett, J., dissenting from denial of rehearing *en banc*) (quoting Fed. R. App. P. 35(a)(2)), because it poses a "constitutional challenge" to the President's "assertion of virtually unlimited power to control individual conduct [of federal employees] under the guise of a workplace regulation," *BST Holdings*, 17 F.4th at 617. Although rehearings *en banc* are generally disfavored, *see* Fed. R. App. P. 35(a), this Court routinely "devote[s] [the] full court's attention to … cases raising nettlesome questions about the scope of various constitutional guarantees." *Mance*, 896 F.3d at 397 & n.9 (Willett, J., dissenting) (collecting cases). It is hard to imagine a more important issue than the question of whether the President can order over 10 million federal employees and contractors to surrender their healthcare autonomy as a condition of working for the federal government.

CONCLUSION

Because the panel majority shirked its "duty … to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177 (1803), this Court should grant the petition for rehearing *en banc* and affirm the judgment below.

Respectfully Submitted,

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/s/ John J. Vecchione

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/s/ John J. Vecchione